# Agriculture and Food

2021 YEAR IN REVIEW

MLT AIKINS

WESTERN CANADA'S LAW FIRM

# INTRODUCTION

Canada's food and agriculture industry continued to demonstrate its resilience in 2021 despite a number of monumental challenges, from severe drought and flooding to the ongoing effects of the COVID-19 pandemic.

The pandemic once again placed unprecedented stress on supply chains. Transportation systems suffered the effects of lockdowns, trade tensions, and labour and container shortages. Throughout 2021, these challenges restricted the ability of Canadian producers and manufacturers to access production and manufacturing inputs and to export products. Meanwhile, consumer preferences drove an increased demand for organic and sustainably produced food and food ingredients, as well as an increased demand for the use of organic and sustainably sourced inputs in the production of food and food ingredients. This trend made the biologicals space a segment to watch in agriculture.

As biologicals continue to grow, we can expect to see increased R&D investment in the space, including via collaborative and co-development arrangements. Companies that collaborate on new technology are faced with tough questions regarding ownership of the technology created – and rights to the control of such technology's dissemination. Intellectual property ownership has become increasingly complex as innovation continues to drive the food and agriculture industry forward.

The industry also faces a new challenge: the rise of sustainable investing and environmental, social and corporate governance (ESG) metrics. For all companies, whether public or private, ESG is the new benchmark driving investment decisions and strong ESG performance is becoming a pre-requisite in order to access capital.

While the industry faced new challenges in 2021, it also received some help. In May 2021, the federal government passed legislation to minimize the tax consequences of farmers transferring their businesses to family members. The federal government and some provincial governments also introduced programs to help the agriculture industry.

In this Agriculture and Food Year in Review, we explore these topics and more, and provide an overview of the key issues and trends that shaped the food and agriculture industry in 2021.

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Thank you to Todd Thomson, Greg Dalgetty, Thao Lam, and all of the other contributors who are noted throughout the ebook.

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# Venture Capital in Western Canadian Agriculture

*Authors: Stathy Markatos and Samer Awadh*

Venture capital deals in Canadian agribusiness totalled $182 million in 2021, while $1.3 billion in private equity funding flowed into the agriculture and forestry sector. A substantial number of these transactions were in Western Canada. Of the total $14.7 billion in venture capital deals (in all sectors) in 2021, $3.7 billion was completed in Western Canada, representing 25% of the total.

Last year saw a continued growth trend in agricultural venture capital with a number of significant initiatives.

In August, Saskatchewan-based Conexus Venture Capital Inc. announced the launch of Emmertech, a $60-million venture capital fund focused on Canadian agtech and agribusiness innovation. Along with an anchor investment from Innovation Saskatchewan, Emmertech received investments from a number of credit unions, as well as international ag companies Mosaic and Viterra. In 2021, Emmertech closed two investments in Lucent BioSciences in British Columbia and Ukko Agro in Ontario. MLT Aikins acted as counsel to Conexus Venture Capital Inc. in establishing Emmertech and on a number of Emmertech's investment transactions. Other funds and institutions have continued their growth in the sector, including Ag Capital Canada, Telus Ventures, SVG Ventures, Business Development Bank of Canada and Rio Investment Partners, among others.

## Federal and Provincial Financial Supports for Agriculture and Food

Federally funded supercluster initiatives such as Protein Industries Canada, headquartered in Saskatchewan, also continue to represent a bright spot in potential deal flow for agricultural companies. Protein Industries Canada recently announced that with one year left in its initial tranche of $153 million in funding from the federal government, it has leveraged almost $300 million in additional industry investment.

Provincial governments are also providing support, including significant investments such as Alberta's Accelerate Fund, Saskatchewan's Advantage Innovation Fund and Agtech Growth Fund, and Manitoba's Innovation Growth Program. Further, the provinces offer innovation tax credits and incentives for start-up and growth companies, including Manitoba and British Columbia's Small Business Venture Capital Tax Credits, among others.

## Investment in Ag & Food Will Bring Opportunities for Growing Companies

According to the most recent data from Statistics Canada, Canada's agriculture and agri-food industry was responsible for $139.3 billion in economic activity in 2020. This represented 7.4% of Canada's gross domestic product and accounted for one in nine jobs. In 2020, farm cash receipts were approximately $70 billion, with Western Canada contributing 59% of the total.

