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Authors

Josianne Beaudry

Partner, Lawyer

Jean-Sébastien Desroches

Partner, Lawyer

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EASING THE FINANCING RULES WHILE WAITING FOR CROWDFUNDING
Josianne Beaudry

There is no doubt that small and mediumsized enterprises ("**SMEs**") and businesses in the startup phase (also known as early- stage businesses) face multiple challenges when seeking financing. Not only must they identify investors who are prepared to take the risk of investing in their projects, they must also ensure that they comply with the rules on raising capital imposed by the securities regulators.

Under the rules in force in Quebec and the rest of Canada, for a corporation to raise capital, unless it has an exemption, it must retain the services of a firm registered in an appropriate category with the Canadian Securities Administrators, and must also prepare and provide the purchasers with a disclosure document known as a " prospectus".

This procedure is generally too onerous and demanding for SMEs and startups, not to mention the obligations these companies would have after the financing to prepare and distribute continuous disclosure documents, such as financial statements, management's discussion and analysis and press releases.

Thus, SMEs and startups are often limited to raising funds from business associates, family ("love money") and accredited investors — which are generally persons with a net income before taxes exceeding $200,000 or net assets of at least $5,000,000.

SMEs and startups also have the option of soliciting funds from a broader range of investors without having to prepare a prospectus through the use of an offering memorandum. The offering memorandum is a disclosure document similar to a prospectus but which is more simple to prepare and less costly. This financing alternative seems generally to be overlooked and underused by SMEs and startups. The lack of use of the offering memorandum is likely due to the accompanying regulatory requirement of preparing audited financial statements drawn up in accordance with the IFRS. This type of financing appears to be much more popular in the Canadian West.

However, in this regard, on December 20, 2012, the Autorité des marchés financiers ("**AMF**") issued an interim local order allowing SMEs and startups that are not otherwise reporting issuers, as defined in the securities legislation, to distribute their securities by means of an offering memorandum without having to include audited financial statements drawn up in accordance with the IFRS.

Thus, it is henceforth possible for these corporations to issue an offering memorandum without having to prepare audited financial statements. Moreover, the unaudited financial statements accompanying the offering memorandum may even be drawn up in accordance with the Canadian GAAP applying to private issuers.

However, to take advantage of this easing of the regulatory requirements, the issuer must limit the total amount of all of its offerings made under this rule to $500,000 and limit the aggregate acquisition cost per purchaser to $2,000 per 12-month period preceding the offering (and not $2,000 per issuer). A warning must also be added to the offering memorandum clearly informing any purchaser of the fact that the financial statements are not audited and are not drawn up in accordance with the IFRS, and of the limits on the investment threshold.

It should also be noted that, under the Quebec legislation, the use of an offering memorandum by a corporation to raise funds is subject to translation requirements. Thus, for purposes of soliciting financing in the province of Quebec, the offering memorandum must either be written in French or in both French and English.

Conscious of the financing needs of SMEs and startups, at the same time as the AMF was announcing the easing of the rules on the contents of the offering memorandum (which is slated to apply for a maximum period of two years), the AMF also launched a consultation on equity crowdfunding.

Equity crowdfunding consists of raising capital from a large number of investors, who are not necessarily accredited investors, by means of an electronic platform in return for the issuance of securities. Some jurisdictions such as the United States (under development since April 5, 2012), England and Australia have adopted rules authorizing equity crowdfunding.

These rules generally provide that corporations may only raise a modest amount through this type of financing. Similarly, the amount investors may invest is also small. At present, this type of financing is prohibited in Canada unless one has an exemption or issues a prospectus.

The main objective of equity crowdfunding is to facilitate access to capital at a reduced cost. However, this objective is difficult to reconcile with recent developments in the regulation of Canadian securities markets aimed at protecting investors.

Indeed, in carrying out their mission to protect investors, Canadian authorities have continued to increase the regulatory requirements (disclosure, compliance, proficiency, etc.), which also has the effect of increasing the operating costs of the various participants in the financial markets.

Some financial market stakeholders are concerned about the risks of an exodus of innovative Quebec corporations and talent which could be tempted to move south to the U.S. to finance their projects, where they would benefit from a more streamlined and less costly financing environment. The Canadian Securities Administrators will have to meet the challenge of finding the difficult balance between the financing needs of SMEs and startups and the protection of investors.

AVOIDING DISPUTES BY ENTERING INTO A SHAREHOLDERS' AGREEMENT

Jean-Sébastien Desroches

Disputes between shareholders sometimes have serious consequences for a business corporation and can be an impediment to the carrying on of the operations in the ordinary course of business. Such disputes are usually complex and costly while also being protracted in nature. In this context, a well-written shareholders' agreement that is tailored to the business can help to avoid disputes or, at least, limit their scope and provide a framework for managing them.

