CORONAVIRUS – A PREPAREDNESS AND RESPONSE GUIDE FOR CANADIAN BUSINESSES

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Coronavirus (COVID-19) has sent shock waves through global markets, businesses and supply chains. Boards of directors and senior management of businesses are likely asking themselves some tough questions. For instance:

1. What should we be doing to protect our employees and operations?
2. Can boards be responsible if employees get sick from COVID-19?
3. Do we really understand the risks to our business operations from COVID-19?
4. What happens if our supply chain vendors fail to perform their contracts with us?
5. Can our lenders and other funders stop funding if the impact of COVID-19 worsens?
6. When does a COVID-19 problem become a "material change" that must be disclosed to regulators or disseminated by public companies?
7. What are we doing to contingency plan for a severe down-side scenario?
8. What communication plans do we have in place if a crisis occurs with our operations?

COVID-19

The outbreak of COVID-19 was first discovered in Wuhan, a city in Hubei Province in China in December 2019. The Chinese government imposed extraordinary measures to attempt to contain the spread of the virus. While the containment measures appear to have impacted the spread of the virus in China, they caused significant economic disruption and social hardship for those affected. Businesses in North America and elsewhere around the globe were negatively impacted by the related supply chain interruptions and the ripple effect from those interruptions.

As at the time of publication, the virus has spread to over 115 countries, including the United States, Italy, Iran, South Korea, Egypt, Japan, France, Spain, Australia, Thailand, Taiwan and Canada. The number of people diagnosed with COVID-19 now exceeds 116,000 with over 4,000 confirmed deaths. Quarantine and travel restrictions have been imposed in all parts of Italy. Last week, the states of California and New York each imposed a state of emergency and Amazon and other high tech companies asked tens of thousands of

employees to work from home. The SXSW tech and music conference in Austin, Texas, which expected hundreds of thousands of delegates, was cancelled due to COVID-19 concerns. The American Bar Association has cancelled several meetings, including the Spring Meeting of the Business Law Section that was to take place at the end of March. The concern and uncertainty about the virus and the protective actions taken by governments, local authorities and businesses around the world to contain the spread are having a real and present impact on business.

So far in Canada, there are more than 60 reported cases of COVID-19 but this number will likely increase as the virus spreads and detection measures become more readily available. Understandably, Canadian businesses are very concerned about the impact that COVID-19 will have on their employees, operations, partners, customers and suppliers. Accordingly, boards of directors and management of Canadian businesses should implement a range of measures to protect their employees and operations from the uncertain impacts of this global health crisis.

These measures include creating a response team of qualified management and advisors, assessing and addressing operating, commercial and contractual performance risks for themselves and key partners and engaging in contingency planning. In addition, businesses will need to implement robust inter-departmental and stakeholder communication and collaboration protocols to ensure that reactions are measured and responsive to new developments.

This practice guide is intended to help businesses identify potential issues and suggest risk mitigation steps related to the COVID-19 outbreak. The impact of COVID-19 is evolving rapidly and new information is available daily. Management should constantly monitor and re-evaluate their risk mitigation strategies and adjust accordingly.

The following are the topics discussed below:

- Protecting Employees
- Privacy
- Stress Testing Operating Scenarios, Contractual and Regulatory Compliance
- Waivers and Force Majeure
- Securities Regulatory Compliance
- Crisis Management Advice

PROTECTING EMPLOYEES

Protection of a business' employees is paramount and critical to maintaining resilient operations during the COVID-19 outbreak. As part of any preparedness strategy, businesses should consider the ongoing rights and

responsibilities of employers and employees in relation to the global health emergency.

