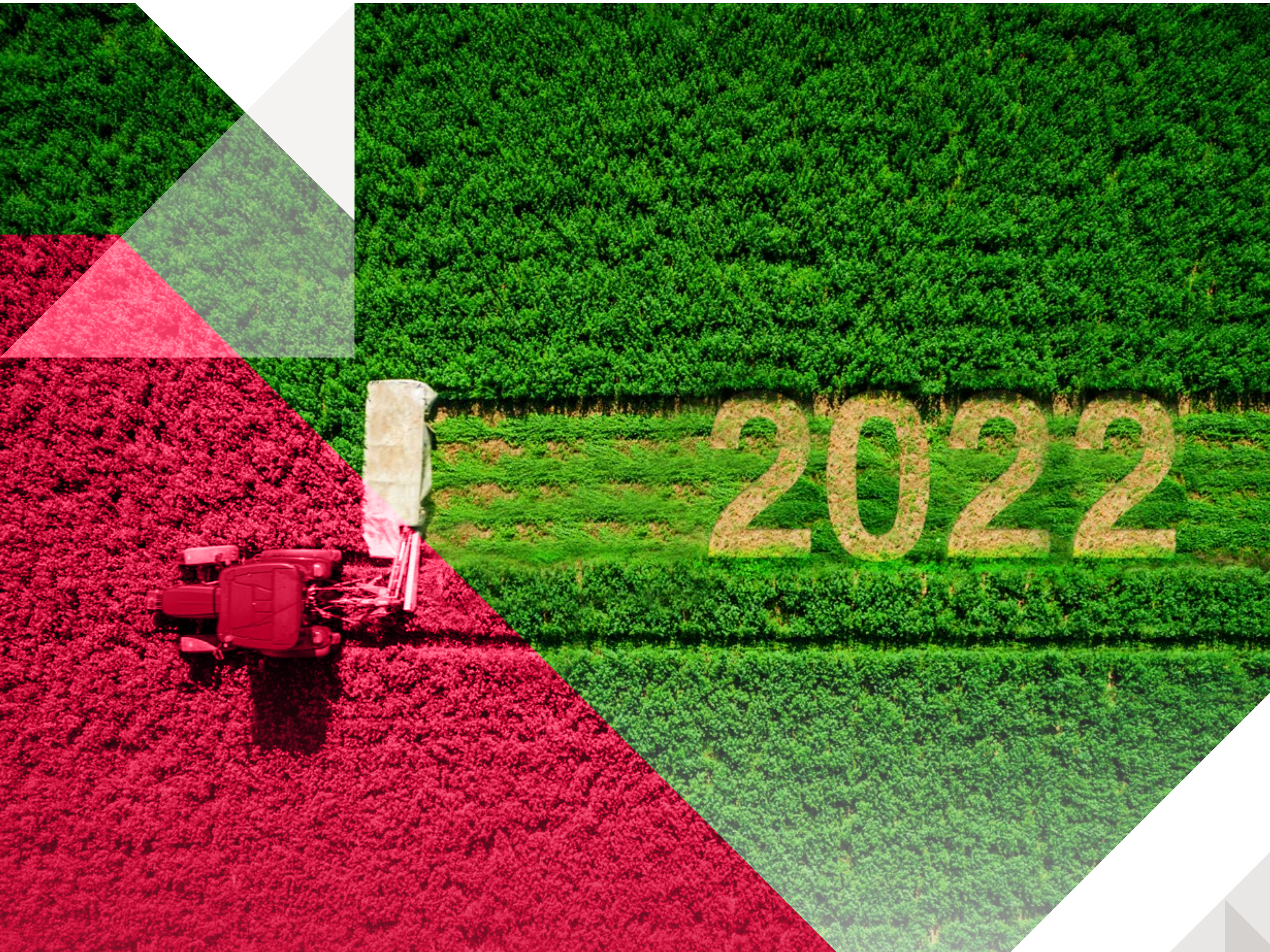


Agriculture and Food

2022 YEAR IN REVIEW

MLT AIKINS

WESTERN CANADA'S LAW FIRM

Introduction

Authors: Kristal Allen, Samer Awadh

Inflation, interest rate hikes and market turmoil dominated 2022, putting a strain on global economies and commodity markets as the world began to emerge from the COVID-19 pandemic and deal with the fallout of the Russian invasion of Ukraine. In spite of these challenges, agricultural producers continued to innovate and deliver for clients, proving once again how resilient this industry is in the face of adversity.

Bear markets and high borrowing costs didn't put a damper on venture capital (VC) investors' enthusiasm for innovative Western Canadian agribusinesses. Just halfway through the year, VC investment in the Canadian ag sector was 33% higher than in all of 2020, and on pace to shatter the record set in 2021. Emmertech, a VC fund launched by Regina-based Conexus Venture Capital Inc., invested millions in Canadian agtech companies. We also saw the launch of Tall Grass Ventures, a Calgary-based VC fund dedicated to pre-Series A financing for agtech startups.

However, if you're an agricultural producer looking to raise capital, VC investors aren't your only option. Prospectus exemptions such as the offering memorandum and small business financing exemptions can help you raise capital quickly while minimizing costly red tape. This year, we've provided an overview of how these exemptions work – and possible regulatory relief that may be on the way to help make your business an even more attractive investment.

The past year saw several developments at the federal level that will have wide-ranging impacts on agriculture. The Canadian Food Inspection Agency continued on its path toward regulatory modernization with the transitional period applicable to 2020's amendments to the *Fertilizers Regulations* drawing closer to its end, and the introduction of a set of changes to the *Food and Drugs Regulations* and the *Safe Food for Canadians Regulations* – a perhaps less significant suite of revisions than anticipated, but nonetheless an important step toward consolidating Canada's food labelling requirements and reducing the regulatory burden for the food industry. Meanwhile, vigorous debate regarding the Government of Canada's updated climate plan and its targets regarding the reduction of emissions arising from fertilizer application, continued. The federal government also levied a bevy of sanctions against the Russian federation, which could impact agricultural producers involved in foreign trade. In November, Canada announced its intention to significantly ramp up its immigration efforts, which will come as welcome news to agribusinesses looking to fill vacant positions.

We discuss all of these developments and more – such as estate planning for growers who aren't quite ready to retire, and ESG considerations for agribusinesses – in our latest Agriculture & Food Year in Review. Read on for an overview of the key developments and trends that shaped agriculture in 2022.

Table of Contents

Fertilizer Industry in Flux: A Changing Regulatory and Policy Environment

Author: Kristal Allen

Changes to Fertilizers Regulations – End of Transitional Period Nearing

Back in 2020, the Canadian Food Inspection Agency (CFIA) made substantial amendments to the *Fertilizers Regulations* as part of its regulatory modernization initiative. These amendments sought to strengthen regulatory controls for product safety, environmental sustainability and consumer protection, while reducing regulatory red tape. They included the following changes (among others) to the regulation of fertilizer products in Canada:

- extended the period applicable to product registration from 3 to 5 years
- removed an exemption for specialty fertilizers
- removed an exemption for fertilizers imported for personal use
- updated the definition of "supplement" to include materials that act directly or indirectly to improve soil condition or aid plant growth or crop yield, requiring supplements such as polymers, signalling compounds, nanomaterials and DNA aptamers to be registered
- introduced a requirement for all new product registrations and renewals of existing registrations to be submitted pursuant to the new regulations

Although the amendments came into force on October 26, 2020, a three-year transitional period was applied to aid industry in achieving compliance. During this period, regulated parties had the option of complying with the new regulations or the former regulations in their manufacture, sale, import or export of fertilizers and supplements subject to the *Fertilizers Act*. The goal was to allow existing product stocks to be exhausted over the three-year period, thereby lowering the cost associated with complying with the updated regulatory requirements and giving regulated parties time to transition their products to the new regime.

