

Protecting the Farm

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In recent years issues related to farm succession have attracted a lot of attention. Specifically the increase in litigation that has resulted from family disputes has been used as a reason for farmers to attend to their estate planning.



Farm Credit Canada published an article^[1] that states the potential legal threats to the family farm go beyond litigation arising from fighting siblings. The article illustrates that the potential threats to the family farm are ever increasing and there is not a high likelihood that litigation rates will decrease any time soon.

The significant increase in farmland prices in recent years has put a lot of money at stake and can result in a dispute over things that might have been ignored in the past. Those disputes are not confined to family feuds. They can arise as well from poorly drafted Offers to Purchase or Agreements for Sale, a lack of succession planning, marriage breakdowns, and any scenario where one interested person (or his/her spouse) feels short-changed or where such a person wants to realize on the farmland's value immediately and others do not.

What this means is farmers and family farm corporations need to actively take strides to eliminate avoidable problems whenever possible. Where past practice would simply be to rely on handshake deals and hope that all parties are on the same page, this will no longer cut it. In our modern society the institutions that govern our lives will rely on strict compliance with bureaucratic processes, and if farm operations do not dot their i's and cross their t's, that failure can lead to major problems in the future.

Below is a list of some of the actions that can be utilized to provide additional protection for the farm enterprise:

1. If the farm operation is dependant on leased land, then leases should be prepared by a lawyer and protected by caveats.
2. If taxes are filed as partners, then a proper Partnership Agreement should be drawn.

3. Where applicable a holding corporation should be used for farm land to separate the farm operation from its key asset. This will aid in protecting against third party claims and preventing regulatory grief.
4. If the farmer is going to sell or acquire farmland, the Offer or Agreement should be prepared, or at least reviewed before it is signed, by a lawyer to eliminate misunderstandings or mistakes.
5. All key individuals in a farm operation should have a Power of Attorney in place. This will allow someone to stand in their place and continue to conduct the affairs for that individual in the event of physical disability or the loss of mental capacity.
6. If the farm is incorporated the shareholders should give serious consideration to having a Unanimous Shareholders' Agreement. Amongst other things, a Unanimous Shareholders' Agreement will provide for what will happen in the event of the death or retirement of a shareholder or the separation of a shareholder and his/her spouse.

The value of a Unanimous Shareholders' Agreement cannot be over-stated. This Agreement can provide for what will happen if certain events occur which, if not planned for, will have a disastrous effect on the farm. It is much easier to plan for such events while everyone is on good terms, rather than wait until the event has already occurred and someone is not as friendly as they once were.

As an example, in a corporation where the only two shareholders are farming brothers, if one of the brothers dies, unless a Unanimous Shareholders' Agreement prevents it, the spouse of the deceased brother can insist on immediate payment of the entirety of the deceased brother's interest in the corporation. In reality, such a situation has led to the corporation being wound up due to a lack of liquidity available to buy-out the in-law.

In addition to in-fighting and potential litigation from third parties, another potential source of frustration and financial consequences for those in the agriculture industry is from Canada Revenue Agency. CRA is expanding the data sources available to it in order to collect extra information about taxpayers. It is imperative that tax filing requirements are met and that all record keeping obligations are adhered to.

An additional consideration from a record keeping perspective is upcoming amendments to The Corporations Act in Manitoba. These amendments will increase the record keeping obligations for those farm operations that are incorporated. As of 1 January 2020, all corporations will need to keep a register displaying certain details about all shareholders that have "significant control" of the corporation.

At the beginning of this article, mention was made of family disputes. "Fighting siblings" are the infamous, gold standard example of why family farms need to have their plans in order. Those in agriculture face unique challenges in estate planning. Although most parents want

to treat their children fairly, in the context of agriculture and the ownership of farmland, fair is not always equal. An equal division of assets may initially seem like the only way to go; in reality it may not be practical as the farming child cannot pay out the non-farmers.

It is likely that not all children will have taken an interest in farming. Inheritance decisions can be difficult, and although it may not be easy to have certain conversations, estate planning is critical. At a minimum all farmers regardless of age should have a Will in place. You should consult a lawyer and other appropriate professionals to establish an estate plan that addresses your unique circumstances. Dying intestate (without a Will) can lead to unintended and potentially devastating consequences. Even if your succession plan involves the potential sale to a third party, this requires advance planning to ensure your business is setup to maximize the value of the eventual sale.

Regardless of whether your farm is incorporated, a partnership, or you are a sole proprietor, it is imperative that you take careful consideration of potential hazards and protect yourself to the extent possible. If there are any issues you would like to discuss or if you wish to implement any of the above strategies, the lawyers at **Christianson TDS** would be happy to meet with you.

[1]Matt McIntosh, FCC, 31 October 2019:

<https://www.fcc-fac.ca/en/ag-knowledge/knowledge/farm-litigation-rates-are-on-the-rise.html>
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