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The Impact of COVID-19 on Agribusiness – business and legal considerations

In addition to the adverse impact to public health and the public healthcare system, the COVID-19 pandemic is causing severe economic hardship to western Canada. We expect that many, if not all, key industries will feel the COVID-19 pain. Federal, provincial and municipal governments are now faced with the need to stimulate an economy that has ground to a halt and address high unemployment.

As oil and gas revenues have declined, governments have returned focus to the agriculture industry playing catch-up to a consuming public who demand a safe, secure and accessible food supply. Perhaps, they have come to see the wisdom of the words of Bernard Baruch, who said: "Agriculture is the greatest and fundamentally the most important of our industries. The cities are but the branches of the tree of national life, the roots of which go deeply into the land. We all flourish or decline with the farmer." It is refreshing to see a renewed awareness of the importance of agriculture and agribusiness.

With this renewed emphasis and demand, there is no better time to enthusiastically promote the essential work that you do. It is time to tell your story. We have summarized some key things that you should consider.

Essential Services

The agriculture and food sectors have been designated as essential services in Alberta, Saskatchewan, Manitoba and British Columbia and thus are able to continue to operate during the pandemic.

Government Support

The federal government has announced a number of federal programs to provide support for workers and businesses. Discussing all of these is outside the scope of this article, but we encourage you to review the programs available since a number of these are tailored to the agriculture and food processing industry, including the \$5 billion increase in Farm Credit Canada's lending capacity and deferrals of the repayment of principal and interest on existing loans. In addition, the CRA is deferring corporate tax payments until August 31, 2020. Supports already in place through the Canadian Agricultural Partnership will continue to be available.

Legal Contracts

You may have questions about how the current circumstances affect the contracts you have with suppliers and customers. There are four clauses that are of particular importance:

1. *Force Majeure (Act of God)*: Do not assume that the pandemic or a declaration of a state of emergency or public health emergency will be sufficient to relieve a party of their obligations under a contract. A force majeure provision must contemplate the event and the force majeure must actually prevent the performance of the obligation in question. In addition, the provision may require a party to take actions to limit damages caused by the force majeure. Depending on the contractual wording, it is possible that the pandemic will be recognized as a force majeure in some contracts and not in others. You need to carefully review your contracts and the wording of each force majeure provision.
2. *Notices*: Many contracts require written notices to be delivered to parties within certain timelines. Compliance with these deadlines and notice requirements will help parties avoid unnecessary litigation. Where a contract provides for written notice by mail, we recommend also using electronic and telephone communications to provide more timely notice.
3. *Amendments and Waivers*: Contracts often include a clause confirming how the contract may be amended or non-

conformation with the contract can be waived. In light of the current situation, parties may want to amend or waive non-compliance with contractual provisions based on unforeseen changes in circumstances. Parties should clearly set out in writing any agreement to amend the contract, extend the time to perform the contract or waive any non-performance of the contract. An unwritten contract, including an amendment, is almost always unenforceable.

4. *Disputes*: Contracts often provide for dispute resolution. Courts in many jurisdictions are issuing directives to dispense with typical legal formalities for the sake of public health, including by permitting mediation and arbitration through electronic means. Courts are permitting electronic filing, extending deadlines (but not limitation periods, except in Ontario), and loosening the strict rules of civil procedure. If you are in a dispute, consider how these changes will affect you.

Supply Chain Logistics

Consider reviewing your supply chains for any opportunities to build in redundancies to minimize the impact of manufacturing slowdowns or delays in shipping. You may consider reviewing the terms of your supply chain logistics, including whether exclusive supply arrangements should be revisited. Businesses may also think about opportunities to store additional supplies or inputs and to cooperate with other businesses that may also need the same supplies or inputs to see if you can obtain priority for a larger order or share a limited supply of inputs.

Employees

If you employ workers, there are federal supports for working-sharing to avoid layoffs and temporary wage subsidies for small business. In addition, Alberta, Saskatchewan and Manitoba have implemented a number of measures to provide support. For example, the workers' compensation boards of each of the provinces have implemented various relief measures for employers in the form of

deferral and rebate programs for premium payments and some forgiveness of penalties.

As for the migrant farm workers who are so critical to the industry, the federal government has exempted temporary foreign workers from current travel restrictions and the horticultural industry, lead by Foreign Agricultural Resource Management Services (FARMS), will charter and pay for planes to bring workers into the country. Strict two-week isolation periods will still apply.

Employers and employees are both responsible for ensuring workplace safety. Employers are required to stay up to date with provincial health orders and to implement such measures to minimize the risk of spreading the virus.

Research and Grant Programs

Although it is difficult to predict, day-to-day, what government will do while they are focussed on recovery from the pandemic, they have indicated they will invest in research and grant programs to protect, strengthen and build Canada's agriculture and food processing industries. Some programs, such as the Canadian Agricultural Partnership (CAP) and Saskatchewan's Agriculture Development Fund (ADF) are expected to continue in their current form. New initiatives are also anticipated, including Alberta's recently announced Results Driven Agriculture Research (RDAR) program for agricultural research. Don't lose sight of these grants during these times of uncertainty as they provide an opportunity to access funds.

Banking

Lenders are aware of the situation you are in and hopefully will be receptive to novel solutions. They have a vested interest in your business continuing. ATB small business customers can apply for a payment deferral on loans, lines of credit and Mastercard for up to six months and additional working capital may be made available. If you work with a bank or credit union, reach out to them directly to work out a plan for your business situation.

If discussions with your lender or creditor are not going well, Agriculture and Agri-Food Canada offers the Farm Debt Mediation Service to provide financial counselling and mediation services to those having difficulty meeting financial obligations.

The Path Forward

While challenging, the pandemic will benefit those in the agriculture sector who are pro-active, measured and strategic. Use this as an opportunity to work with your key suppliers, customers, regulators and lenders to find solutions that work in the short-term but also in the long-term as you navigate the recovery and growth of your business.

McMillan LLP is your one stop legal and communications, and government relations team. Please contact us today if we can be of assistance to help your business weather this storm.

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a cautionary note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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