

Matinées Dentons breakfast seminar series

Corporate financing in the midst of a pandemic

- Charles Spector, Partner and National Lead of the Corporate group, Montréal
- Ora Wexler, Partner and Local Lead of the Securities group, Toronto
- Kimberly Burns, Partner, Vancouver

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Introductions

Speakers



Ora Wexler

Partner, Toronto

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Ora Wexler is a partner in our Corporate group and acts as the head of the Toronto Securities group. Ora focuses her practice on a variety of public and private capital market transactions and securities regulatory matters.

Ora regularly advises on stock exchange listings, corporate governance, continuous disclosure obligations and other regulatory compliance matters. Ora's strong securities law practice has provided her with numerous opportunities to act on behalf of both underwriters and issuers in initial public offerings and subsequent private placement and public offerings.

Ora is also a member of the Ontario Securities Commission Securities Advisory Committee (SAC). The SAC provides advice to the Commission and staff on a variety of matters including legislative and policy initiatives and important capital markets trends.



Charles Spector

Partner, Montréal

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Charles Spector leads the Dentons national Corporate Law practice group. He is a partner in the Dentons Montreal office. His practice covers a wide range of commercial transactions focusing primarily on public and private corporate and project financing, takeovers, and mergers and acquisitions.

Chuck represents clients in certain key industries including energy, oil and gas, pulp and paper and mining. He advises his clients on matters in the following fields: public offerings, private placements, takeover bids, takeover bid defenses and strategies, leveraged buy-outs, private power project financing, corporate reorganizations and corporate governance.

Chuck has published articles on a variety of subjects including government regulations affecting the petroleum industry, the duties of the board of directors during a hostile takeover and independent power project financing in Québec.

Moderator



Kimberly Burns

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Alternative Types of Financings

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At-the-market (ATM) offerings

- Form of prospectus offering
- Sales by a registered dealer on behalf of the issuer (typically on an agency basis) into the market, at prevailing market prices
- Like a “line of credit”
- Generally no marketing efforts (i.e.; roadshows) or marketing materials
- Allows quick and cost-effective market access “as needed” or when a traditional public offering may not be available or desirable
- “Quieter” process than traditional offering
- Does not preclude simultaneously pursuing a traditional offering
- Agent cannot over-allot or undertake market stabilization activities during ATM offering

Basic components

- Primary documents
 - Base shelf prospectus
 - Prospectus supplement
 - Equity distribution/sales agreement
- Placement notice delivered by issuer to agent to commence distribution
 - Includes maximum number/amount of shares to be sold and sale period, and can include minimum price and other limitations
- Settlement of trades (T+2 or T+3)
 - Issuer issues shares; agent pays net sales proceeds to issuer
- Periodic deliverables under equity distribution/sales agreement
 - In light of the ongoing nature of an ATM program, the equity distribution/sales agreement will provide for periodic updates to the issuer's representations and warranties, the auditor's comfort letters and due diligence