Safety of the Workplace

Employers and employees are both responsible for ensuring the safety of their workplace. Employers should prioritize employee health by implementing strategies to share educational information with employees to minimize the risk of spreading the virus. Such measures include:

- Circulating email reminders about cold and flu season etiquette.
- Posting additional handwashing signs and providing hand sanitizer for use at work.
- Ensuring that policies on various sick and caregiver leaves are readily available to employees, and that employees understand they will not be penalized for absenteeism related to controlling the spread of COVID-19.
- Encouraging employees who have recently travelled to affected areas or are in close contact with someone who has done so, to stay at home and notify their manager or supervisor.

Additionally, employers should take steps to mitigate the risk of the spread of COVID-19 in the workplace by:

- Considering measured ways to employ social distancing where possible, such as encouraging electronic meetings via phone or video conference (rather than in person).
- Arranging for routine cleaning of frequently touched surfaces and communal spaces (such as handles on office entry doors, kitchens, meeting rooms and washrooms).
- Limiting non-essential business travel to affected areas.
- Establishing a protocol to approve business travel to affected areas and for employees to notify management of non-business travel to affected areas.
- Reviewing policies related to sick leave, caregiver leave, working from home and working remotely and ensure that they are flexible and follow public health guidance.
- Ensuring that information technology systems can accommodate an increase in remote users.
- Communicating with third party service providers who may provide on-site contractors and ensure that they are employing appropriate, non-punitive policies to allow contract workers to work remotely or take sick leave, if appropriate.
- Preparing for higher rates of absenteeism due to illness and the closure of schools or child care services in response to an outbreak.
- Preparing a contingency plan for when key employees are absent due to illness.
- The Center for Disease Control and Prevention (www.cdc.gov) has additional guidance for businesses in the face of the COVID-19 outbreak, available at: Interim Guidance for Businesses and Employers to Plan and Respond to Coronavirus Disease 2019 (COVID-19), February 2020

Generally speaking, boards of directors will be protected from personal liability if they ensure their company follows an adequate response plan informed by current guidance from the applicable health authorities.

Privacy Issues

It should be noted that if an employee is quarantined with symptoms of COVID-19, employers may face requests to disclose information related to the individual. While employees have a right to expect that their personal information, including health status, will be kept confidential and not disclosed throughout the workplace, this right must be balanced against employers' legal obligations to ensure that the workplace is safe. The question of whether to reveal the names of employees who have symptoms of COVID-19 or who have been isolated or quarantined is a difficult one to answer, and will involve a balancing of competing interests.

We encourage employers to proceed with caution and to seek legal advice in appropriate cases.

CONTRACTUAL AND REGULATORY COMPLIANCE

Stress Testing

Business is conducted in a complicated environment based on contractual relationships and regulatory requirements. Canadian businesses have already experienced delays in receiving goods from foreign suppliers and interruptions in service from critical non-resident service providers as a result of the COVID-19 outbreak. Many of the disruptions have been caused by government and business directed containment and spread mitigation efforts. The knock-on effect being that those businesses may now be directly affected by the virus. Accordingly, as part of businesses' preparedness and contingency planning, stress testing and modelling of operations should be conducted based on various assumptions related to a possible COVID-19 outbreak in Canada and other downstream impacts of this global health emergency. Response teams dedicated to monitoring the status of the outbreak should review the results of such testing and modelling and advise of updated parameters, where changes to the reality of the COVID-19 outbreak warrant such updates. Testing and modelling should focus not only on the business' ability to perform under the assumptions, but also the ability of contractual counterparties to perform under various assumptions.

Analysis of Stress Testing Results

The scenarios that are tested and modelled should be compared to the business' contractual and regulatory obligations. In particular, consideration should be given to contractual compliance risks, such as:

1. ***Impacts to performance covenants in contracts***. Review material contracts, licenses and permits and determine when performance or compliance risk could become a real concern. What proactive steps can be taken in advance to mitigate the risks?