Now, the deadline to comply with the amended *Fertilizers Regulations* is just under one year away. After October 26, 2023, products packaged in accordance with the former regulations must be off the market and registrations granted under the former regulations will be cancelled. With this in mind, it is critical for your fertilizer business to be prepared for the end of the transitional period and full compliance by the fall of 2023.

To aid in preparation, the CFIA held multiple webinars to review and outline the regulatory changes effected by the amended *Fertilizers Regulations* and provide guidance to the industry and other stakeholders. In addition, our Agriculture & Food team would be pleased to advise you on any questions you may have regarding the transition to the new regulatory regime and registration requirements applicable to fertilizer products.


pH
B
Mn
Fe
TEMPERATURE
Ca
P
K
Mg
N
S
Zn
BALANCE

Emissions Reduction

In December 2020, the Government of Canada introduced its updated climate plan “A Healthy Environment and a Health Economy,” targeting the reduction of greenhouse gas (GHG) emissions and the enhancement of carbon sequestration activities.

This plan was inclusive of several measures impacting the agriculture and food industry, including the aggressive goal of reducing GHG emissions arising from fertilizer application by 30% below 2020 levels by 2030. As described in the plan, this emissions reduction target applies to both direct *and indirect* emissions from the application of fertilizer. Although the plan does not address emissions associated with the manufacturing of fertilizers, it does call attention to the further potential for emissions reductions as the result of the use of new, innovative fertilizer products.

Response to this plan was swift and varied, and gathered steam throughout 2022. Many members of the agriculture and food industry, including growers and fertilizer manufacturers, argued that Canadian growers are already among the most sustainable growers in the world. They warned that the lowering of fertilizer emissions to target levels was unlikely to be achieved without compromising food production. They also noted that concerns regarding food security have become more acute in the face of continued population growth and regional famine, the logistical and labour challenges presented by the COVID-19 pandemic, and commodity market and transportation disruption resulting from global unrest and the Russian invasion of Ukraine.

Other stakeholders, however, argued that the plan and its targets are essential to reduce GHG emissions and battle climate change. According to data cited by the Government of Canada, agriculture was responsible for approximately 10% of Canada's GHG emissions in 2019, or 73 Mt CO_2, and emissions from synthetic fertilizers are estimated to have accounted for approximately 12.75 Mt of that amount. In addition, that same data indicates that fertilizer use in Canada increased by 71% between 2005 and 2019. As the data cited by the Government of Canada appears to illustrate that fertilizers are responsible for a growing share of overall agricultural emissions, environmental groups and other stakeholders view a reduction in fertilizer use as a crucial part of reducing agricultural emissions.

In March 2021, Agriculture and Agri-Food Canada launched a phased consultation with industry, Indigenous communities, environmental organizations and other stakeholders to gather information and feedback regarding the impact of its stated target and develop a plan to achieve it. During the first phase of consultations, a number of key points were discussed, including:

- the use of the 4R Nutrient Stewardship approach developed by Fertilizer Canada, a collection of best management practices to promote the sustainable use of fertilizer and achieve large-scale emissions reductions
- possibilities respecting the replacement of synthetic fertilizer with non-synthetic alternatives such as manure or compost
- opportunities for the use of drainage design and conservation tillage
- the impact of the use of maximum (rather than minimum) guarantees for nitrogen content and enhanced efficiency technologies in synthetic fertilizers
- the identification of additional methods by which the reduction of emissions can be supported

The second phase of consultations concluded at the end of August. Following the consultation period, an industry-led report was released suggesting that the Government of Canada's goal of reducing fertilizer emissions by 30% by 2030 was not achievable. The report argued the plan was both economically non-viable and presented risks to food security and food production that must be carefully considered, adding that an emissions reduction of approximately 15% was more realistic.

However, it is worth noting that the Government of Canada has stated that emission reductions efforts are intended to be focused on improving nitrogen management, encouraging innovation and optimizing fertilizer use rather than a mandatory reduction in the use of fertilizers. In other words, at this time, the government has not proposed a fertilizer ban, regulations to reduce fertilizer emissions or even mandatory emissions reduction practices. What has been proposed as part of the updated climate plan is a voluntary emissions reduction target, supported by a range of best practices and technologies. Whether or not this plan is good policy or will strike an appropriate balance between reducing GHG emissions and maintaining a secure food supply and expanding agricultural exports is a matter of continued debate.

At the time of this writing, a report on the results of the second phase of consultations is expected before the end of 2022. Watch this space for updates regarding the outcome of these consultations and the Government of Canada's plan to address fertilizer emissions.

A Red-Hot Year for VC Investment in Agtech

Authors: Stathy Markatos, Scott Exner, John Brigidear

Despite a year of economic uncertainty and aggressive rate hikes that wreaked havoc on financial markets, venture capital (VC) investment in Canadian agribusiness thrived in 2022.

Only halfway through the year, VC investment in agribusiness was already 33% higher than all of 2020 and on pace to surpass the records set in 2021, both in terms of deal volume and deal value, according to data from the Canadian Venture Capital and Private Equity Association.

Emmertech Announces Investments

Regina-based Conexus Venture Capital Inc. was very active in 2022, contributing to 13 rounds of funding in the first half of the year. In 2021, Conexus launched the $60-million Emmertech fund, which focuses exclusively on opportunities in Canadian agtech and agribusiness innovation.

Over the past year, the Emmertech continued deploying capital, announcing investments in several Canadian companies at the leading edge of agtech innovation, including:

- Leading a $34-million Series C funding round for Ontario-based Vive Crop Protection, which develops products aimed at enhancing the efficiency and sustainability of crops
- Leading a $3.1-million seed financing round for Vancouver-based BarrelWise Technologies Ltd., which develops data systems to improve efficiencies in winemaking
- Leading a $1.7-million seed financing round for Ontario-based IntelliCulture, which develops technology for monitoring and optimizing farming equipment and crop yields

Tall Grass Ventures Launches

September saw the launch of Calgary-based Tall Grass Ventures, Canada's newest agtech VC fund focusing on pre-Series A financing for startups focused on globally applicable agtech innovation.

Tall Grass is leaning in with its experience in agriculture, tech and finance to invest both experience and capital. Having built companies, brought innovation to market and been in ag for most of their careers, the Tall Grass team understand founders' struggles with building market defining companies.

"As past founders, investors and builders ourselves, we know firsthand some of the challenges that exist building an early stage agtech company, especially in Western Canada," Wilson Acton, managing partner of Tall Grass Ventures, said in a statement. "Bringing experience and capital to agtech startups is exactly where Tall Grass is focused."

Tall Grass plans to help the next generation of Western Canadian agtech companies scale quickly as the industry transforms through its growing adoption of data, connectivity and sustainability.

Growing Support for VC Investment

The federal government gave a boost to VC investors in October when it invested $350 million in four VC fund-of-funds managers through the Venture Capital Catalyst Initiative.

“We are committed to helping innovative businesses and entrepreneurs get the investments they need to scale up, access new markets and succeed,” said Mary Ng, the minister of international trade, export promotion, small business and economic development.

Manitoba also has its sights set on encouraging investment in early-stage companies. In April, the province announced a plan to allocate $50 million to privately managed VC funds and enhanced its Small Business Venture Capital Tax Credit for VC investors.