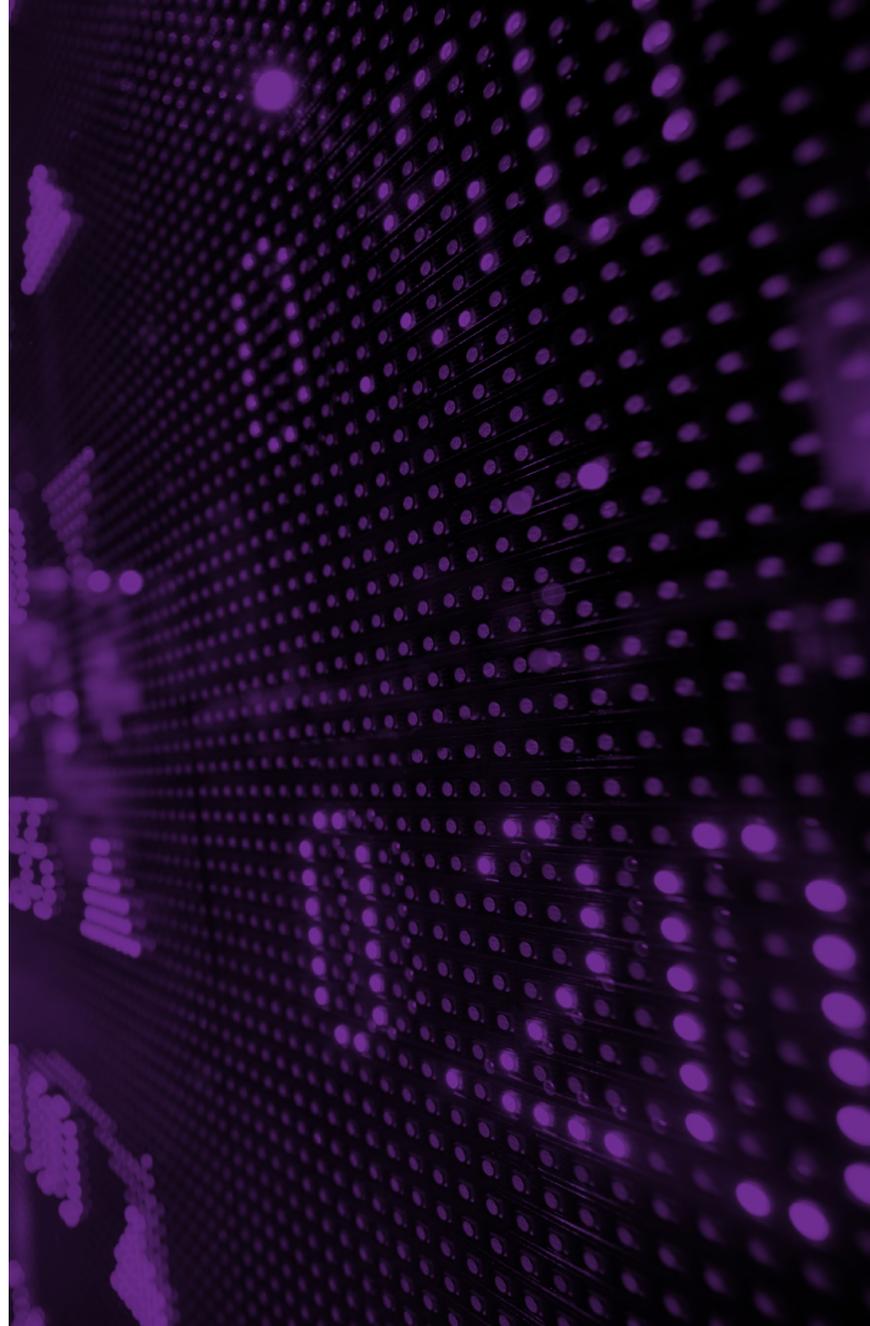
Recent CSA Amendments

- Effective date: August 31, 2020
- Amendments eliminate:
 - Need for issuers to obtain discretionary exemptive relief
 - Overall size and daily sales limits (i.e.; 10% cap and liquidity requirements), and streamline ongoing reporting requirements
- Cover page disclosure
 - Requirement to disclose on the cover page of the base shelf prospectus that the prospectus may qualify an ATM offering
- Designated news releases
 - Issuers will be required to identify news releases disclosing information that constitutes a “material fact” as “designated news releases” in order to incorporate material facts by reference into an ATM prospectus
- No automatic exemption from French translation requirements
- Bring Canadian ATM offering rules in line with U.S. rules

