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Canadian Association of Insolvency and Restructuring Professionals
Association canadienne des professionnels de l'insolvabilité et de la réorganisation

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November 14, 2023

BY E-MAIL – pamela.wallin@sen.parl.gc.ca

Honourable Pamela Wallin, O.C, S.O.M.
Chair, Standing Committee on Banking, Commerce and the Economy
Senate of Canada
Ottawa ON K1A 0A4

BY E-MAIL – Tony.Loffreda@sen.parl.gc.ca

Honourable Tony Loffreda
Deputy Chair, Standing Committee on Banking, Commerce and the Economy
Senate of Canada
Ottawa ON K1A 0A4

Re: Review of Bill C-280

Honourable Senator Wallin,
Honourable Senator Loffreda,

We are writing to you in connection with your review of Bill C-280 ("**Bill**"), *An Act to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act (deemed trust – perishable fruits and vegetables)* (the *Fresh Produce Protection Act*, or "**FPPA**").

While we believe the Bill is well intentioned, we consider it is ill-advised and unlikely to achieve its stated objectives, and on the contrary is likely to make the administration of insolvency estates more costly and less efficient. Further, we believe there already exists protection within the *Bankruptcy and Insolvency Act* ("**BIA**")[1] which addresses the types of claims sought to be protected through the FPPA. For the reasons stated in greater detail hereunder, we consider this Bill is flawed and should not be approved in its current form.

We would appreciate if our letter could be shared with the members of the Senate Standing Committee on Banking, Commerce and the Economy ("**BANC**"), and any other colleague as you consider appropriate, for their review and consideration, prior to their detailed review of this Bill.

We have attached as an Appendix to this letter a short description of our organisation, the Canadian Association of Insolvency and Restructuring Professionals ("**CAIRP**"), for your reference.

We consider that the changes contemplated by the FPPA are important issues that warrant careful consideration and analysis, and we have set out hereunder our thoughts on the likely impact of the provisions as drafted, from our perspective. If you wish, we are prepared to meet with you to discuss the matters raised herein.

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[1] *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3, as amended ("**BIA**").

CAIRP's interest in the issue under review

You will note from the attached Appendix that CAIRP's mission includes advocating for a fair, transparent, and effective insolvency and restructuring system throughout Canada.

The questions raised by the FPPA touch on aspects that are a close focus of the insolvency and restructuring system, namely:

1. The fair and equitable allocation of limited resources amongst stakeholders; and

2. Promoting restructuring compromises and settlements rather than liquidation, to avoid the societal ills associated with a bankruptcy.

Bill C-280, which seeks to amend the *Bankruptcy and Insolvency Act* ("**BIA**")[1] and the *Companies' Creditors Arrangement Act* ("**CCAA**")[2], seeks to protect the claims of a specific category of creditors by elevating them above other creditors' claims, which affects the insolvency objective referred to in paragraph 1 above. In doing so, it is likely to affect the insolvency objective referred to in paragraph 2 above.

We are concerned, for the reasons more fully set out hereunder, that the proposed changes will not result in an improvement in the insolvency legislation or in the fairness of result, but rather will have a detrimental impact on the administration of estates and on restructuring activity.

Preliminary comments

As a preliminary comment, we would like to formulate a general comment which, although not strictly related to the Bill under review, should be considered by your committee.

Insolvency legislation is intended to be remedial legislation designed to establish and manage broad policy principles, to set "rules of the road" on the relative rights of debtors, creditors and others in a context where the normal commercial rules can no longer apply because the debtor's assets or means are insufficient to cover the existing obligations.

Insolvency legislation has several objectives that are sometimes conflicting and need to be balanced. For example, the insolvency legislation aims at providing for the financial rehabilitation of the debtor and enhancing confidence in the credit system and in the economy, by respecting creditors' rights to obtain repayment of their debts. It is easy to see how these objectives can conflict, when a financial rehabilitation requires a discharge of the debts that results in a shortfall in payment to the creditors.

Considering that insolvency refers to an insufficiency of assets or sources of funds to pay the debts, there will also always be some friction amongst the creditors, between one group and the next, as to whose claim should have priority. This friction arises because the process of distributing the value of the assets, a finite resource, is a zero-sum game, and if one creditor group is granted a priority status, it is necessarily at the expense of another creditor group.