2. ***Impacts to financial covenants in credit or loan agreements.*** Consider how financing arrangements or derivative contracts may be impacted by operating performance, market conditions, supply chain interruptions or workforce disruption related to COVID-19. Could certain realistic scenarios trigger any material adverse change or material adverse effect clauses in credit or loan agreements? If so, what are the rights and obligations attached to such clauses?
3. ***Liquidity risks.*** How could potential market shut downs, capital tightening and loan agreement covenant requirements impact the availability of liquidity? Do other potential market disruptions pose liquidity risks that could impact the business' cash flow?
4. A***re pending financing and M&A transactions potentially at risk?*** What steps can be taken to preserve these potential transactions or, alternatively, find a low risk exit?

Mitigation Strategies

Once compliance risks have been identified through analysis of the stress testing results, businesses should take steps to reduce the risk of default under their contractual commitments and prepare or update existing contingency plans. Such mitigation strategies could include:

- Review existing contingency plans to determine if there are any gaps that do not address the risks created by COVID-19.
- Review supply chain logistics. Are there opportunities to build in redundancy to minimize the impact of manufacturing slowdowns or restricted travel and shipping in areas subject to an outbreak? Does the business have capacity to store additional supplies in anticipation of shortages of key inputs? Can the company work with its vendors to obtain priority allocation of available production capacity?
- Where work cannot be completed remotely, such as in manufacturing or service industries, implement measures to protect employees.
- Address potential risks through pro-active, measured and strategic conversations with key suppliers, customers, regulators, and, if appropriate, lenders. These measures might include obtaining waivers or special accommodations.
- Assess whether there are opportunities to obtain short-term additional or incremental liquidity to mitigate potential cash flow issues.
- Develop or review communication plans regarding contingency plans for employees, customers, suppliers and lenders.

By reviewing and updating business' contingency plans in light of the spread of COVID-19, management will position the business to respond to the developing situation in Canada in a considered and pro-active manner.

Events of Default or Breach of Contractual Commitments

Even with the best-laid contingency plans, businesses may still default on, or face a counterparty's default of, contractual obligations or defaults under one or more material contracts as a result of the impact of COVID-19. In these instances, addressing the risk of breach or default will require measured and strategic responses. Businesses should have their lawyers review material contracts to determine the applicability and consequences of breach or default under such contracts. In particular, consideration should be given to the availability of the following provisions:

1.*Waiver Provisions*. Many businesses value their relationships with long-term suppliers and customers. In the face of a potential contractual breach, parties may be willing to grant extensions of time or waive contractual obligations in an informal manner. Where possible, businesses should consider documenting any waivers (either given or obtained) in writing. Generally, where a contract requires that a waiver be in writing, Canadian courts will enforce the requirement.

2. *Force Majeure Provisions*. *Force majeure* provisions are common in commercial contracts and exist to deal with events that are "unexpected, something beyond the reasonable human foresight and skill." If these clauses are triggered, then the counter-party may have some protection from being held in default of the contract for some period of time. Despite this commonality, force majeure clauses vary widely and it is important to proactively review the wording of these clauses, considering the following issues:

a. Scope of the triggering events: The wording of force majeure clauses will be a critical factor in determining whether impacts from COVID-19 can excuse delays in contractual performance (by either party). A helpful *force majeure* clause that might assist in the circumstances created by COVID-19 is one that provides protection to the contracting parties in the event of epidemics, pandemics, global health emergencies, orders by governmental authorities and restrictions on travel or trade related to the foregoing. Having said that, there may be other language in existing *force majeure* provisions that also affords the required protection. Businesses should seek qualified legal advice based on their specific facts and circumstances to determine the applicability of force majeure provisions to a breach or threatened breach of contractual obligations.

b. Impact on the triggering events: One party does not necessarily need to show that the triggering events make contract performance impossible, but it will usually need to show that the events created, in commercial terms, a real and substantial problem. The party seeking to rely on the *force majeure* clause may also have a duty to mitigate the effect of the triggering events, if doing so is reasonable in the circumstances.

c. Notice and Duration: Many force majeure clauses require prompt notice of a triggering event. If the event lasts beyond a defined time period, the counterparty may have the right to give notice of termination of the contract.