Bank Financing

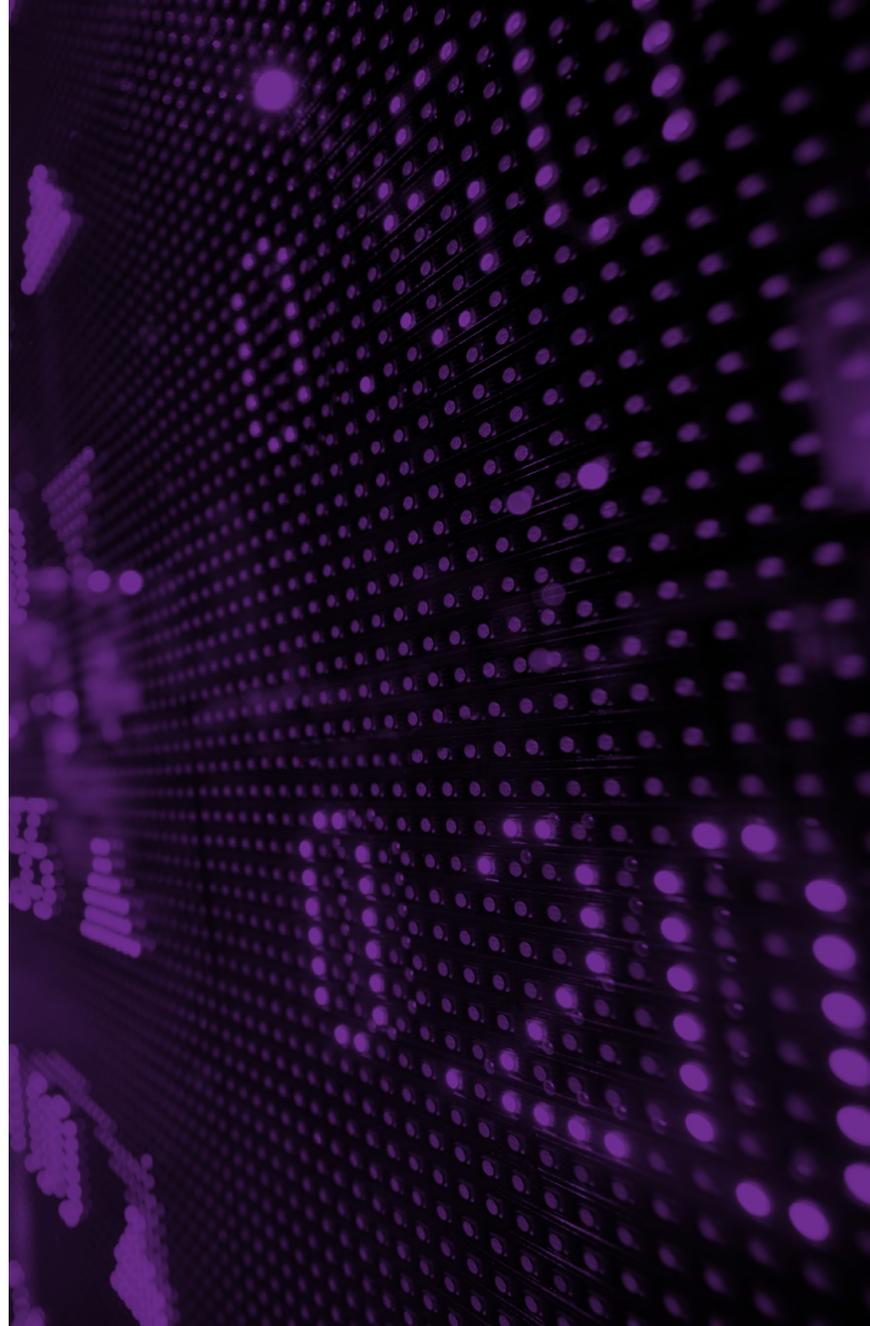
What we are seeing in the market generally:

- Transition from reaction mode to forward-looking mode. New financings are emerging but very cautiously.
- In the first few months of the pandemic, borrowers and lenders were in reaction mode. Requests for amendments to existing credit facilities, including increases in the borrowing base of these facilities, was overwhelming
- The initial wave of amendments really hit when the financial reporting for the period ending March 31, were received by lenders which was around mid-May
- Borrowers and lenders have now settling into more of a traditional forward-looking analysis based on revised assumptions, cash flow analysis and other standard valuation methods. Amendments are still being done but we are also seeing a number of new deals