Shareholders' agreements may not age well over time. They may not evolve in sync with the business and its shareholders, particularly in a context of expansion and growth. Furthermore, it is generally difficult to change a shareholders' agreement once it has been signed, and an attempt to change the ground rules in midstream could be a source of additional conflicts between the shareholders. It is therefore imperative for the shareholders to establish their rights and obligations, as well as those of the corporation, in a shareholders' agreement as early as possible in the life of the corporation.

No one will be surprised to learn that money is the main cause of disputes between shareholders, whether it is the money invested (or to be invested) in the corporation or money that the corporation pays (or will pay) to its shareholders in the form of dividends or otherwise. At the same time, the shareholders' contributions in property, services, time and money often create friction within the corporation, particularly since the shareholders' business, financial and other expectations may evolve differently - even in opposite directions - over time.

Apart from financial issues, personal conflicts can also inflame the relationship between the shareholders, especially when family members are involved with the business. The same is true when decisions are to be made on the global objectives of the corporation and strategic issues.

In addition, if the corporation has shareholders from different jurisdictions, cultural differences can also give rise to tension between the shareholders. In such cases, the text of the shareholders' agreement must be very explicit and should, if possible, be supported by concrete examples of the application of the more complex clauses, such as valuation of the shares and the procedure for exercising a right of first refusal. In all cases, it is essential to provide for the order of priority for the exercise of the various rights, remedies and mechanisms contained in the agreement to avoid adding issues of interpretation of the agreement to the existing business issues.

It is often at times when the business of the corporation is not faring so well that the common disagreements between shareholders tend to flare up and lead to litigation. The shareholders' agreement should therefore anticipate the future situations which the corporation may face, whether positive or negative, such as refinancing, the arrival of new shareholders, family succession, the acquisition or sale of a business, international expansion, the development of new markets, and retirement from the business.

The ability to anticipate future developments takes on its full importance when one considers the context in which the shareholders' agreement is being entered into. Thus, the shareholders' and drafter's objectives may be different in the case of an agreement concluded for tax and estate planning purposes versus an agreement dealing, for instance, with the arrival of a new investor, a transaction for the acquisition of the business (e.g., business transfer or succession) or a start-up situation. Even in a very particular context such as this, the shareholders' agreement should still give the corporation and its shareholders the means to achieve their ambitions and the requisite flexibility to carry out all their business projects.

In addition to their status as shareholders, the shareholders may also hold several other titles or functions in the corporation, since they often also act as directors, officers and employees. Disputes may therefore arise as a result of these different roles and the associated rights and obligations, and degenerate very quickly into personal disputes.

The drafting and negotiation of a shareholders' agreement is a complex and exacting exercise requiring both legal and practical experience. Thus, a review of the cases in the courts shows that disputes pertaining to the most complex terms and conditions of the agreement, such as the mechanisms for the arrival and departure of shareholders and transfers of securities (right of first refusal, purchase and sale (shotgun) clause, etc.) as well as interpretation of non-competition, non-solicitation and intellectual property provisions, are among the subjects most frequently debated in the courts.

Valuation mechanisms for assessing the price of the shares in different situations should also be clearly established in the shareholders' agreement. Such mechanisms should oversee and govern any discussions on the value to be attributed to the shares of the corporation in the context of a sale or transfer, including in complicated situations where there are ongoing disputes among the parties.

Lastly, it is fundamental to provide for effective conflict resolution mechanisms tailored to the needs of the parties (confidentiality of the process, cultural and linguistic factors, obligation to pursue the operations of the business as a going concern in spite of the dispute, etc.) that allow for action to be taken quickly to preserve the value of the business. This will enable the parties to avoid the forced liquidation of the business, with its disastrous consequences for the employees, suppliers and clients.

TENTH ANNIVERSARY OF BILL 72: LAND PROTECTION AND REHABILITATION
Sophie Prégent

The planning of a construction project or start-up of an industrial activity requires prior verification of a number of matters. Despite the introduction, ten years ago this year, of rules in the *Environment Quality Act* (EQA) governing the protection and rehabilitation of contaminated lands, the physical condition of the project site is often still a neglected issue.

While the question of soil contamination can raise issues of civil relations, such as, for example, civil liability or the warranty of quality (against latent defects), in this article, we will focus exclusively on the obligations that can arise from the EQA.

The purpose of the EQA is environmental protection. This protection is embodied in measures for prior protection, emergency responses and rehabilitation in the EQA. The EQA also imposes certain duties to act on the users of immovables.