Absent a *force majeure* clause in a contract, a party seeking to delay or excuse contractual performance may need to invoke the doctrine of frustration or commercial impossibility. This doctrine allows a party to set aside the contract in its entirety rather than to suspend performance of an obligation temporarily. The threshold for a claim of frustration is high and requires the invoking party to show that an event has occurred after the formation of the contract that makes performance of the contract radically different from what the parties contemplated at the time the contract was formed. If this strict test is met, the contract will come to an end.

3. *Dispute Resolution*. The interpretation of *force majeure* and waiver clauses will depend on the parties' choice of law. The legal principles from Canada's common law provinces discussed above may not apply if the parties have chosen a different law to govern their contracts. For example, parties to international supply agreements often choose international arbitration rules to resolve their disputes. Moreover, the choice of contract law should not be confused with the choice of forum to resolve disputes arising out of the contract.

CAPITAL MARKETS

Continuous Disclosure Obligations

In addition to contingency planning considerations, public companies in Canada (or, "reporting issuers") must also carefully consider their regulatory duty to disclose information related to the impact of COVID-19 on their business. As a general matter, reporting issuers face two general categories of continuous disclosure obligations in Canada:

1. periodic or regularly scheduled disclosure obligations such as interim and annual financial statement filings, related management discussion and analysis (MD&A) and annual information forms; and
2. timely or event driven disclosure obligations such as press releases and material change reports disclosing a "material change" (described below) under applicable Canadian securities laws.

Reporting issuers must carefully consider and possibly address the impact of COVID-19 on their business and ensure that proper disclosure is made on a timely basis.

1.Periodic Disclosure

Among other things, reporting issuers are required to discuss trends and risks currently affecting or reasonably likely to affect their businesses, and, where practicable, the financial aspects of such risks in their periodic disclosure. This obligation may require a reporting issuer to provide disclosure on the direct and indirect effects of COVID-19 on the issuer's business, operations and prospects.

Reporting issuers should therefore consider and, as applicable, disclose in their periodic disclosure documents, trends and risks relating to the current and foreseeable effects of COVID-19:

- material supply chains;
- counterparty risk, including customers, suppliers, distributors, creditors and business partners;
- material revenue exposure to any affected countries or regions;
- disruptions to business operations resulting from travel restrictions and reduced consumer spending;
- contingency plans for material facilities located in an area that is, or becomes, subject to a COVID-19 outbreak;
- transaction risk, including the ability to conduct due diligence and obtain consents and approvals; and
- uncertainty around the duration of COVID-19's impact.

On March 4, 2020, the U.S. Securities and Exchange Commission issued an order[1] granting issuers affected by COVID-19 an extension of time to file certain disclosure documents under U.S. federal securities laws, subject to certain conditions. At the time of this publication, no comparable relief has been granted by the Canadian Securities Administrators (the "**CSA**"). Accordingly, reporting issuers should be proactive in ensuring that their financial reporting, auditing and review processes are as robust as practicable in light of COVID-19 in order to meet the applicable filing deadlines. Failure to file annual financial statements, interim financial reports, related MD&A or annual information forms will generally result in the issuance of a cease trade order against the reporting issuer and the notation of the reporting issuer as in default of applicable Canadian securities laws. Management of a reporting issuer who foresee difficulty in meeting their filing deadlines should consult with legal counsel as soon as possible to explore available options.

2. Timely Disclosure

Reporting issuers are required under applicable Canadian securities laws to immediately publicly disclose the nature and substance of any "material change" to their affairs. A "material change" is a change in the business, operations or capital of the reporting issuer that would reasonably be expected to have a significant effect on the market price or value of any of the securities of the reporting issuer.

The timely disclosure obligations under applicable Canadian securities laws do not require reporting issuers to continually disclose "material facts". A "material fact" is a fact that significantly affects or would reasonably be expected to have a significant effect on the market price or value of any securities of the reporting issuer.