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[2] *Companies' Creditors Arrangement Act*, RSC 1985, c. C-36, as amended ("**CCAA**").

The insolvency legislation aims at establishing the rules for the relative allocation of limited resources, from a broad policy perspective. In view of this necessarily broad perspective in addressing competing claims for limited resources, insolvency legislation is not well suited to introducing modifications through private members' bills to address a single stakeholder's group concerns. This necessarily leads to bills that can be flawed, because of the natural tendency to focus on the objectives of the amendment, without taking into consideration the more global objectives of the legislation.

We lament the fact that in the recent past, this tendency of implementing drastic changes to the BIA and CCAA through private members' bills to address the concerns of a single constituency, has been on the increase. We have seen this occur through the introduction of Bills C-225, C-228, C-264, C-280, C-309 and S-215.

To be clear, we do not suggest that insolvency legislation should never be changed. Insolvency legislation is intended to address economic problems and needs to be periodically reviewed, updated and modified to ensure it stays relevant. The insolvency legislation could be modified to address a changing need, to address a new development, to decrease an administrative burden, or to increase efficiency.

However, to the extent that the proposed change to the legislation affects the broad policy principles, perhaps it would be preferable to address these changes in a comprehensive review of the legislation, when all of the stakeholders' interests and their interactions can be considered.

We point out that CAIRP has participated in the past with the relevant policy departments of Innovation, Science and Economic Development Canada ("**ISED**") in the context of the periodic comprehensive reviews of the legislation and is prepared to continue to do so.

Proposed changes to the BIA

The FPPA contemplates the introduction of a new section 81.7 to the BIA that purports to protect the rights of unpaid suppliers of perishable fruits and vegetables through the creation of a deemed trust. The potential problems we perceive with the new section as drafted, are as follows:

1. Existing protection:

We point out that the BIA already has existing provisions that creates a protection for the same type of claims as those addressed by the FPPA. These provisions are found at sections 81.1 and 81.2 BIA.

The first section, 81.1 BIA, is available to all types of suppliers who deliver goods for use in relation to the purchaser's business and allows the supplier to recover those goods if they are still in the possession of the purchaser, receiver or trustee, provided certain conditions are met. These conditions are essentially that the goods were supplied in the 30 days prior to the bankruptcy or receivership, are unpaid, are identifiable and in the same state as when delivered, and that the purchaser delivers a demand, stating it wants to repossess the merchandise, within 15 days after the bankruptcy or the receivership.

The second section, 81.2 BIA, is available to farmers, fishermen and aquaculturists, so the protection extends to people who typically would deliver perishable fruits and vegetables, but also to other suppliers of perishable animal-based products and aquatic plants.

Section 81.2 BIA protects the claims of farmers, fishermen and aquaculturists, by creating a statutory security over all of the inventories of the purchaser, that ranks in priority to any conventional security (i.e. a secured creditor's claim), for any merchandise that has not been recovered through the repossession right under section 81.1 BIA, provided the said merchandise was delivered in the 15 days prior to the bankruptcy or receivership, and the farmer, fisherman or aquaculturist files a claim within 30 days after the bankruptcy or receivership.

From our reading of the proposed section 81.7 BIA, the suggested text allows for the rights that are already provided in sections 81.1 and 81.2 BIA, namely a right to recover merchandise if it is still on hand, and a right to be paid in preference if the merchandise has been used in the course of the business activities and is no longer in the possession of the purchaser, receiver or trustee. The only significant difference is that the priority right is formulated as a deemed trust rather than a super-priority secured claim. For reasons discussed later in this text, we believe the deemed trust protection would not be as effective as the existing super-priority secured claim.

2. Deemed trust:

The proposed section 81.7 BIA purports to protect the suppliers through a deemed trust, whereby the merchandise delivered would be deemed to be held in trust, and if the merchandise has been sold, the proceeds thereof would be deemed to be held in trust.