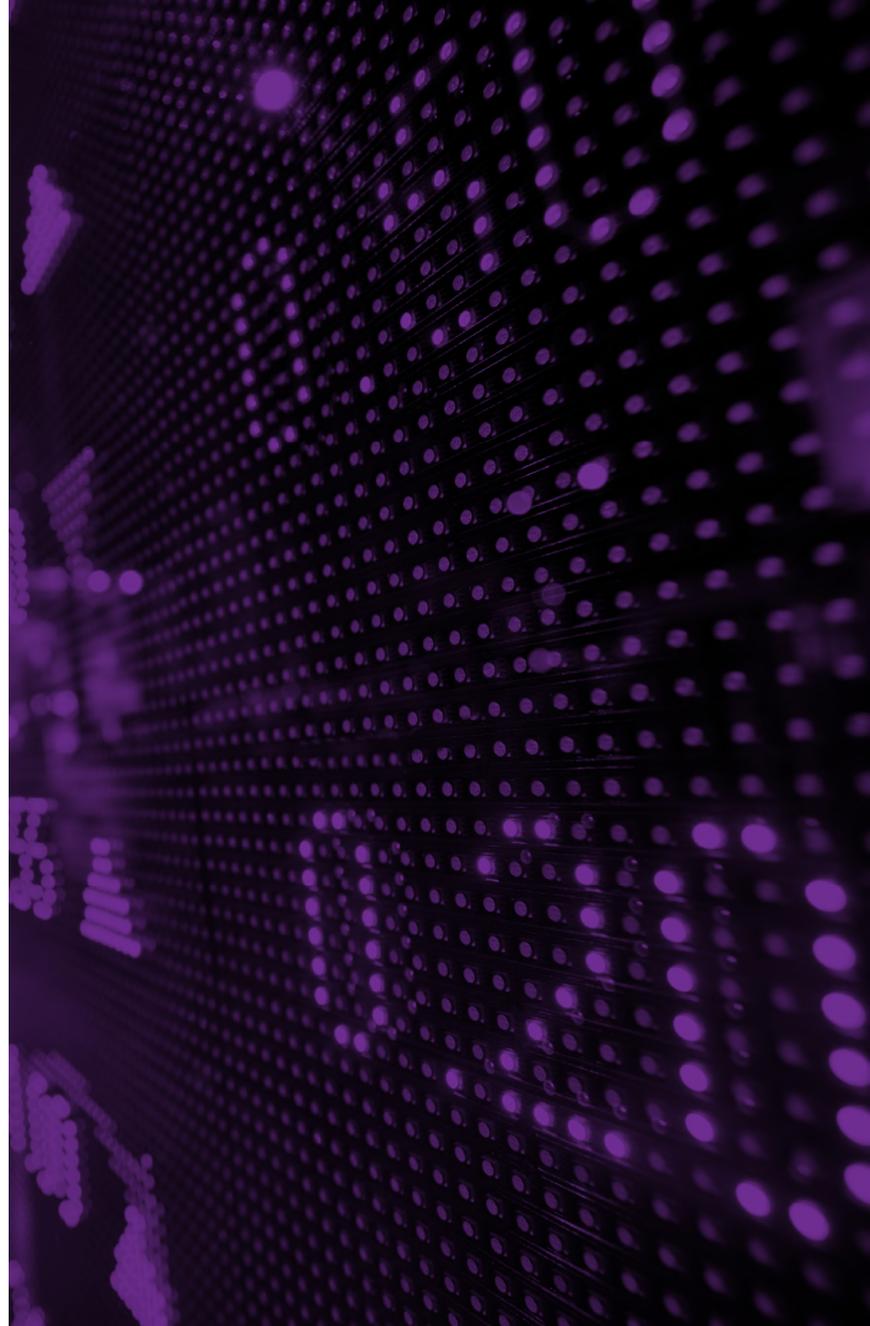
Bank Financing

- As more clarity has emerged there is much more emphasis on actual and potential covenant breaches
- Among the new or tougher conditions that we are seeing include:
 - The addition of anti-hoarding provisions for any revolving loans;
 - Adding more stringent reporting requirements to loan agreements to give Lenders more visibility on the current financial situation of the Borrower and tightening up of other covenants such as:
 - Financials have to be delivered sooner to the Lender;
 - Increased demand for Information on metrics and variables that will affect the Borrower's business
 - Changes to MAE/MAC clauses to ensure they work properly
 - A review of the security package to make sure the coverage is sufficient (Do the hypothecs or other real property security need to be increased to accommodate any increases in the loan amounts)
 - Consider whether landlord waivers or standstill agreements should be obtained as the borrower's situation with their landlord may not be great right now



Bank Financing

- Are we seeing any lenders claiming a MAC or MAE? In the current market, the answer is generally no.
- Generally speaking, MAC clauses are meant to deal with unforeseen events that have a material adverse impact on a **target company's** value, business or assets as opposed to general broader economic conditions. There have been some recent case law which is challenging this notion
- We are following how courts are responding to lenders using MAC and MAE clauses However, do not believe everything you read as many cases are very fact-specific and may not apply uniformly in each Canadian province.



Bank Financing

Suggestion:

- Add a provision in any amendment which expressly deals with how COVID-19 should be dealt with. Parties will want to consider if the impacts of COVID-19 should be specifically excluded or whether a **benchmark for losses** sustained by the target business will be set that, if surpassed, would allow a party to rely on such MAE/MAC to terminate the loan agreement
- These type of clauses should be very specific to the borrower
- Make sure your legal advisors are involved at a very early stage

Disclosure Changes to Prospectuses

- Forward-looking information disclaimer
- Risk factor disclosure
- Recent developments
- Use of proceeds

- Comments from securities regulators related to COVID-19 disclosure in prospectuses

- **NOTE:** Issuers that choose to rely on an exemption provided by the securities regulators to delay any of their filings cannot file a prospectus until their continuous disclosure record is current

Disclosure Changes to Underwriting Agreements

- Termination events (“disaster out” clauses)