The relationship between "material facts" and "material change" in relation to external developments has been explored by the Supreme Court of Canada. Reporting issuers are not required to continually interpret external political, economic and social developments, unless the external development will result in a change in the business, operations or capital of the particular reporting issuer, i.e. the external development constitutes a material change to the reporting issuer. Whether an external development constitutes a material change must be determined by management of an issuer. The existence of COVID-19 may not, itself, constitute a

material change to the issuer's affairs.

There may be, however, instances where management believes that COVID-19 will disproportionately impact the business' affairs. There is no bright-line test about whether something constitutes a material change.

At the time of publication, several reporting issuers, notably those with material manufacturing operations in, or exportation to, areas affected by COVID-19, have filed material change reports relating to the effects of COVID-19 on their affairs.

In addition to the timely disclosure obligations of applicable Canadian securities laws, a reporting issuer may be subject to additional timely disclosure obligations if their securities are listed for trading on a stock exchange. Canadian stock exchanges generally require listed issuers to immediately disclose all "material information". "Material information" includes both "material changes" and "material facts". Management of listed issuers should consider, notwithstanding a determination that the impact of COVID-19 does not constitute a material change to the issuer's affairs, whether and when COVID-19 could constitute material information of the listed issuer.

Disclosure in the Context of a Transaction

Reporting issuers undertaking transactions in the public and private capital markets should also consider the impact of COVID-19 in applicable disclosure documents. Applicable Canadian securities laws impose civil liability for "misrepresentations" in prospectuses, take-over bid circulars and offering memoranda. A "misrepresentation" is an untrue statement of facts or an omission to state a material fact that is required to be stated or that is necessary to make a statement not misleading in light of the circumstances in which it was made.

It may be that disclosure of the potential impact of COVID-19 will be required to ensure that in the context of a transaction, the applicable disclosure document does not contain a misrepresentation.

CRISIS MANAGEMENT

Restructuring Expertise

The market and business disruptions caused by COVID-19 and the related government, business and stakeholder actions may put a previously unanticipated level of stress on a business. If a business is facing this type of situation or anticipate that it may soon be in such a situation, then it should seek out specialized advice. This advice can come in the form of restructuring advice to develop ways to find alternative forms of capital or creative ways to keep creditors, contractual counterparties, governments, and other stakeholders working with the company as it navigates its way through a challenging period. Our corporate restructuring

lawyers are experts in dealing with unique situations and finding ways to help companies find ways to be resilient in challenging times.

McMillan Vantage: Protecting the Reputation of the Business; Seeking Government Support

In addition to mitigating the risks that the COVID-19 outbreak poses to the health and safety of a business' workforce and contractual and regulatory obligations, Canadian businesses also have to consider their reputation and public perception of their response to potential crises.

Imagine this scenario:

Two employees test positive for COVID-19; how do you respond to the reporters calling and asking what your company is doing to stop the spread?

McMillan Vantage, the only media and government affairs consultancy located within a national law firm, provides a one-stop resource to you to help your business deal with a crisis. Vantage's PR professionals can help you prepare your crisis communications plan, deal with media and ensure effective communication with your most important stakeholder: your employees. Our government relations team can help you stay on top of the latest government actions and identify areas where government policies or programs can help. McMillan Vantage includes former senior Cabinet Ministers, Chiefs of Staff, deputy ministers and journalists who routinely assist businesses with crisis communications and their government relations.

Conclusion

McMillan LLP is your one stop COVID-19 legal and communications response team. Please contact us today if we can be of assistance to help your organization navigate the potential fallout and business risks from the COVID-19 outbreak.

by Waël Rostom, Tim Murphy, Dave McKechnie, Robert Wisner, Jeff Gebert, Laura Giesbrecht

[1] SEC Provides Conditional Regulatory Relief and Assistance for Companies Affected by the Coronavirus Disease 2019 (COVID-19)

a cautionary note