The application of deemed trusts in insolvency proceedings is rich from a long jurisprudential history, which has been fueled more particularly by the Federal and Provincial Crown's attempts to elevate its claims above those of other creditors in insolvency proceedings, through this legal fiction[3]. The Supreme Court of Canada ("**SCC**") has been called upon many times to interpret the deemed trust provisions and their effect in a bankruptcy context. The long line of jurisprudence starts with *Dauphin Plains Credit Union v. Xyloid Industries Ltd.* ("**Dauphin Plains**")[4] and ends with *Canada v. Canada North Group Inc.* ("**Canada North**")[5]. The line of jurisprudence has been described as "replete with cases involving competing claims"[6] in respect of deemed trusts.

The deemed trust mechanism has been described by the SCC at times as a legal fiction,[3] a sort of floating charge over (…) the debtor's assets[7], a proprietary interest[8], and a loosely defined bundle of rights.[9]

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3 *Canada v. Canada North Group Inc.,* 2021 CarswellAlta 1780, 2021 SCC 30, at paragraph 192.

4 *Dauphin Plains Credit Union Ltd. v. Xyloid Industries Ltd.*, 1980 CarswellMan 169, [1980] 1 S.C.R. 1182.

5 *Canada v. Canada North Group Inc.* ("**Canada North**"), 2021 CarswellAlta 1780, 2021 SCC 30.

6 *Royal Bank v. Sparrow Electric Corp.,* 1997 CarswellAlta 112, [1997] 1 S.C.R. 411, at paragraph 19.

7 *First Vancouver Finance v. Minister of National Revenue,* 2002 CarswellSask 317, 2002 SCC 49, at paragraphs 4 and 40.

8 Canada North, *supra* note 5, at paragraph 38.

9 Canada North, *supra* note 5, at paragraphs 104 to 108.

In Canada North, the SCC issued 4 different opinions, in which the SCC did not define the exact nature or characteristic of a "deemed trust", but came to the conclusion that it was not necessary for the Court to exhaustively define the deemed trust to address the questions at issue, which in that case pertained to the deemed trust created in virtue of section 224(4) and 224(4.1) of the *Income Tax Act* ("**ITA**").[10] However, in its consideration of the issues of that case, the SCC did address what the deemed trust under the ITA is not.

Based on our understanding of the decision in Canada North and the other past jurisprudence dealing with deemed trusts, we believe that the deemed trust contemplated by the proposed section 87.1 BIA would likely not be effective in protecting the suppliers' claims, or at the very least would give rise to conflicts and litigation amongst stakeholders in the context of the insolvent estates, for the following reasons:

- The deemed trust does not create a "real" trust.[11]

- The concept of beneficial ownership is not easily applicable in a civil law context.[12]

- The deemed trust and rights provided therein are similar to the deemed trust considered by the SCC in *Royal Bank v. Sparrow Electric Corp.* ("**Sparrow**").[13] In the Sparrow case, the SCC decided that (then) section 227(5) ITA did not have priority over a security interest that had already encumbered the assets that the deemed trust would purport to be beneficially owned by the claimant.[14]

- Furthermore, the deemed trust as contemplated by the proposed section 81.7 BIA would purport to deem held in trust the merchandise purchased from the supplier, as well as the proceeds from the sale of this merchandise if it has been sold. However, no provision in the deemed trust allows for a tracing of the proceeds, if they are not themselves held separate and apart, such that a claim by the supplier, in the case where the merchandise is no longer in the possession of the purchaser, receiver or trustee, would likely lead to a dispute and litigation on the basis that the proceeds are fungible property and cannot be identified or traced.

- The proposed section 81.7 BIA mentions that the laws of general application in relation to trusts would apply to the trust created by section 81.7 BIA. However, as noted earlier, the trust created by section 81.7 BIA is not a real trust. As such, the proposed text of section 81.7 BIA itself may lead to invalidating the deemed trust contemplated by section 81.7 BIA, if the provincial law cannot entertain rules that would make a deemed trust valid. We note in particular that the *Civil Code of Quebec*[15] has strict requirements regarding trusts, which are not easily reconciled with the

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10 *Income Tax Act*, RSC 1985, c. 1 (5th Supp.).

11 Canada North, *supra* note 5, at paragraphs 42 to 45.

12 Canada North, *supra* note 5, at paragraph 42.

13 *Royal Bank v. Sparrow Electric Corp.,* 1997 CarswellAlta 112, [1997] 1 S.C.R. 411, at paragraphs 28 and 29. Note that section 227(5) ITA has subsequently been modified and renumbered 227(4.1) ITA.