As climate change, global supply chain disruptions and a growing population continue to put pressure on the agriculture industry, we expect innovative agtech companies throughout Western Canada to become increasingly attractive to VC investors everywhere.

Lawyers from MLT Aikins were pleased to act as counsel to Conexus on the formation of Emmertech and advise on the fund’s investments. MLT Aikins also advised Tall Grass Ventures on its formation. If you’re looking for investment opportunities in Western Canadian agtech, the lawyers in our Private Equity and Venture Capital group would be happy to assist you.

CFIA Continues to Simplify and Modernize Food Labelling

Author: Kristal Allen

Canada has taken another step toward consolidating its food labelling requirements and reducing the regulatory burden for the food industry.

On July 6, 2022, the Canadian Food Inspection Agency ("CFIA") introduced changes to the *Food and Drugs Regulations* ("FDR") and *Safe Food for Canadians Regulations* ("SFCR"). These changes serve to simplify labelling requirements, reduce duplication and introduce new measures to support the current state of the food system in Canada and better align our requirements with those of our international trading partners.

Published in the Canada Gazette, Part II, Volume 156, Number 14, the amendments are the result of the CFIA's efforts to modernize food labelling through its Food Product Innovation initiative. The first step in consolidating Canada's food regulation occurred in January 2019, when the *Safe Food for Canadians Act* and the SFCR came into force. The most recent amendments continue this consolidation and begin the process of modernizing Canadian food regulation to reduce the regulatory burden on industry and foster innovation.

Although amendments to the FDR and SFCR do not at this time result in any requirement for manufacturers to change their food labels, nor do they require any change to how these labels are inspected, they do cause changes for manufacturers in several key areas:

Repeal of Certain Standard Container Sizes: Standard container sizes and net quantity requirements applicable to various foods and food types have been removed from the SFCR.

Common Names of Ingredients: Although no changes have been made to the ingredient common names themselves at this time, the list of class names for spices, herbs and seasoning ingredients has been expanded and the description of seasoning ingredients has been clarified.

Commodity-Specific Requirements: Various commodity-specific requirements contained in the SFCR and FDR have been replaced by requirements regarding the "true nature" of food. Pursuant to this requirement, if a prepackaged food is likely to be mistaken for another food, words describing its "true nature" are required to be included on the principal display panel.

Licensing: Clarification has been made that restaurants and similar hospitality enterprises engaged in preparing food for customers that may be transported across borders are exempt from the licensing requirements of the SFCR.

In addition, in aid of consolidation, a number of items and topics have been incorporated by reference into the SFCR and FDR via documents prepared by the CFIA, enabling the CFIA to update these documents as may be required without the need to make formal amendments to the regulations. Examples of topics addressed via this approach include descriptive words, expressions and identification names for specific foods, standard container sizes and mandatory ingredient common names and optional class names.

The above amendments are only part of the CFIA's previously communicated plans to modernize food labelling. Its Food Product Innovation initiative follows the Government of Canada's earlier Food Labelling Modernization Initiative, a broader program with the additional objectives of improving the quality of information on food labels and enhancing consumer access to information regarding food, including via mandatory label changes. As these issues were not addressed in the current suite of amendments, it is expected that certain of these matters will be the subject of a future regulatory package.

Watch this space for updates as the overhaul of Canadian food labelling regulation continues. In the interim, if your business requires assistance with interpreting or implementing these amendments, please contact our Agriculture & Food team.

Bill Before Parliament Supports the Right to Repair

Authors: Adam Lakusta, Kristal Allen

Many of the devices we use in the 21st Century are controlled or regulated by software. The agriculture industry has become increasingly reliant on software to maintain high performance and safety standards for farming equipment — but repairing high tech equipment or farm equipment software isn't always a straightforward task.

That's in part because Canadian copyright law currently contains provisions that prohibit the circumvention of "technological protection measures" ("TPM"). TPMs are a form of "digital lock" used in a variety of sectors to control access to digital content and prevent unauthorized access, reproduction or distribution of digital products such as music, film and software. Since coming into force in 2012, section 41 of the *Copyright Act* has guarded against the unauthorized modification of TPM-protected software on software-enabled devices.

This has meant that farmers are often required to go to original equipment manufacturers (OEMs) when the software used in farming machinery needs repair. But that could soon change due to a bill making its way through the House of Commons.

What Is Bill C-244?

On October 5, 2022, Bill C-244, *An Act to amend the Copyright Act (diagnosis, maintenance and repair)*, passed its second reading and was referred to the committee stage. The bill seeks to amend section 41 of the *Copyright Act* to permit the diagnosis, maintenance and repair of TPM-protected products.

Bill C-244 follows hot on the heels of the *Freedom to Repair Act* introduced in the United States House of Representatives on February 2, 2022. The U.S. Act seeks to amend the *Digital Millennium Copyright Act*, enabling users to circumvent digital locks to diagnose, repair and maintain software-enabled devices. As of the date of writing, the U.S. Act has been referred to the committee stage but has not been made law.

Section 41 of the *Copyright Act*

In the *Copyright Act*, a TPM is a form of technology, device, or component that is designed to control access to, and/or modification and reproduction of, a copyright-protected work. In many cases, the copyrighted work is computer code.

TPMs are frequently used by copyright holders to prevent against unauthorized use or distribution of protected works such as music, films, television shows and software. Currently, circumventing (including avoiding, bypassing, removing or deactivating) a TPM is prohibited under section 41.1 of the *Copyright Act*. Accordingly, the copyright in TPM-protected works is deemed to be infringed when:

1. Actual circumvention of the TPM has occurred
2. Individuals offer TPM circumvention services to the public
3. Individuals manufacture, import, distribute or offer for sale or rental any technology that is produced primarily to circumvent TPMs

Pushback Against Section 41

In 2009, most Canadian automobile manufacturers came to a voluntary agreement providing third parties access to their computer code for the purpose of diagnosing and repairing, therefore enabling consumers to choose where they have their vehicles repaired post-warranty. However, in the intervening years, the issue of the right to repair has extended far beyond the automotive industry and questions have resurfaced regarding the need for legislation.

Consumer advocates and several Members of Parliament have pushed back against section 41, alleging that it contributes to increasing technological waste and modern day “throwaway culture.” Specifically, consumer advocates argue that the expanding issue of “planned-obsolescence” – the practice of producing technologies that rapidly become obsolete – warrants an exception in the *Copyright Act* to repair devices.

To address these issues, Bill C-272 — which, notably, had the exact same language now used in Bill C-244 — was introduced to amend the *Copyright Act* in 2021 and received unanimous parliamentary support. However, that bill died on the floor after the 2021 federal election was called. Bill C-244 is the successor to Bill C-272, and has also obtained virtually unanimous parliamentary support on a second reading.

How Will Bill C-244 Affect the Ag Industry?

Bill C-244 appears to create a carveout in section 41 of the *Copyright Act*’s prohibition on circumventing TPMs for the limited purposes of diagnosing, maintaining and repairing software-enabled devices. In effect, this means that unauthorized third parties will not be prohibited from diagnosing and performing repairs on software-enabled devices to which a TPM is applied.

As a result, owners of vehicles, tractors and other equipment and devices that contain integrated software would be permitted to have their TPM-subject equipment and devices serviced by non-OEM service providers of their choosing.