With a global population that some estimate will grow to 10 billion people by 2050, the opportunities for agriculture and agri-food in Canada are significant, including for companies looking for venture capital to expand their footprint. A number of positive initiatives brought online in 2021 suggest that the outlook for 2022 will be similarly robust.

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# Supply Chain Disruptions/Export and Transportation Challenges

*Author: Bennet Misskey*

Two barriers that continue to pose significant challenges for the future of Canadian exports are disruptions in international supply chains and trade infrastructure issues that prevent or delay the production and shipment of goods.

The COVID-19 pandemic placed unprecedented stress on supply chains. Transportation systems suffered the effects of lockdowns, trade tensions, and container shortages. Throughout 2021, these challenges restricted the ability of Canadian producers to access manufacturing inputs and to export their products, driving many producers to seek alternative markets and means of transporting goods from abroad.

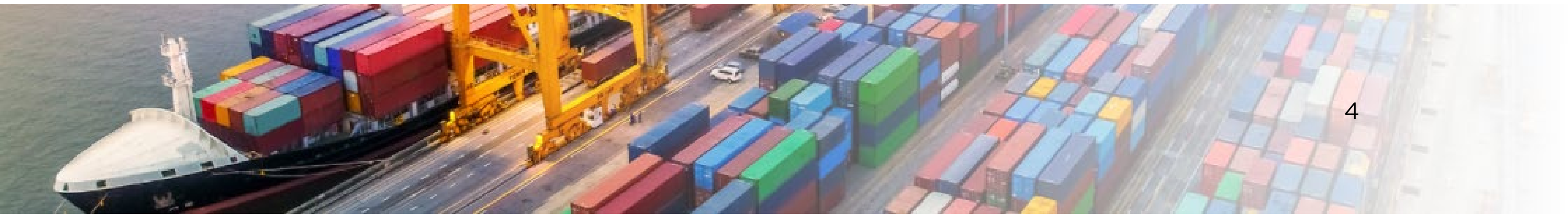
Adding further instability to an already fragile supply chain were setbacks created by trade infrastructure issues within Canada. A recent example was the strike by 1,100 workers at the Port of Montreal in April of 2021. Striking workers had been without a collective agreement since their previous collective agreement expired on December 31, 2018. This was the second strike at the Port of Montreal after a 10-day work stoppage in August 2020. Anticipating the potential for a second strike, some shippers were re-routing to ports in Halifax and Saint John. However, the transportation infrastructure was not able to fully cope with the demand.

On April 30, 2021, following calls for action by provincial governments, business groups and trade associations, the Federal Government ultimately passed Bill C-29, the Port of Montreal Operations Act, 2011, legislating the striking workers back to work.

The two strikes at the Port of Montreal did not just affect Eastern Canada. The port is a critical international and domestic gateway for the Canadian economy as a whole. Many agricultural manufacturers in Western Canada rely on this port as a critical juncture for the shipment of their products or to obtain necessary parts and equipment from companies that are routing products through Montreal.

While the Federal Government's back-to-work legislation helped to temporarily relieve port congestion, these events reinforce the need for a framework that proactively resolves conflicts impacting critical infrastructure in Canada before they turn into work stoppages. For this reason, Agricultural Manufacturers of Canada (AMC) members have called for the renewal and expansion of infrastructure projects to reduce bottlenecks and build resiliency for North American supply chains. AMC's pre-budget submissions highlighted the need for improved infrastructure as critical to long-term expansion of production, increased sales, and the competitive development of export markets.

These solutions have been proposed while recognizing the already important role played by Export Development Canada, which offers trade knowledge and financial solutions to support Canadian businesses develop sustainable trade relationships in the international marketplace.



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# IP — Who Owns Your Technology?

*Author: Kristal Allen*

If you are a technology firm serving the food and agriculture sector, intellectual property (IP) is one of your most valuable assets. However, it is difficult to extract value from IP that you don't actually own.

No matter how you go about creating and developing technology, documenting the ownership of the IP in that technology, and establishing an appropriate chain of title, is critical to ensuring that you can extract value from the products of your hard work. With that in mind, here's what you need to think about in order to protect your IP.

## IP Created by Employees and Contractors

Before an employee or contractor begins working for you, have them sign an agreement that addresses ownership of IP in technology that they may create for or with you and assigns you the ownership rights in such IP.