14 Sparrow, supra note 13, at paragraph 40 and 99

15 *Civil Code of Quebec*, CQLR c. CCQ-1991, as amended.

concept of a statutory deemed trust,[16] such that making the deemed trust subject to the *Civil Code of Quebec* might make the deemed trust inapplicable in Quebec.

In short, we believe that the choice of a deemed trust mechanism to protect the claims of suppliers is ill-advised and will likely lead to administrative inefficiencies, additional costs, litigation and lack of predictability of results for stakeholders.

3. Supplier of perishable fruits and vegetables

The proposed measure purports to protect a supplier of perishable fruits and vegetables. Considering that (as mentioned earlier herein) a protection already exists under the BIA for farmers (amongst others) who are most likely to sell and distribute perishable fruits and vegetables, we must conclude that the "supplier" referred to in the proposed section 81.7 BIA is a concept that goes beyond the definition of a farmer in section 81.2 BIA and may include any supplier, wholesaler or distributer of perishable fruits and vegetables.

This would elevate the claims of claimants who are essentially ordinary unsecured creditors above the level of other similarly situated trade suppliers, without due consideration and explanation of the policy objectives of elevating the claims of some ordinary unsecured creditors over those of similarly situated ordinary unsecured creditors.

4. Definition of perishable fruits and vegetables

The proposed section 81.7 BIA introduces a definition of "perishable fruits and vegetables" that is vague and is likely to cause confusion rather than to clarify the intentions regarding the protection.

The concept of perishable fruits and vegetables is easily understood and is not subject to confusion. At first glance, the measure would appear aimed at protecting a person that supplies merchandise that is perishable. While the policy objective of protecting such supplier is unclear and unspecified (as discussed in the previous section), it is easy to conceive that, if it is necessary to protect such a supplier, the protection should subsist if the merchandise later becomes non perishable, through some transformation or processing that does not substantially change the goods. A similar objective is sought and achieved in section 81.1 BIA, for example, where the right of the unpaid supplier is maintained if the goods are identifiable and in the same state as they were on delivery.[17]

The definition of "perishable fruits and vegetables", on the other hand, confuses the issue, as the definition can be understood to mean that fruits and vegetables that have been repackaged and transformed, to the extent that they are no longer perishable, could benefit from the protection. For example, imagine a farmer that sells peas and carrots to a food processor who transforms them in canned goods, who sells them to a food distributor, and the food distributor sells them to a grocery store.

In the above example, no argument could be made that the peas and carrots are still perishable after they have become canned goods, however based on the text or proposed section 81.7 BIA, the food

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[16] Canada North, *supra* note 5, at paragraph 43.

[17] Subsections 81.1(1)(c)(ii) and 81.1(1)(c)(iii) of the BIA.

distributor could argue that it can benefit from the contemplated protection, in the event that the grocery chain becomes bankrupt or in receivership, and similarly the food processor could make the same argument in the event that the food distributor becomes bankrupt or in receivership.

In fact, considering that the requirement is that the "nature" remains unchanged, and that the nature of fruits and vegetables will always be "a plant based thing that is intended to be used as food", such a large portion of the merchandise inside a grocery store could be considered under the definition in the proposed section 81.7 BIA, that it would be surprising if grocery stores and chains could still obtain any financing based on inventory as collateral.

5. Scope of the protection

Contrary to the protections granted for suppliers of recently delivered merchandise (section 81.1 BIA), for farmers, fishermen and aquaculturists (section 81.2 BIA), and employees (sections 81.3 and 81.4 BIA), the proposed section 81.7 BIA does not appear to impose a time limit on the claim.