Members of Canada’s agricultural technology and manufacturing sectors have voiced concerns that Bill C-244’s proposed amendments will not only enable diagnosis, maintenance and repair, but will also lead to unauthorized or inappropriate modification of software and a reduction of performance and safety standards in the industry. More specifically, concern has been raised that permitting the circumvention of digital locks on devices could enable the overriding of performance, safety, and emissions management features designed to optimize device performance and protect end users.

If passed, Bill C-244 will still need to be interpreted by a Canadian court; however, a plain reading of the bill, along with parliamentary speeches and remarks, indicates that its effects are intended to be narrowly targeted. In particular, Bill C-244 provides that an individual who circumvents a TPM may only do so “for the sole purpose of diagnosing, maintaining or repairing a product in which a computer program is embedded.” Additional purposes, such as modification, customization or alteration of a product or its embedded software, are not contemplated.

In Bill C-244’s current state, the proposed legislation does not expressly grant individuals or third parties permission to override performance and safety features that may be present on devices. The creation of any inadvertent or indirect ability to perform such overrides will surely be the subject of discussion regarding Bill C-244, perhaps with the aim of arriving at legislation that contains a right to repair without enabling a broader, unfettered right to modify.

Despite Bill C-244 having passed its second reading with unanimous support, whether it becomes law is not entirely certain. We’ll continue to monitor the bill as it works its way through Parliament – and if you have any questions about how Bill C-244 could affect your business, we’d be happy to assist you.

Addressing Labour Challenges in Agriculture with Foreign Recruits

Author: Scott Bell

One of the bigger issues facing the agriculture sector is the limited labour pool in Canada. Many employers who are looking for workers from outside of Canada to fill job vacancies will be pleased to hear the federal government is ramping up its immigration efforts.

In November 2022, the Government of Canada announced a plan to welcome more than 1 million newcomers to the country over the next three years. Immigration, Refugees and Citizenship Canada (IRCC) plans to allow 465,000 permanent residents into Canada in 2023 – a number that will rise to 485,000 in 2024 and 500,000 in 2025. The majority of these newcomers (60%) will be economic immigrants looking to fill the estimated 1 million vacant jobs in Canada.

While these new immigration targets will come as welcome news to many in the agriculture sector, the process of bringing skilled workers into the country can be time-consuming and complicated. Here is a brief overview of issues to be aware of if you are looking to hire foreign recruits.

What Type of Workers Are You Looking to Hire?

Generally speaking, the strategy you use for bringing workers into Canada will depend on the roles you are hiring for and the countries the workers are coming from.

Engineers, engineering techs, IT workers, mechanics and other professionals and credentialed tradespeople are considered skilled workers and may have a quicker route to working in Canada. Assembly line workers and uncredentialed tradespeople are more likely to be considered low-skilled positions and will generally take longer to obtain working status.

The agriculture sector has a number of high-skilled and low-skilled occupations which impact the immigration pathways available. Managers in agriculture, farm supervisors and specialized livestock workers are all examples of high-skilled occupations. General farm workers, harvesting labourers and animal care workers are all considered lower-skilled. It is important to understand the conditions around the target occupation to get a sense of the immigration steps required.

Supporting a Work Permit for Canada

Most foreign nationals need a work permit to work in Canada.

The majority of work permits, particularly for low-skilled workers, are supported by a Labour Market Impact Assessments (LMIA) under the Temporary Foreign Worker Program (TFWP). This can be a long process that requires specific domestic recruitment efforts and advertising to demonstrate that you cannot find a Canadian citizen or permanent resident to fill a role. With advertising and application processing timelines, securing an LMIA can take three to four months and delay hiring efforts.

The TFWP has an Agriculture Stream for employers in specific commodity sectors that need employees to conduct on-farm primary agriculture activities. These positions must include job duties such as farm machinery operation, animal care or tending to crops. This is not an exhaustive list and other primary farm activities may qualify, so long as they are consistent with National Occupational Classification codes 80020, 80021, 82030, 82031, 84120, 85100, 85101 and 85103. Until June 30, 2023, the requirement to advertise and recruit for qualifying occupations has been waived, allowing for more streamlined access to the LMIA process.

Seasonal agricultural positions may qualify for the Seasonal Agricultural Worker Program (SWAP) under the TFWP. These positions must also be primary agriculture occupations within an applicable commodity sector. Employment candidates under this stream must be citizens of Mexico or a Caribbean country.

For reference, the National Commodity List for both agricultural streams includes the following: apiary products, fruits, vegetables (including the canning/processing of these products if grown on the farm), mushrooms, flowers, nursery-grown trees (including Christmas trees and greenhouses/nurseries), pedigreed canola seed, seed corn, grains, oil seeds, maple syrup, sod, tobacco, bovine, dairy, duck, horse, mink, poultry, sheep and swine.

In some instances, work permits are LMIA exempt and can be supported without the need for domestic recruitment efforts or the pre-approval of the federal government. Under the International Mobility Program (IMP), an employer can skip the LMIA and apply directly for a work permit. These options are only available where Free Trade Agreements or special programs allow a foreign national quicker access to Canadian employment.

The federal government has stated it will use new features in the Express Entry system to make it easier for workers in the manufacturing, building trades and science, technology, engineering and math sectors to enter Canada. The government will also rely on the various Provincial Nominee Programs to address targeted local labour market needs. Regardless of the immigration pathway you take, a work permit still must be processed. This can take an extended period, as outlined below.

Issues to Be Aware Of

- Expect the immigration process to be lengthy. The LMIA process can be three to four months, and the online work permit application process could also take months. A work permit for a candidate in India could take up to 42 weeks to process online. Employers may want to focus on recruits from countries with shorter processing windows. Further, employers can focus on candidates from countries that do not require online processing of their work permits once proper supports are in place, such as an LMIA. As an example, citizens of Mexico can travel to Canada and receive their work permits at the port of entry, eliminating online processing times. Knowing which countries can process faster is key to accelerated staffing.
- Exercise caution when entering into agreements with third-party recruitment firms. These firms can be a good source of workers but can also lead to immigration compliance issues later on. As of September 26, 2022, IRCC has imposed stricter compliance obligations on employers who use third-party recruiters. Employers should have recruitment agreements reviewed and ensure they are fully aware of the work a third-party is doing on their behalf. This must also set out the fees being collected with an assurance the third-party is not collecting recruitment fees from the foreign worker. Employers should also be aware of what work the third-party may be doing for the foreign workers.
- Many foreign workers who are already in Canada have labour mobility issues due to closed employer-specific work permits. These permits only allow them to work for one employer, normally in one location and in a specific occupation. As of September 2022, an application to renew or change work permit conditions from inside Canada was estimated to take 165 days.
- In November 2022, IRCC began using the 2021 version of the National Occupation Classification (NOC) system, which will have an impact on the eligibility criteria for various immigration pathways, including Express Entry and the Provincial Nominee Programs. Foreign nationals applying for work permits must now use the 2021 NOC codes. Notably, 16 new occupations have become eligible for Express Entry, including heavy equipment operators.
- In Western Canada, employers can consider programs such as the B.C. Provincial Nominee Program, the Alberta Advantage Immigration Program, the Saskatchewan Immigrant Nominee Program and the Manitoba Provincial Nominee Program. While each provincial program is different – and some programs are friendlier to employers hiring foreign nationals than others – each can be used for positions in the agriculture sector.

Hiring foreign workers can be a complicated process with the potential for significant delays and compliance issues. A skilled legal team can help make the process easier. If you are looking to hire workers from outside of Canada, the MLT Aikins Immigration team would be pleased to assist you.

