Business Structures for Family Farms:

Ongoing Operations, Transfers, Asset Protection, and Estate Planning

Prepared For: Legal Education Society of Alberta
Family Farm Issues

Presented by:
Lori Bokenfohr
Dunphy & Bokenfohr Law Partnership
Calgary, Alberta

For Presentation In:
Red Deer – May 9, 2014

INTRODUCTION

> *Farming has had for Mr. Martin – as, I daresay, for farmers all over Canada – its ups and downs. Drought, fire and excessive rain, fluctuating prices and escalating costs, have taken their toll. Yet still he hangs in, like so many other members of this integral part of the Canadian economic fabric.*
>
> *What is the composite picture that emerges? A typical Canadian farmer. Not a wealthy professional or executive who dabbles in exotic cattle or horses with a view to enhancing his social standing but as a hard working Canadian farmer who cleans stables, harvests grain, fixes broken machinery, cares for sick cows and pigs and lives through the major and minor tragedies and heartbreaks that have best farmers for millennia.*[1]

As evidenced in the above comments by Justice Bowman at the Tax Court of Canada in 1996, the business of farming holds a very fond position in Canadian culture and within the courts. This may explain some of the tax benefits that apply to farm operations, as compared to other business ventures under the *Income Tax Act* (the "**Act**").[2]

For the purposes of illustration, this paper will explore a multi-generational family farm

(the "**Family Farm**") presently held by the grandfather ("**Grandfather**") and father ("**Father**"). Both the grandmother ("**Grandmother**") and the mother ("**Mother**") are alive. There are two adult children ("**Children**"), only one of whom is active in Family Farm operations on a full-time basis (the "**Farming Child**"). There are also four grandchildren ("**Grandchildren**"), two of whom are active on the Family Farm. The farm land is held in a family farm corporation, and the Grandfather and Father are the sole shareholders. (Please see the "scenarios" attached as Appendix "A".) This paper will discuss the impact of divorce between the Mother and Father, and the death of the Grandfather in the context of the Act.

Part I of this paper details the various business structures that may be used for farm operations, with a comparison of the features of each structure. Part II contains a discussion of land transfers among family members under the *inter vivos* rollover provisions in the Act. A discussion of estate freezes, transfers by will and divorce under the rollover rules is also included in this part. Part III discusses sale of farm interests for fair market value in the context of the debt forgiveness rules, divorce, and the replacement property rules. In Part IV, various estate planning options that should be considered in farm operations are highlighted.

---

[1] *Martin v MNR*, 1995 CarswellNat 89 at paras 17-18, (TCC) Bowman, J.

[2] *Income Tax Act*, RSC 1985, c 1, (5th Supp) [*ITA*].

Unless otherwise specified, all references in this paper to the Act mean the *Income Tax Act* (Canada). Goods and Services Tax may be payable in any transfer of farm property, but the applicable rules under the *Excise Tax Act* (Canada) are not discussed in this paper.

PART I – COMPARISON OF BUSINESS VEHICLES: CORPORATIONS, TRUSTS, PARTNERSHIPS

A brief overview of the general law and tax rules that apply to corporations, trusts, and partnerships will identify the advantages and disadvantages associated with each of these structures in the Family Farm context.

CORPORATIONS

The corporation may be regarded as a traditional business vehicle, and the Family Farm is held in a corporation.

General Law

In law and under the Act, a corporation is a separate entity and is governed by provincial statutes which tend to be very detailed, and contain very specific compliance requirements. For example, the provincial *Business Corporations Acts* require the names and addresses of directors to be included on provincial corporate registries, which are updated annually.[3] The provincial acts also set out specific obligations for directors and rights of shareholders of a business. Shareholders may dissent, for example, or bring derivative actions, oppression claims, and apply for liquidation in appropriate circumstances.[4] Shareholders also have the right to access certain financial records of the corporation. The public disclosure required under corporate law, and the powers of shareholders to hold directors to account, should be considered by families proposing to incorporate farm operations.

At the same time, an obvious advantage of using a corporation is the limited liability of shareholders.

[3] Voting shareholders are also required to be listed on registries in Alberta.

[4] For example, under subsection 215(1) of Alberta's *Business Corporations Act*, RSA 2000, c B-9, a Court may liquidate and dissolve a corporation if it is satisfied that the business of the corporation has been conducted in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of a shareholder. A detailed discussion of the interaction of directors and shareholders in corporate law is beyond the scope of this paper.