The right under section 81.1 BIA is limited in time, in that a supplier can only recover merchandise delivered in 30 days prior to the bankruptcy or receivership, and only if a claim is timely filed. Similarly, the right under section 81.2 BIA only extends over merchandise delivered in the 15 days prior to bankruptcy or receivership, and only if a claim is timely filed. As well, the claims of employees benefit from a prior ranking statutory security under sections 81.3 and 81.4 BIA, but only in respect of wages or salaries[18] that are due in respect of the period that begins 6 months before the initial bankruptcy event and ends on the date of bankruptcy or receivership, and limited to $2,000 per employee.[18]

Contrary to the protections referred to above established in the legislation to protect creditors considered vulnerable and deserving of a priority status in the distribution of the proceeds of an estate, the proposed section 81.7 BIA does not contemplate a time limit for the claim to benefit from a priority, or a time limit to submit a claim to the trustee or receiver, or a maximum value for the claim. This would make the right under section 81.7 BIA an obscure right, and these tend to chill lenders when the debtors are applying for credit.

Furthermore, the proposed section 81.7 BIA does not specify which assets might be affected by the purported deemed trust – is this deemed trust intended to affect inventories? All current assets? All assets?

This is likely to lead to a lack of predictability in results, which could impact credit availability for debtors and could impact the administration of insolvent estates.

6. Conflicting priority scheme:

The insolvency legislation provides for a scheme of distribution that allocates limited resources amongst equally meritorious claimants, based on broad policy objectives that seek to (1) elevate the claims of certain creditors above others, based on a social policy need, and (2) otherwise treat all similarly situated creditors the same way.

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[18] An additional protection also exists for expenses of a travelling salesperson, for up to $1,000, but that is beyond the discussion in this text.

Examples of claims that have been elevated to a priority status based on social policies include (not in any particular order):

- Claims of the Crown for unremitted payroll source deductions, for amounts deducted from employees' salaries and not remitted, in respect of income taxes, employment insurance premiums and Canada Pension plan or Quebec pension plan contributions. These claims are granted priority status for social policy reasons, given the importance of the amounts for the country as a whole to fund the government and its programs, the social responsibility of each person to contribute through taxes, and the expectation in the various statutes that the amounts withheld from salaries should be held in trust until remitted.

- Claims of suppliers for recently delivered merchandise. These claims are granted priority status by allowing the suppliers to repossess such merchandise. The right to repossess the merchandise was created as a disincentive to improper conduct, out of a concern that an insolvent person on the brink of bankruptcy could take advantage of informational asymmetry by ordering goods before bankruptcy, to enhance the recovery for secured creditors that the insolvent person may want to prefer, at the expense of ordinary unsecured creditors.

- Claims of farmers, fishermen and aquaculturists. These claims are granted priority status through a statutory security, because the claimants are considered more vulnerable than other categories of suppliers.

- Claims of employees for wages. These claims are granted priority status through a statutory security and/or a preference in distribution, because the employees are considered a vulnerable group with limited means to monitor credit or compel payment.

- Claims of pension plans. These claims are granted priority status through a statutory security and/or a preference in distribution, because the employee pensions are considered to be deferred compensation, and employees are considered a vulnerable group.

- Others. Certain creditors are granted a preference in the distribution scheme contemplated in section 136 BIA, before payment can be made to ordinary unsecured creditors out of assets available for distribution.

The above groups represent the creditors for whom the legislator has already established an entitlement to priority and has decided on the relative priority amongst the groups. Depending on the cases, the priority takes the form of a right to repossess assets; a deemed trust over all or substantially all of the assets, a statutory security over specific assets, a statutory security over all assets, or a preference in a distribution.

The proposed section 81.7 BIA contemplates a deemed trust as a protection mechanism. A deemed trust purports to prevent assets from forming part of the "property of the bankrupt" referred to in section 67 BIA.

Due to the nature of the deemed trust, the proposed section 81.7BIA would have the following impact on the claims that presently benefit from a priority status:

- The right would be in direct conflict with the deemed trust of the Crown for unremitted payroll source deductions.

- The right could conceivably displace the rights of unpaid suppliers to repossess recently delivered merchandise, although this is unclear.

- The right would have priority over the rights of farmers, fishermen and aquaculturists.

- The right would have priority over the rights of employees for unpaid wages.

- The right would have priority over the priority of pension plans, including the superpriority that was recently adopted by the government through Bill C-228.[19]

- The right would result in a reduction of amounts available to pay the preferred claims listed in section 136 BIA.

In short, the proposed measure to protect suppliers of perishable fruits and vegetables would conflict, displace and possibly frustrate the protection mechanisms that have been put in place to date by the legislator to protect vulnerable creditors or advance social policy concerns.