ESG Considerations for Canadian Agribusiness

Authors: Conor Chell, Scott Exner, Laura Roberts, Sydney Thomson

More than ever before, the Canadian agriculture and food sector is recognizing the importance of performing well from an environmental, social and corporate governance (ESG) perspective.

Beginning in 2023, federally regulated banks will face mandatory ESG reporting requirements. This means banks will be asking more questions about their business clients' ESG performance when making lending decisions. Agribusinesses need to be prepared for this.

The ag sector is intimately connected to the environment. It not only has impacts on the environment, but is significantly impacted by environmental changes. Consumers are increasingly conscious of the impact their decisions have on the environment and their communities. They are demanding transparency from producers and choosing to support sustainably produced products. A focus on ESG strategy can help the Canadian agriculture and food sector support positive social and environmental outcomes while driving sustainable business value.

Agriculture is the world's largest industry, employing more than 1 billion people, generating more than US$1.3 trillion of food annually and using 50% of the earth's habitable land. Within Canada, the federal government has noted that agribusiness is one of the sectors with the highest economic growth potential, currently making up 7.4% of the country's GDP. However, agribusiness is also vulnerable to the effects of climate change and often places significant pressures on the environment, including through extensive land use, carbon intensive farming practices and reliance on fertilizers. In conjunction with Canada's 2030 Emissions Reduction Plan, approximately $900 million has been earmarked by the federal government for agricultural climate initiatives such as investment in more energy-efficient farm equipment over the next eight years. In embracing ESG practices, agribusinesses can position themselves for future growth, funding and business viability under changing market and environmental conditions.

Innovation and Technology Critical

To facilitate sustainable growth, the Canadian agriculture and food sector will need to focus on innovation and technology. In recent years, many agribusinesses have focused on developing value-added processing facilities for Canadian-grown crops. With the increasing global demand for plant-based proteins, Canada has seen significant research and investment devoted to pulse processing facilities over the past 20 years. Many of the facilities are located in Western Canada to capitalize on the sourcing of local crops such as peas, chickpeas and lentils.

Another significant area of opportunity for the agriculture and food sector relates to carbon offsets. In June 2022, the federal government announced that it was working to establish a set of federal greenhouse gas (GHG) offset protocols for the generation of offset credits, including offset protocols for enhanced soil organic carbon and livestock feed management. Provincial jurisdictions are also working to establish carbon offset credit markets with protocols specific to agricultural activities. Alberta has a well-established system in place for generating and trading agricultural carbon offsets for conservation cropping, reducing greenhouse gas emissions from feed cattle, distributed renewable energy generation and anaerobic decomposition of agricultural materials. However, Alberta's system is still underutilized by the agriculture and food sector due to a lack of regulatory certainty and limited financial benefit compared to the implementation costs. Although much work needs to be done to clarify, stabilize and incentivize agricultural carbon offset systems for Canadian farmers, the emergence of the carbon offset market will likely factor prominently in the ESG strategies of many agribusinesses going forward as carbon pollution pricing continues to escalate each year.

Sector-Specific ESG Guidance

Agribusinesses have a variety of options when considering how to best assess and report their ESG impacts. In recognition of both the high environmental impact of the agriculture and food sector, which contributes approximately one-third of global GHG emissions, and the projection that the sector will have to double in size by 2050 to meet growing consumer demand, ESG standard and reporting organizations have developed agricultural-specific ESG standards and reporting metrics, such as the Global Reporting Initiative's *GRI 13: Agriculture, Aquaculture and Fishing Sectors 2022*. Other organizations that have released agricultural standards and reporting guidance include Canada's National Index on Agri-Food Performance, which helps agribusinesses assess their ESG impacts; the Science Based Targets Initiative, which helps businesses set targets to reduce their ESG impacts; and the Sustainable Accounting Standards Board, which helps businesses report on and understand how ESG impacts their financial outlook.

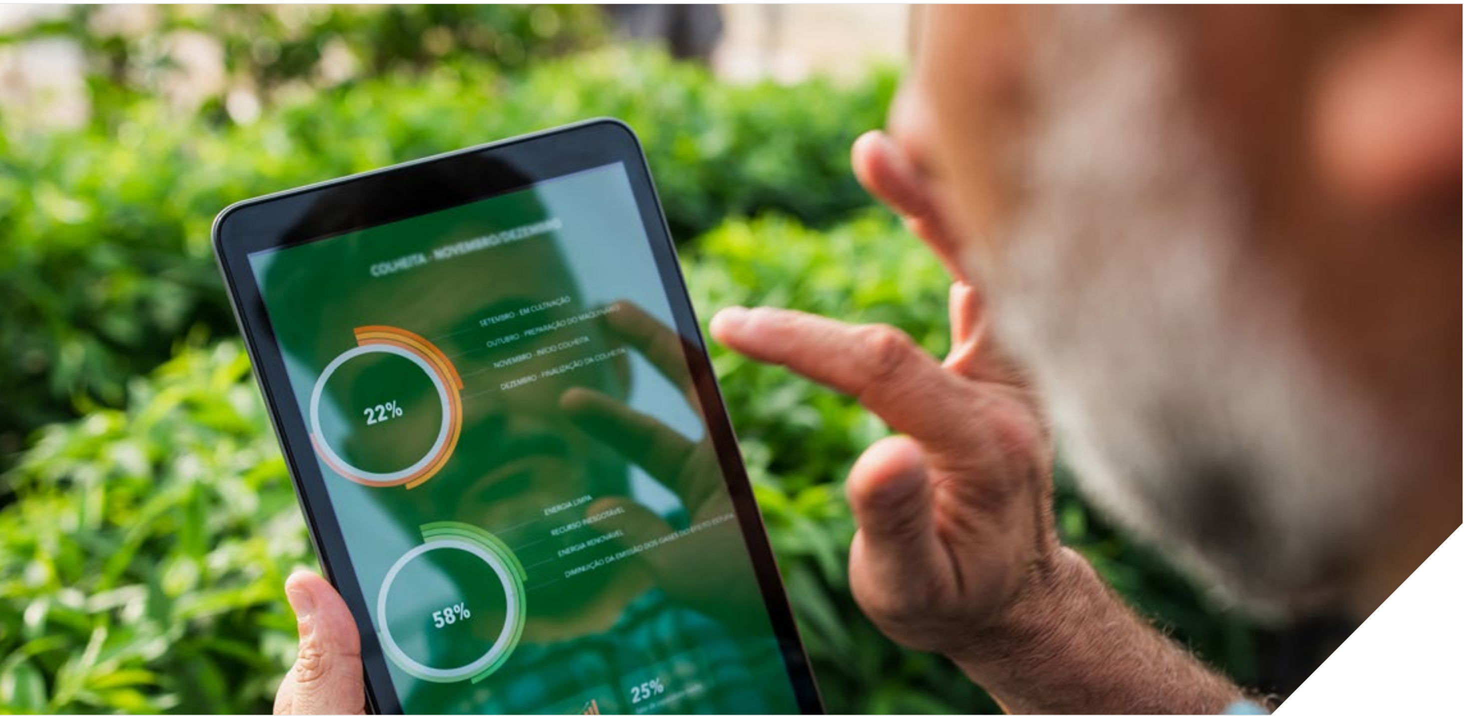
The types of ESG impacts most often considered in agriculture and food sector reporting and target setting include energy consumption, biodiversity, GHG emissions, climate resilience and adaptation, water management, gender balance, food safety and security, Indigenous partnerships and relationships, and fair labour practices. Identifying ESG impacts is the first step in mitigating those impacts on the environment, the business and society.