When hiring new employees or contractors, check to see if they are subject to any non-compete clauses or other relevant restrictions due to an agreement with a previous employer or client before you hire them. If they are using IP or confidential information generated or obtained in the course of their employment or engagement with a previous employer/client in the work they perform for you or to generate new IP for you, their work product or that IP could end up belonging to or being subject to rights held or owned by their previous employer/client.

Keep detailed records of who within your organization is involved in creating your IP, always making sure that they have assigned their rights to their work product to you. In certain circumstances, you may want to seek out additional or confirmatory assignments of IP, or waivers of certain rights.

Have employees and contractors sign confidentiality/non-disclosure agreements with you. Agreements of this type mandate maintaining the confidentiality of confidential material or trade secrets that they may access or use in the course of their engagement with you, and therefore help safeguard your IP. This is especially important if you wish to preserve the ability to patent certain proprietary processes or inventions, as inventions that have been disclosed so as to become known to the public are not eligible for patent protection.

Finally, if you are a software developer, be wary when using open-source code to develop your software. Many open-source licences are "copyleft" agreements that will effectively prevent you from using the code to generate your own proprietary software.

## IP Created in Collaboration with Another Organization

If you are collaborating with another organization to develop technology, you should enter into an agreement with that other organization that clearly spells out who owns the IP in the technology that may result from your collaboration, and what happens to it when your collaboration ends.

Collaborations typically involve parties with complementary technologies, skills or resources. For example, you may have the technical know-how, but lack the facilities and equipment to realize your vision. Or perhaps you have developed a technology that would be even better, or be able to be used for a new application, when paired with another organization's technology.

Collaboration agreements take many forms depending upon what each party is bringing to the collaboration, who is funding the activities that form part of the collaboration, and whether one or both parties' existing technology or IP is required for the collaboration.

## These agreements are complex, however, and should consider the following key items at a minimum:

- What is each party contributing to the collaboration?
- What rights does each party retain in their contribution, and what rights do they grant?
- Who owns the IP arising from use of these contributions in the course of the collaboration? Who is permitted to use it? How are they permitted to use it?

You and your collaborator may both be bringing your own IP – often referred to as "background IP" – into a collaboration. If your collaboration is successful, it will result new IP – often referred to as "foreground IP."

Your collaboration agreement should address how foreground IP is to be managed. For example, is ownership granted to only one party? Is ownership granted to one party, but usage licensed to another? Will the parties have joint ownership of the foreground IP? How will these joint ownership rights be exercised?

Another consideration is what will happen when your collaboration ends. This is especially important if you are involved in collaborative endeavors such as breeding activities or software development. If you and your collaborator develop new germplasm or novel code, who can use it when you are no longer working together? Can it be developed further or incorporated/placed into new applications?

In many cases, these questions are answered by defining who owns the foreground IP arising from your collaboration. However, if your agreement contemplates joint ownership or if the foreground IP relies upon, incorporates or requires usage of the background IP of one or both parties, things can get complicated quickly.

When drafting collaboration agreements, it is important to remember that both parties are working together, and both should benefit from the results or output of the collaboration. Consulting a legal professional before entering into a collaboration agreement can help ensure your efforts are appropriately rewarded.

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# ESG Considerations for Ag Entities

*Author: Conor Chell*

Whether you are a publicly traded agriculture company or a private company within the supply or value chain or a publicly traded company, the time for you to start thinking about environmental, social and corporate governance (ESG) reporting is now. According to recent surveys of institutional and retail investors, issuers that are not reporting on how they are addressing ESG risks could end up losing access to capital.

## What Is ESG?

ESG uses non-financial criteria to demonstrate how well an organization operates from an ethical and socially conscious perspective. ESG metrics are now being used within the investment and financing communities to screen and rank potential investments and determine how capital is allocated.

- The "E" in ESG refers to the environment and includes anything that impacts the natural world.
- The "S" refers to social aspects and relates to people and relationships.
- The "G" refers to governance and addresses how well your company is managed.

When you provide detailed disclosure on the E, S and G, issuers are endeavouring to demonstrate to investors and potential investors the positive steps you are taking to manage ESG risks and contribute to a better future – both for the planet and society as a whole.