7. Sale with terms:

The proposed section 81.7 BIA suggests the right will only be available where the purchaser has 30 days or less to pay the entire balance owing to the supplier.

In our experience, there often exists a significant difference between the sale terms that are set out within documents such as a sale contract, purchase order or invoice, and the terms that actually are applied in the context of the commercial relationship. A sale made on "30 day" terms often results in tolerated payment schedules that are different, usually longer.

As a result, we can foresee disputes and litigation regarding the applicability of the right under the proposed section 81.7 BIA, based on agreed payment terms that differ from what the invoice suggests. The disputes and litigation will likely lead to a lack of predictability in results, which could impact the administration of insolvent estates and cause additional costs and inefficiencies.

8. Restructuring under the BIA:

The measures set out in Bill C-280 do not suggest a treatment for the claim of a supplier of perishable fruits or vegetables, in the context of a restructuring proceeding under the BIA. The proposed section 81.7 BIA appears to only apply in the context of a liquidation process, where the concept of the property of the bankrupt as defined in section 67 BIA is most relevant. The text of section 81.7(1)(a) BIA suggests that the right is intended to apply "in case the purchaser becomes bankrupt or subject to a receivership".

Given that the provision appears to only apply in the context of a liquidation and not in the context of a restructuring, it is possible that the contemplated measure would offer no protection whatsoever to

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[19] 44th Parliament, 1st session, now SC 2023, c. 6.

suppliers of perishable fruits and vegetables, in cases where the debtor initiates a restructuring process. In such a case, since the deemed trust is not triggered, the supplier's claim would be considered a claim provable (as defined in section 121 BIA), which claim would be released by the operation of section 62(2) BIA if and when the proposal is fully performed as contemplated in section 65.3 BIA.

Proposed changes to the CCAA

Our comments regarding the proposed changes to the CCAA are essentially the same as the comments made in section 8 above, and we will not repeat them here.

Transitional Provisions

We note that Bill C-280 does not have transitional provisions, which means the legislation, if adopted, would apply immediately. We believe this is a flaw, as the rules under which an administration is commenced should not be allowed to change mid course. This would lead to a lack of predictability that is undesirable in dealing with legislation that is subject to change.

Admittedly, the requirement in Bill C-280 for a notification that the supplier intends to avail itself of the right (found in proposed subsections 81.7(1)(a) BIA and 8.1(1)(a) CCAA) makes the likelihood of a transitional problem remote, however such a problem is not impossible as nothing would prevent suppliers from introducing a practice of sending a notice in advance of the adoption of the measures contemplated by Bill C-280, which could effectively affect estates that are on-going.

Reciprocity Issue

We understand that one of the stated justifications for the introduction of Bill C-280, is the issue of reciprocity affecting cross border transactions with our largest trading partner, the U.S. It appears that suppliers of certain specific agricultural products in the US benefit from a protection that purports to create a trust over the products and the proceeds therefrom, provided certain conditions are met, the whole as described the *Perishable Agricultural Commodities Act* ("**PACA**").[20]

We understand that the reciprocity issue relates to the fact that suppliers in Canada that deliver merchandise to the U.S. do not benefit from the protection contemplated by the PACA, because suppliers in the U.S. could not benefit from identical protection, for products delivered in Canada.

We consider that the inequity inherent in similarly situated creditors receiving different treatment is egregious, and efforts at redressing this inequity are commendable. However, we do not consider that Bill C-280 is an appropriate measure to deal with this issue, for the following reasons:

- We note that the PACA protection applies regardless of whether the purchaser of agricultural products is bankrupt or in receivership. The measures are found in Title 7 of the *U.S. Code*, and

[20] *U.S. Code*, Title 7, Chapter 20A. The protection measures are described more particularly at §499e(c) thereof. The U.S. Code can be accessed at U.S. Code: Table Of Contents | U.S. Code | US Law | LII / Legal Information Institute (cornell.edu).

not in Title 11 (i.e., the *Bankruptcy Code*[21]). The protection in Bill C-280 would be limited to situations where the purchaser is bankrupt or in receivership, and as such it is not certain that the protection would be considered as equivalent, to ascertain reciprocity.

