

CORPORATE BORROWING

Hamlet's friend Polonius gave some very famous advice to his son, Laertes, when he said "Neither a borrower nor a lender be; For loan oft loses both itself and friend and borrowing dulls the edge of husbandry." Of course, that was in the days of hunting, gathering and husbandry. Nowadays, in the era of air miles, deficit financing and credit cards borrowing is a way of life and worries about dulling the edge of husbandry are not as high on everyone's priority list as they ought to be.

Two things are for sure, however, if your corporation is borrowing money. The first is that the lender will certainly want that loan to be secured by something more substantial than the corporations promise to repay it.

In addition to charges on the company's assets, the lenders often insist that the owners of the company agree to be personally responsible for repaying the loan if the company fails to do so. This is usually done by way of a guarantee wherein you agree to repay the loan if your company cannot. All guarantees are potentially very dangerous documents.

The other thing for certain is that there are going to be lawyers involved. Those lending money to companies usually retain lawyers to assist in the preparation and registration of security documentation. Those borrowing money will want legal guidance through the maze of paperwork to make sure the lender isn't taking more than was agreed upon (like your first born child as part of the security package). Both the lender's and the borrower's lawyers, however, will probably be paid by the borrower.

The lender's lawyer will make sure the company has the capacity to borrow, that when it was set up the power to borrow was properly included in its powers, that the company still exists and that the company is in good standing. The lawyer won't worry about the company's ability to repay the loan as that is a concern only of the lender and the borrower. He is more concerned with making certain that all steps have been taken internally by the company to

authorize the borrowing, that all documents have been properly executed and delivered and that everything is binding on the company.

Everyone has to be careful that financial assistance is not given at a time when the company is insolvent or if the giving of the loan has the effect of rendering the company insolvent. Aside from the high risk (unwanted by lenders) there is a possibility that directors may be exposed to personal liability (unwanted by directors).

There is also a prohibition in British Columbia against a company providing financial assistance for the purchase of its shares or debt obligations except in the case where it is in the best interests of the company. Three notable exceptions to this rule are in the cases of employee stock purchase plans, the "acquisition exception" and the related company exception.

Employee stock option plans are relatively straight forward but they have to be previously authorized by special resolution and there have to be reasonable grounds for believing they are in the best interests of the company. The acquisition exception provides that a non-reporting company may give financial assistance to a person acquiring not less than 90% of the issued shares of each class of shares. Since this can trigger a right to dissent, it is usually only used when there is unanimity among the shareholders. The related company exception involves financial assistance between subsidiary and parent companies or between a wholly owned company and its owner. This involves the problems of "upstream" and "downstream" guarantees, which are a topic in themselves.

Corporate borrowing is a relatively complicated area of the law. Doing your own legal work in this area is about as sensible as doing your own cornea transplant.