Investors – both at the institutional and retail levels – are now paying close attention to companies' ESG performance.

## Overwhelming Majority of Institutional Investors Favour Good ESG Disclosure

A November 2021 report from EY that surveyed institutional investors around the world found the overwhelming majority (86%) said companies with a strong ESG program and performance "would have a significant and direct impact" on their investment decisions.

As a result, the quality of ESG disclosure is more important than ever. EY found that 78% of institutional investors are now conducting a "structured, methodical evaluation of nonfinancial disclosures," compared to only 32% in 2018. This suggests that issuers should not be lax in their ESG reporting. Disclosure should provide meaningful, material information on the risks and opportunities a company faces.

Environmental risks continue to attract significant attention from the investment community, with climate change topping the list. 90% of investors said they favour companies with specific decarbonization plans and approaches, and 86% are looking to invest in companies with  aggressive strategies to reduce their carbon footprint.

In terms of the timeframe that sustainability disclosure typically covers, the survey found 51% of institutional investors were dissatisfied because companies often fail to explain how they are delivering long-term value, and instead focus too heavily on short-term profits. Half of the investors surveyed said ESG disclosure lacked detail on material issues.

EY reported that companies' commitment to ESG is increasingly under the microscope, and specifically in terms of organizational structure, with 53% of investors indicating that they evaluate whether a company's key ESG team members report directly to the CEO. Just over half (52%) of investors indicated that they want to see a company's culture aligned with its ESG goals.

## Retail Investors Continue to Show a Preference for Responsible Investments

Interest in ESG is not limited to institutional investors. A December 2021 survey from the Responsible Investment Association (RIA) found that retail investors in Canada are also demanding greater accountability from corporations, particularly on environmental issues.

Eight-five per cent of retail investors surveyed by the RIA agreed that corporations should set goals to achieve net-zero emissions by the year 2050, and 80% said they wanted investment fund managers to engage with companies to reduce their carbon emissions.

A strong majority (78%) of investors said they wanted at least some of their portfolio allocated to companies that are providing solutions to reduce carbon emissions, and 77% said they wanted their investment advisers to recommend products that are aligned with their values. Overall, 73% of people surveyed by the RIA said they were interested in responsible investment options. Canadian retail investors also expressed significant interest in corporations working with Indigenous communities to achieve environmental goals, with 70% saying companies should engage with Indigenous Peoples on decisions involving future energy transitions.

## What Does This Mean for Agriculture Companies?

For public issuers, the need to provide detailed, meaningful ESG disclosure has never been more urgent. The same goes for private agriculture companies that need to access capital or are within the supply or value chain of a public company. With institutional and retail investors demanding better disclosure, ability to access capital and attract investment will at least in part depend on the strength of the ESG strategy.

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# Tax and Estate Planning — Changes to Intergenerational Transfers

*Authors: Aaron Haight, Emily Barlas, Adam Unick*

On May 12, 2021, the House of Commons passed amendments to the Income Tax Act (Canada) (the "Act") which increase tax planning options for intergenerational transfers of shares of a qualified small business corporation, or a family farm or fishing corporation. The amendments made two key changes to provisions of the Act.

The first change was made to section 84.1 of the Act and created an exception from the rules which generally prevent an individual from accessing corporate surplus in a sale of shares to a non-arm's length corporation. Prior to the amendments, an individual was prevented from realizing a capital gain (and claiming their lifetime capital gains exemption) on a sale of their qualified small business corporation or their family farm or fishing corporation to a corporation controlled by their child.

The change was long requested by Canadian farmers as the former rules put parents that wished to transfer their business to the next generation of their own family at a tax disadvantage compared to individuals who sold their corporation to an unrelated person.

This narrow modification of section 84.1 may allow a parent to access the proceeds from an intergenerational sale of their shares of a qualified small business corporation or their family farm or fishing corporation to a corporation controlled by their child on a tax-free basis, where certain conditions are met. This allows a parent to achieve the same tax treatment as they would have if they had sold their corporation to an unrelated third party.

The second change addresses an issue that could arise in reorganizations involving corporations owned by siblings. The potential difficulty comes under section 55 of the Act, which contains rules which recharacterize tax-free intercorporate dividends as taxable capital gains where the dividends are paid in a reorganization involving an unrelated person.  Section 55 contains a general rule deeming siblings to be unrelated so certain reorganization transactions involving siblings could be caught by section 55.