- We note that Bill C-280 has a much greater scope than the PACA. The definitions found at §499a of Title 7 of the *U.S. Code* suggest that the protection is only available to a supplier of a "perishable agricultural commodity", which is limited to fruits and vegetables that are fresh, frozen, or packed in ice, and cherries in brine; only applies after a certain threshold amount is reached; and only applies to interstate or foreign commerce. As mentioned earlier in this text, Bill C-280 appears to have a much wider scope, that is not well defined, and would apply to both local, interprovincial and foreign transactions.

- The interpretation of the "trust" rights based on provincial law and jurisprudence could be substantially different from what has developed in the U.S., which could still present difficulties from a reciprocity perspective.

- As mentioned earlier herein, there presently exists a measure of protection for farmers and fishermen within the BIA, that provides a superpriority status for recently delivered merchandise. This measure of protection is available in the context a bankruptcy or receivership, regardless of the nationality of the supplier, is available to a greater category of suppliers than what appears to be contemplated under the PACA, and the protection available appears superior to that which would be available under some trust rules interpreted under provincial laws. The government should endeavour to have this protection recognized as a functional equivalent to the protection available under PACA, to achieve reciprocity.

Overall comments

To summarize, we are concerned that Bill C-280 may not achieve the objectives sought thereby, creates a priority in favour of some ordinary unsecured creditors without a full social policy rationale therefor, would affect, disrupt or frustrate the priority scheme already put in place by the legislator to protect vulnerable stakeholders or to promote social policy objectives, and would likely lead to disputes and litigation which would increase costs and make administrations of insolvent estates less predictable, more costly and less efficient.

We further believe that to the extent the suppliers of fresh fruits and vegetables need protection, this protection is already available, through the combined application of sections 81.1 and 81.2 BIA.

In short, we believe that the measures contemplated by Bill C-280 are unnecessary and ill-advised. We further believe that to the extent Parliament wants to revisit the issue of protection for a specific category of stakeholders or creditors, such an exercise should not be performed on a piecemeal basis, but should be done holistically, in the context of comprehensive reviews of the legislation, at a time where the competing interests of stakeholders can be considered together, with a fulsome analysis of the relative merit and problems associated with the allocation of priorities in a context of an allocation of a scarce resource. We can assure you that CAIRP is prepared to participate in such an exercise.

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[21] *U.S. Code*, Title 11.

Closing remarks

Thank you for your attention to this letter. As mentioned above, we are prepared to meet with the members of BANC to discuss this important issue.

Sincerely,

THE CANADIAN ASSOCIATION OF INSOLVENCY AND RESTRUCTURING PROFESSIONALS

Per: Anne Wettlaufer, FICB
President and CEO

Per: André Bolduc
Chair of the Board of Directors

c.c. Martin Simard martin.simard@ised-isde.gc.ca
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APPENDIX

Who we are

The Canadian Association of Insolvency and Restructuring Professionals / L'Association canadienne des professionnels de l'insolvabilité et de la réorganisation ("**CAIRP**") (www.cairp.ca) is Canada's national professional association of insolvency and restructuring professionals that represents approximately 940 general members and approximately 430 articling, life, corporate and honorary associates who also contribute to the breadth and unique expertise of CAIRP.

Over 90% of Licensed Insolvency Trustees ("**LITs**") licensed under Canada's *Bankruptcy and Insolvency Act* ("**BIA**"), are members of CAIRP. LITs act as trustees in bankruptcy, trustees under proposals, administrators of consumer proposals, receivers, all under the BIA, as well as financial advisers, monitors under the *Companies' Creditors Arrangement Act*, and other tum-around consultants. LITs have been involved in every major insolvency and restructuring filing in Canada.

CAIRP was founded in 1979 as a not-for-profit and non-partisan corporation designed to advance the practice of insolvency administration in Canada, as well as the public interest in connection with insolvency matters.

Mission

CAIRP advances the interests of its members and the public by:

- promoting excellence among members,
- providing relevant professional development,
- establishing and enforcing CAIRP's Rules of Professional Conduct and Standards of Professional Practice,
- maintaining rigorous certification standards and providing innovative education to aspiring insolvency and restructuring professionals, and
- advocating for a fair, transparent and effective insolvency and restructuring system throughout Canada.