Managing Divestment Risk & ESG Activism

ESG reporting is increasingly under scrutiny by a variety of stakeholders including investors and financial institutions. In fact, 75% of institutional investors say they may divest from companies with poor ESG performance. The Canada Pension Plan, Ontario Teachers' Pension Plan and the Caisse de dépôt et placement du Québec have all committed to net-zero investment portfolios. These net-zero plans may be achieved through either divesting in high-emitting sectors or through exerting pressure on high-emitters to force them to reduce emissions. In either scenario, commitment to good ESG practices and reporting will enable companies to better attract and maintain long-term investors.

In addition to the risk of divestment, corporations without robust ESG policies and reporting risk being targets of activist investors. This is especially true in the agriculture and food industry. In 2021, Ceres published an investor-led initiative to work with 50 of the highest-emitting public food companies in North America to increase their reporting of GHG emissions, set ambitious reduction targets and create climate action plans. Through this initiative, Ceres is seeking to directly engage these companies as well as influence other investors in the agriculture and food industry to increase pressure to address climate change. Other examples of activist investors include a letter sent from 120 advocate groups to institutional investors calling on them to pressure Tyson Foods to implement worker safety measures to address the number of COVID-19 cases impacting employees. In response to activist ESG pressure, several organizations have created programs intended to help industry demonstrate that it is operating in a sustainable manner. A recent example of such a program is the Farm Credit Canada Incentive Program, which recognizes Canadian beef producers that certify to sustainability standards set by the Canadian Roundtable for Sustainable Beef.

Creating a robust ESG plan makes good business sense and can insulate agribusinesses from divestment and investor activism. Canadian agribusinesses need to evaluate their ESG policies, report on their social and environmental impacts, and set targets to mitigate negative impacts and capitalize on positive opportunities. The MLT Aikins ESG group has wide-ranging experience advising clients in the agriculture and food sector on their ESG strategies.



Raising Capital for Agriculture Projects: Tips for Agribusinesses

Authors: Sean MacLachlan, John Brigidear, Deirdre Lanigan

Alberta agricultural operations and producers have a number of options for raising capital – but navigating securities laws while tending to business is often a challenge.

For the most part, agribusinesses in Alberta aren't reporting issuers, which basically means that shares of their companies are not listed for trading on a stock exchange. In general, a common way to become a reporting issuer is to file a prospectus with a securities regulator for review and receipt before selling new shares to the public. This can be a lengthy process, and the fees for professional advisors can add up quickly. The cost may not be worth it if a company does not expect to raise funds from the public regularly.

An alternative is to sell securities based on an exemption from the prospectus requirement, which is often called a "private placement." This allows companies to raise capital more quickly and efficiently, although the range of potential investors is much smaller.

Two of the most common exemptions relied on are the "accredited investor" and "private issuer" exemptions. An accredited investor is generally a high-net-worth or high-earning person who satisfies certain criteria.

A private issuer is a company that can sell securities to many different types of investors including directors, officers, employees, close personal friends and business associates of the issuer, provided the company meets certain criteria. One key requirement of this exemption is that the company cannot have more than 50 shareholders (not including employees). Unfortunately, this means that many mid-size or larger agribusinesses will not qualify as private issuers, as they often have more than 50 shareholders.

Fortunately, there are other prospectus exemptions that allow agribusinesses in Alberta to raise capital. Here's a brief overview of two options we believe will be helpful for those operating agribusinesses: the offering memorandum exemption and the small business financing exemption.

Offering Memorandum Exemption

This exemption allows businesses to raise capital by providing investors with an "offering memorandum," which is a document that describes the business, its management and the risks of investing in the company, among other criteria. Notably, issuers must provide investors with annual audited financial statements under the offering memorandum exemption, as well as notices about how it will use the funds it has raised.

Investment Limits

The offering memorandum exemption allows you to raise capital from a wider range of investors than other prospectus exemptions available in Alberta. There is no cap on the amount you can raise using the exemption, although there are limits on the amount you can raise from certain categories of investors.

There are no investment limits for:

- investors that are not individuals
- accredited investors (e.g., financial institutions, pensions and high-net-worth individuals)
- investors who qualify for the family, friends and business associates exemption

For investors who do not fall within the above categories, the investment limits looking back on a rolling 12-month time period are:

- $10,000 for individuals who do not meet the definition of an "eligible investor"
- $30,000 for eligible investors
- $100,000 for eligible investors who received advice from a portfolio manager, investment dealer or exempt market dealer that an investment above $30,000 is suitable

Disclosure Requirements

To qualify for and rely on the offering memorandum exemption, businesses must prepare and deliver an offering memorandum to investors that describes your business, its management, the securities you are offering and the risks of investing in your company. Importantly, this exemption requires you to include audited annual financial statements of your business.

The requirement to provide audited annual financial statements is more onerous than the reporting requirements for the small business financing exemption. Once you have relied on the offering memorandum exemption, you must file audited financial statements annually and a Notice of Use of Proceeds detailing how you used the funds you raised from investors.

When relying on this exemption, you must file a Form 45-106F1 Report of Exempt Distribution with the Alberta Securities Commission (ASC) within 10 days.

Risk Acknowledgment and Investor Rights

Businesses relying on the offering memorandum exemption must obtain a risk acknowledgment form from each investor.

Individual investors must complete two schedules found in the form. The first confirms whether they are an eligible investor, accredited investor or an investor who would qualify under the family, friends or business associates exemption. The second schedule is an acknowledgment of potential investment limits and confirmation those limits have not been exceeded.

Investors have a two-day "cooling off" period to cancel their investments. They can also sue your company, its directors, CEO and CFO if your offering memorandum or the marketing materials used in association with the offering memorandum contain any misrepresentations.

Small Business Financing Exemption

This exemption allows early-stage companies with headquarters in Alberta to sell shares by providing investors with a more streamlined offering document that describes the business and its management, and how the company intends to use the funds it raises.

Investment Limits

The small business financing exemption offers two tiers of capital raises, both of which have limits on the maximum amount you can raise. To qualify for the small business financing exemption, your head office must be in Alberta or Saskatchewan and you cannot already be a reporting issuer.

Under a Tier 1 raise, businesses can raise up to $1.5 million in a year. An investor can contribute a maximum of $2,500 per year to your company. That limit rises to $10,000 if the investor:

- meets the definition of a "minimum income investor" or is a company controlled by a minimum income investor; or
- has obtained advice from a registered dealer that the investment is suitable for the investor

Under a Tier 2 raise, businesses can raise an aggregate lifetime maximum of $5 million from investors (excluding funds raised from investors who qualify under another specified exemption). Investors can contribute up to $5,000 per year. That limit rises to $20,000 if the investor:

- is a minimum income investor; or
- has obtained advice from a registered dealer that the investment is suitable for the investor

The offering must close within 120 days.

Disclosure Requirements

You must provide investors with an offering document that describes your business, its management, the securities you are offering, how you plan to use the funds you raise and the minimum offering amount.

For Tier 1 raises, you are not required to provide financial statements with the offering document. For Tier 2 raises, you must provide financial statements with your offering document. However, the accounting standards used in these financial statements are less onerous than the offering memorandum exemption.

For Tier 2 Raises, you must also deliver the Small Business Undertaking Form to the applicable securities regulators, undertaking to deliver your annual financial statements and file an annual Notice of Use of Proceeds. You must make both of these documents reasonably available to investors under the exemption.