The change was made by modifying paragraph 55(5)(e) of the Act so that siblings will not be considered to be unrelated where the reorganization involves a qualified small business corporation or a family farm or fishing corporation.

This change allows tax-free intercorporate dividends paid or received by a qualified small business corporation or a family farm or fishing corporation in which siblings have an ownership interest to avoid recharacterization as taxable capital gains.

The amendment of section 55 creates greater flexibility for tax planning in certain situations.  For example, section 55 may no longer apply where a parent desires to transfer assets of a qualified small business corporation or a family farm or fishing corporation to two corporations, each of which is owned by one of their children, on a tax-deferred basis.

While the law based on these amendments has been in effect since June 29, 2021, the Government of Canada has indicated that it intends to bring forward further amendments to ensure the legislation facilitates “genuine intergenerational transfers” and not “artificial tax planning.” As of the date of this writing, no further amendments have been announced.

# Biologicals Present New Possibilities — and Increasing Complexity

*Author: Kristal Allen*

Biologicals present new possibilities for managing pesticide resistance, maximizing soil fertility, protecting beneficial organisms, and enhancing or protecting land and water quality – all of which are major challenges in agricultural production. The biologicals segment has transformative potential, and is expected to involve a remarkable amount of innovation in the years ahead.

## Increased Investment in R&D

As the biologicals segment continues to grow, we can expect to see increased investment in research and development – both in terms of research dollars flowing into existing R&D programs, as well as complementary research programs coming together, either via collaborative or co-development arrangements, or acquisition activity.

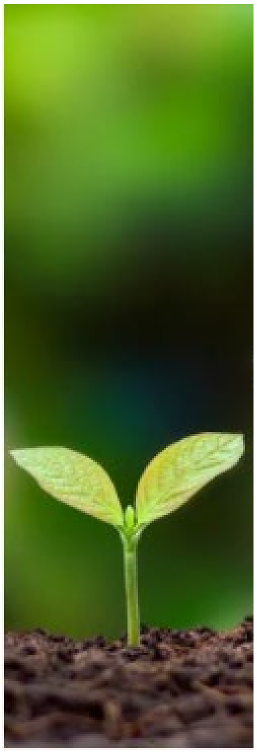
Many companies have a "piece of the puzzle," so to speak, but putting that puzzle together requires pieces that competitors or new entrants into the space may have.

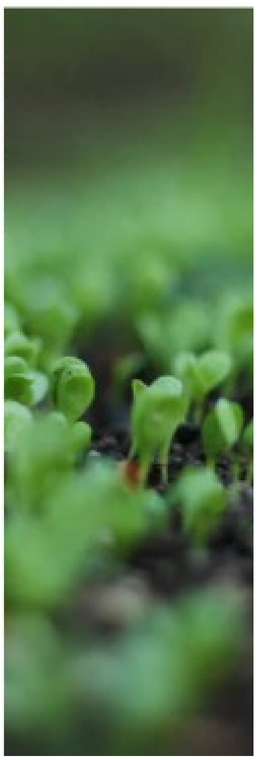
For example, as large R&D companies and multinationals have increased their attention to developing biologicals, a number of those companies have acquired or invested in emerging companies that have novel technology or the potential to advance or repurpose the proprietary technology of large R&D companies.

## Companies that Collaborate Face Tough Questions

One of the challenges posed by collaborations in the biologicals space is the management and protection of proprietary rights. Companies that collaborate are now being faced with tough questions regarding who owns and who has the right to control the dissemination and use of their proprietary technology. Collaborators may sometimes find they have competing rights and interests.

As a result, in addition to navigating traditional intellectual property (IP) challenges – such as determining in which jurisdictions to file for protection and figuring out effective enforcement mechanisms in an IP environment that has significant variability around the world - companies that collaborate in the biologicals space must now determine which party owns the resulting IP and who can disseminate it. For more on this topic, see "Who Owns Your Intellectual Property?" on page 5.





## New Technologies Face Uncertain Regulatory Landscape

Regulatory complexity and uncertainty are among the largest challenges facing the biologicals space. The regulatory landscape can be archaic and involve multiple regulatory agencies that may be siloed from one another, and regulators often struggle to keep up with the speed of technology development and deployment.