POWER TO ISSUE ORDERS

The Minister of Sustainable Development, Environment, Wildlife and Parks (MSDEWP) has broad powers, including, in particular, the power to order the filing of a rehabilitation plan if he has reason to believe, or ascertains, that contaminants are present on land in a concentration exceeding the limit values prescribed by regulation,[1] or that they are likely to affect the environment in general.[2]

Since 2003, this power has applied to all persons who have had custody of the land, in any capacity whatsoever. Such an order can therefore be imposed on tenants and is not limited only to the owner or “polluter” of the land.

Thus, it is important for any purchaser to be familiar with the history of the land so that it can assess whether there is a risk that this type of situation could arise.

Where such an order has been issued, some means are available for a person to exempt himself from it, in particular, where (i) he was unaware of or had no reason to suspect the condition of the land having regard to the circumstances, practices and the duty of care, or (ii) he was aware of the condition of the premises, but shows that he acted at all times with care and diligence in conformity with the law and, finally, (iii) he shows that the condition of the premises is a result of circumstances exterior to the land and attributable to a third party.

CESSATION OF INDUSTRIAL OR COMMERCIAL ACTIVITY

Where a person permanently ceases carrying on a commercial or industrial activity referred to in schedule III of the *Land Protection and Rehabilitation Regulation*[3] (LPRR), the operator must conduct a characterization study of the land.[4] This obligation applies where the activity permanently ceases and it triggers the further obligation to carry out the rehabilitation of the land if the contaminants present in the soil exceed the regulatory concentration limit. This work must be performed in accordance with a rehabilitation plan which is submitted to the MSDEWP and approved by him.

While this obligation to carry out the rehabilitation of the land only applies to the operator of the activity, it creates a restriction on the use of the land which must definitely be taken into account by the purchaser in the context of a transaction. Indeed, the failure by the operator to perform the rehabilitation will have significant consequences for the purchaser, especially if it wishes to change the use of the land.

CHANGE IN USE

Where a person wishes to change the use of land which served as the site of a commercial or industrial activity listed in schedule III of the LPRR, he must conduct a characterization study, unless he already has such a study in hand, and it is still current.[5]

Obviously, in the context of an acquisition, if this obligation exists, it is advisable for the purchaser to ensure it is satisfied by the vendor, or, at the very least, that the condition of the premises be very clearly disclosed to avoid any unpleasant consequences down the road.

If the characterization study reveals that contaminants are present in amounts exceeding the regulatory limits, a rehabilitation plan will have to be submitted to the MSDEWP for approval, after which the rehabilitation will have to be done before the new use of the land can commence. This work will obviously create delays for the purchaser since the municipality will not issue the necessary permits to proceed with the subdivision or construction until the land has been decontaminated.

In the event that the land has already been decontaminated in accordance with the applicable procedures, it is important for the purchaser to carefully review the rehabilitation plan submitted to the MSDEWP and the various entries made in the land register to determine whether there are any restrictions on the use of the land, or whether any excess contaminants may have been left in the ground with the consent of the MSDEWP.

REGISTRATION REQUIREMENTS

The EQA contains a series of measures requiring the publication of notices in the land register with respect to contaminated lands,[6] specifically, notices of contamination, notices of decontamination, and notices of use restriction. In addition, in some circumstances, certain notices must also be given to the local municipality, to the Minister of SDEWP, and even to neighbours.

Clearly, the existence of such notices must be verified when any transaction is being undertaken. However, it is important to remember that the EQA does not regulate all of the situations relating to contaminated lands and, in particular, historic contamination and contamination resulting from activities not covered by the LPRR. The existence or lack of registrations against the land in the land register does not therefore guarantee that the premises are in compliance with the rules of the EQA on the rehabilitation of contaminated soils.

LIMITED APPLICATION

Thus, as far as contaminated soils are concerned, the application of the EQA is limited. For instance, there is no general obligation to perform the rehabilitation of land following the completion of a characterization study done on a voluntary basis. However, the presence of contaminants could trigger a restriction on the use of the land which could prevent the purchaser from being able to use it for the planned activity.[7]

Accordingly, as a purchaser, it is very important to be well informed of the condition and history of an immovable, and even, most of the time, to obtain an environmental characterization of the subject property. It is a question of exercising the care and diligence of a responsible purchaser.

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[1] The *Land Protection and Rehabilitation Regulation*, CQLR, chapter Q-2, r 37.

[2] Section 31.43 of the *Environment Quality Act*, CQLR, chapter Q-2, provides more specifically that this applies to contaminants which are “likely to adversely affect the life, health, safety, welfare or comfort of human beings, other living species or the environment in general, or to be detrimental to property”.

[3] *Supra*, note 1. This is a list of most of the activities that are likely to cause soil contamination.

[4] See sections 31.51 and following of the EQA.

[5] See sections 31.51 and following of the EQA.

[6] See sections 31.51 and following of the EQA.

[7] For example, a residential development that cannot proceed on land where contaminants exceed the acceptable limits for residential usage.