Risk Acknowledgment

Every investor must confirm they have read and understood the offering document and the enhanced risk warning in the Small Business Risk Acknowledgment form.

In Alberta, a business that relies on this exemption must file a Report of Exempt Distribution Form with the ASC within 30 days.

Resale Restrictions and Discretionary Exemption for Agriculture Projects

One downside of raising money relying on prospectus exemptions is that investors who have purchased shares are bound by resale restrictions, which legally prohibit them from selling the shares to another purchaser unless certain criteria are satisfied. The intent behind this is to ensure securities are purchased only by suitable investors who can bear the full risk and are aware their shares cannot be freely resold to the public.

The Corporate Finance and Securities group at MLT Aikins believes some agribusinesses and agriculture projects in Alberta have characteristics that could make them more suitable for a broader range of investors than current securities laws permit. We believe exemptive relief may be granted to permit the resale of shares to a broader set of potential purchasers, making some agribusinesses a more attractive investment and promoting regional economic development.

In particular, we believe there should be exemptive relief allowing purchasers to sell to:

- their own family members
- other securityholders of the same business
- another customer of the business who was not previously a shareholder of the business

We believe the agribusiness itself should meet certain criteria to satisfy regulatory authorities that the market for the shares would be adequately restricted but still allow for greater resale potential than would ordinarily be available. We also believe that greater resale potential will promote demand and regional economic growth.

The nature of the agricultural sector creates unique issues for businesses wanting to raise money. The lawyers in our Agriculture & Food and Corporate Finance & Securities groups have the knowledge of the agricultural sector and securities laws applicable across Canada to effectively help businesses operating in or outside of Alberta that are looking to raise money explore all their options, and think outside the box to find new and creative solutions.

The Business Impact of Canadian Sanctions Against Russia

Author: Alexandre Mireault

Since the advent of the war in Ukraine, the federal government has increased the scope of sanctions against various corporations and individuals from the Russian Federation.

Any agribusiness involved in international trade must be aware of the prohibitions against doing business with sanctioned Russian entities or risk facing financial penalties and significant reputational harm. In this article, we'll offer a brief overview of the sanctions against Russia.

Russian Sanctions

The sanctions imposed against Russia present challenges for Canadian agriculture companies doing business with entities with ties to Russia, particularly when it comes to identifying whether a transaction directly or indirectly benefits a sanctioned person. Moreover, legislative changes now prevent Canadians from providing a broad range of services to major Russian industries. Further, sanctions targeting Russian industries make it challenging for Canadian agriculture companies to provide services to Russian clients.

The Regulations

The sanctions regime imposed by the federal government operates through the *Special Economic Measures (Russia) Regulations*, SOR/2014-58 (the "Regulations"), which target a wide range of persons, corporations, industries and services to respond to Russian aggression in Ukraine. The scope is intentionally broad to counter the opacity of the corporate structures in which many Russian oligarchs operate.

Canadians who fall offside any of the Regulations risk facing significant monetary fines, imprisonment or possibly both. More importantly, given prevailing sentiment, running afoul of the Regulations carries substantial reputational risk.

Targeted Individuals and Corporations

Historically, the Regulations have functioned by prohibiting Canadian companies and citizens from transacting with targeted Russian individuals and corporations. In their current form, the Regulations target more than 1,200 Russian individuals and entities. Expanding upon previous sanctions that largely targeted banks with ties to the Kremlin, the defence sector and the oil and gas industry, the Regulations now specifically take aim at oligarchs and their corporations, many of whom have ties to European companies.

Currently, Canadians cannot deal in property or provide financing that would benefit sanctioned Russians directly or indirectly. Property is defined broadly in a manner that prohibits share purchases or leveraged financing, creating problems for companies with major Russian shareholders. Moreover, the notion of indirect benefit should be broadly interpreted when assessing whether a transaction complies with the Regulations.

Canadians need to be cautious before dealing with companies whose shareholders are sanctioned, as such transactions would be of indirect benefit to the shareholders. However, the corporate structures and shareholdings of Russian oligarchs are often intentionally opaque. Certain sanctioned Russians have made it public knowledge that they have surrendered shares and resigned from directorships of certain European corporations in which they previously held a stake. Absent such public declarations, and even with such information in hand, it is advisable for Canadians to proceed cautiously and seriously investigate whether their transactions will be of benefit to sanctioned Russian individuals or corporations.

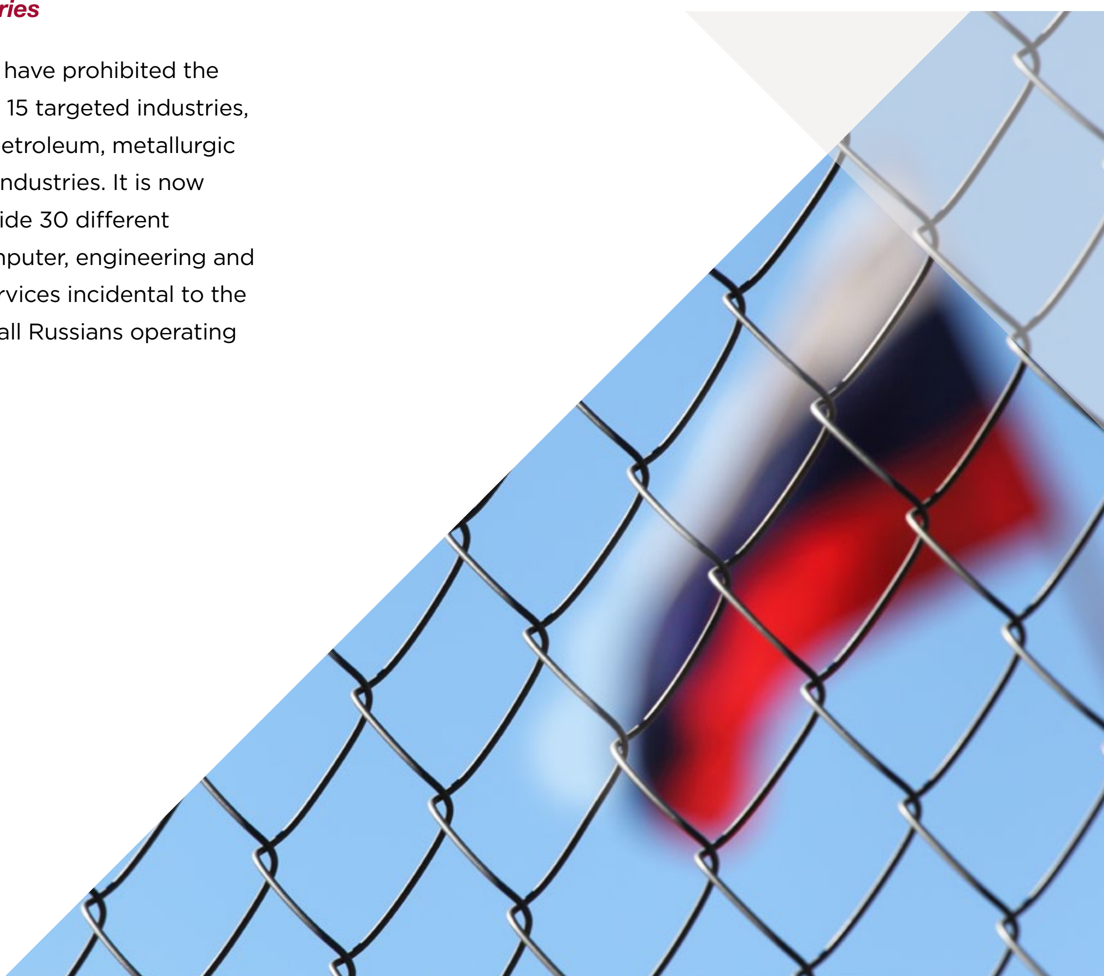
Services Ban for Certain Industries

Since July 2022, the Regulations have prohibited the provision of specified services to 15 targeted industries, including the mining, chemical, petroleum, metallurgic and automotive and equipment industries. It is now prohibited for Canadians to provide 30 different services, including technical, computer, engineering and consulting services, as well as services incidental to the manufacturing of equipment, to all Russians operating in the targeted industries.