This regulatory complexity stands in the way of innovation and progress. This is highlighted even more when biologicals companies are seeking to develop or bring to market products and technologies in multiple jurisdictions with different regulations. The demand for food has never been higher, and the issues facing companies in the biologicals space have never been more complex.

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Our team of food and agribusiness lawyers has advised numerous clients in the invention and development of novel products and technologies. We will continue to monitor developments in the biologicals space as they evolve to ensure our clients are positioned for success.

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# Labour Challenges in Western Canada's Agriculture & Food Industry

*Author: Scott Bell*

Studies on labour gaps in the agriculture industry suggested that prior to COVID-19, Canadian farms faced a labour gap of 63,000 positions as of 2018. Projections show this labour gap to increase to 123,000 by 2029.

The Canadian Agricultural Human Resources Council (CAHRC) estimates that labour shortages during COVID-19 resulted in $2.9 billion in lost sales – roughly 4.2% of the sector's total.

Reliance on foreign labour presents further challenges to the agriculture and food industry when travel is restricted due to COVID-19. While the government has allowed temporary foreign workers into the country and helped farmers fund the quarantine periods upon entry, foreign workers have arrived in less numbers than usual and not in a timely fashion due to delays and need to quarantine.

Technology advancements have reduced agricultural labour requirements, but they have also resulted in the need for workers with highly technical and advanced skills. The evolving skills required of workers in many agriculture sectors will require focused training to improve worker expertise.

In addition, agricultural employers face issues relating to a widening labour gap (e.g. demand of labour driven by production and productivity trends for different commodities in the sector), hiring challenges (e.g. seasonal fluctuations and population decline in rural areas), skills shortage, and work conditions (e.g. demanding manual labour and seasonality).

Canada's ability to meet demand for food production will require a secure, reliable, qualified and skilled workforce.

## Federal Government Proposed Amendments to Regulations Governing Temporary Foreign Workers Permits

On July 10, 2021, the federal government proposed amendments to the Regulations Amending the Immigration and Refugee Protection Regulations (Temporary Foreign Workers) to address existing gaps in worker protections and expand existing program policies. The regulatory amendments are expected to improve worker and employer awareness and to provide stronger worker protection, resulting in greater employer compliance.

Among other things, the federal government proposed requiring all employers of Temporary Foreign Workers (TFWs) to provide each TFW a paper document that outlines TFW rights, make clear that the employer provides a workplace free of abuse, tighten the ban and punishment on employers and recruiters charging TFWs illegal recruiting fees, require employers to make reasonable efforts to provide access to health care to employees who become sick or injured at work, and require employers (in most circumstances) to pay for private health insurance.

## Federal Government's Report on Agricultural Stream of Temporary Foreign Worker Program

Building on its 2018 Primary Agriculture Review, the federal government launched additional consultations in Fall 2020 focused on how industry participants could work together to improve employer-provided accommodations to temporary foreign workers in the agricultural sector.

In December 2021, the federal government released a report of its findings.

Since farms are typically located in rural and remote locations, it is sometimes a program requirement for employers to provide their agricultural temporary foreign workers with accommodations during their work period. A number of stakeholders raised concerns that the standards for employer-provided accommodations are inconsistent across the country, and that TFW accommodations can be overcrowded, unsanitary and unsafe.

Stakeholders have called for stronger requirements under the TFW Program to ensure that migrant workers have access to adequate and safe employer-provided housing.

The federal government has committed to making efforts to develop an approach that recognizes existing provincial, territorial, and municipal standards but also helps to improve accommodations for temporary foreign workers in agriculture.

ESDC officials are leading the development of proposed program changes focused on addressing the most pressing, and non-negotiable, health and safety concerns related to temporary foreign worker accommodations. Key areas of focus include the availability of potable water and clean air, overcrowding, and the proximity of living quarters to hazardous material.

The federal government is expected to propose major changes to the Primary Agricultural Stream of the Temporary Foreign Worker Program in 2022 to ensure that employers provide TFWs with safe and suitable accommodations during their employment in Canada that are compliant with current accommodations and housing standards already in place in their province or territory. These proposed program changes will also build on the proposed amendments to the Immigration and Refugee Protection Regulations.

# About MLT Aikins

MLT Aikins LLP is a full-service law firm of more than 270 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.

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