- EXAMPLE: The underwriters shall be entitled, at their option, to terminate this agreement if there should develop, occur or come into effect any event of any nature, including, an act of terrorism, accident, or new or change in governmental law or regulation, any escalation in the severity of the COVID-19 pandemic / material adverse developments related to the COVID-19 pandemic, after the date of this Agreement, which, in the opinion of any of the underwriters, acting reasonably, seriously adversely affects or involves, or would seriously adversely affect and involve, the financial markets in Canada or in the United States or the business, affairs, operations or profitability of the Corporation or its subsidiaries (taken as a whole) or the market price or value of the Corporation’s securities.

- Representations and warranties

- EXAMPLE: The Corporation represents and warrants to the underwriters that, except as disclosed in the Prospectus and except as mandated by an applicable governmental authority, which mandates have not materially affected the Corporation, as at the date of this agreement, there has been no closure or suspension to the operations of the Corporation as a result of COVID-19. The Corporation has been monitoring the outbreak and the potential impact at all of its operations and has put appropriate control measures in place to support the health of all of its employees and surrounding communities where it operates.

Project Financing

- Project financing have their own particularities and challenges due to COVID-19
- Many of these projects are of a very long duration between start to finish. However, delays can have a critical impact on when revenues are actually generated which can significantly affect the economic model
- Promoters may have to go back to the equity partners to cover increased costs associated with COVID-related delays
- Lenders may be reluctant to add additional funds unless additional equity is added
- Prior to making any additional funding commitments, Lenders may look for additional security including guarantees and security from related companies
- Lenders will seek tighter monitoring and supervisory rights and may look for step-in rights if covenants are not respected
- Borrowers should be aware of *force majeure* clauses that could be invoked by parties who are unable to deliver on time and how to react to this
- Everything will take longer to complete as many projects require regular on-site visits to obtain the appropriate sign-off from independent engineers, to verify the state of completion and the identification of potential problems. Some of these site visits are being replaced with remote video transmission

Questions?

Speakers



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Thank you

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