The industries and services listed by the Regulations are broadly defined and aim to impact Russia's primary industries, notably its petroleum, mining and fertilizer sectors. The Regulations also target industries providing a supporting role to those primary sectors.

The Regulations in their current form show a shift in the strategy of the federal government. With Canadians unable to provide broadly defined services to most major Russian industries, the federal government has made it very difficult for Canadians to transact with Russians at all, even when the Russians they are dealing with are not otherwise targeted by sanctions.

MLT Aikins continues to closely monitor the development of sanctions applied against Russia. We are available to help clients navigate the complexities of the Regulations to ensure they do not inadvertently contravene the sanctions imposed by the federal government. If you are concerned about how these sanctions may affect your business, we would be happy to assist you.



Joint Ventures: Practical with Tax Advantages for Succession Planning

Authors: Aaron Haight, Alain Gaucher

If you're considering retirement or expanding your farming operation, a joint venture arrangement may give you some much-needed flexibility and offer tax advantages.

A joint venture has some similarities to a partnership, but with key differences. A partnership involves partners carrying on one business together, typically for an indefinite period. A joint venture, on the other hand, involves parties with separate businesses agreeing to collaborate for a specified period of time. Joint venturers thus have the ability to define the scope of their commitment to the joint venture and to limit their liability exposure.

The difference in structure is also reflected in the way they are taxed. Under the *Income Tax Act* (Canada) (ITA), the small business deduction (SBD) allows Canadian-controlled private corporations to pay a lower corporate tax rate (between 9–13% depending on the province) on their first $500,000 in active business profits. For partnerships, the ITA specifies that the members of a partnership must share the SBD in respect of the taxable income of the partnership. This means that any partnership income in excess of $500,000 will be taxed at general corporate rates.

Parties to a joint venture are operating different businesses; therefore, they report their income and expenses separately for tax purposes. As a result, each party may qualify for the SBD individually. Depending on the circumstances, a joint venturer may have more of its business income taxed at SBD rates than if it were to earn that same income via a partnership.

How a Joint Venture Works

A joint venture is a flexible relationship between you (or your corporation) and at least one other business entity (an individual, partnership or a corporation) in which you agree to share costs without actually carrying on a single business together.

Unlike partnerships, joint ventures typically have a limited scope and duration. You would be coordinating your efforts and pooling your resources over a specified period of time, giving you the flexibility to review and tweak your business relationship – or abandon it altogether.

Due to their flexibility, joint ventures may offer farmers eyeing retirement time to ease out of the business. It may be possible to gradually sell off certain assets and take a step back from day-to-day labour on the farm while still carrying on an active business until you're ready to fully retire.

It's important to bear in mind that your corporation may be taxed at lower corporate rates if it is carrying on active business and earning business profits. In contrast, if you've decided you're ready to retire and your corporation rents out its land, it will be taxed at significantly higher rates as a passive landlord. For example, passive income earned by a Canadian-controlled private corporation in Saskatchewan in 2022 will be taxed at a rate of 50.67% versus a rate of 10% on business income (note that a portion of the tax on passive income is refundable when the corporation pays dividends).

To maintain active business status, you will need to assume a certain amount of risk and play an active role in the management of the joint venture. Each party should agree on what they're contributing to the venture, the expenses they're agreeing to share and the portion of inventory produced that each will be entitled to. These and other important details should be included in a written agreement.

Example Scenario 1: The Family Transition

Let's say you're planning to pass your farm on to your two children. This could be an ideal scenario for a joint venture, allowing you to transition out of the business while your children gradually take the reins.

In this scenario, you might maintain ownership of your farmland and agree to transfer your farming equipment to corporations controlled by your two kids. You also agree to be involved in the management of the farm while your children use the equipment they now own to carry out operations.

In this scenario, you're contributing your land, time and expertise to the joint venture, while your kids contribute farming equipment and labour. You each assume risks and are each entitled to receive a portion of the grain or livestock inventory produced. It would also be open to each of you to decide to take your respective assets and do something different with them in the future (e.g. you may choose to rent your land to someone else or your kids may choose to carry on their businesses independently from each other).

Example Scenario 2: An Arm's Length Transition

Let's say your family isn't interested in carrying on your business, but a young farmer down the road would love to – she just doesn't currently have the financial means to buy you out.

This could also be an ideal scenario for a joint venture. You could bring the assets – the land, buildings and equipment – while remaining involved in the management of the farm and assuming some of the risks. Meanwhile, your young neighbour is responsible for the labour and benefits from accessing the equipment she needs to expand her own operation.

You can take a step back from sitting in the tractor seat every day while continuing to earn profits in your business. If the venture proves successful, your young neighbour may one day be in a situation to buy your business.

Practical Considerations

When you're entering a joint venture, it's important to consider the following:

- What expenses are you each responsible for and what expenses are you sharing?
- How are you breaking down each party's share of inventory produced?
- Are all the participants involved in management? Are they all assuming some risk?
- Will there be any co-owned property?
- What is the process for terminating the joint venture?

All of these details should be included in a written agreement so that the parties are clear on the terms of their relationship. There is no bright line between what a joint venture is and a partnership. Therefore, the details of the written agreement are key both from a practical perspective and also with respect to how each venturer's business profits will be taxed.

The lawyers in the MLT Aikins Taxation group regularly advise clients in the agriculture industry on succession-planning strategies. If you're interested in learning more about how a joint venture agreement could help you transition to retirement or expand your operation, we'd be happy to assist you.

About MLT Aikins

MLT Aikins LLP is a full-service law firm of more than 280 lawyers with a deep commitment to Western Canada and an understanding of this market's unique legal and business landscapes.

Based out of six key centres across the four western provinces, MLT Aikins is the only law firm to have offices in Winnipeg, Regina, Saskatoon, Calgary, Edmonton and Vancouver. As one of the 13 Largest Law Firms in Canada (Lexpert, American Lawyer Media), we have the bench strength and geographic scope to meet the increasingly complex needs of clients – from the personal concerns of individuals to the highly sophisticated and comprehensive requirements of major business enterprises.

We view ourselves as partners in our clients' ventures, helping them succeed by bringing our experience and legal knowledge to bear on each assignment. We invest in understanding our clients' businesses, the issues they face and their goals – and we efficiently and effectively address the legal and regulatory challenges they face.

Winnipeg
30th Floor
360 Main Street
Winnipeg, MB R3C 4G1

Regina
1500 Hill Centre I
1874 Scarth Street
Regina, SK S4P 4E9

Saskatoon
Suite 1201
409 3rd Avenue S
Saskatoon, SK S7K 5R5

Calgary
2100 Livingston Place
222 3rd Avenue SW
Calgary, AB T2P 0B4

Edmonton
Suite 2200
10235 – 101st Street
Edmonton, AB T5J 3G1

Vancouver
Suite 2600
1066 West Hastings Street
Vancouver, BC V6E 3X1