

Standing Committee on Banking, Commerce and the Economy (banc@sen.parl.gc.ca)
Senate of Canada
Ottawa, Ontario K1A 0A4

October 1, 2024

Re: Bill C-280, the *Financial Protection for Fresh Fruit and Vegetable Farmers Act*

Dear Senators,

We are writing to you to re-affirm the fresh produce industry's need for a financial protection mechanism through the establishment of a deemed trust for fresh produce farmers and sellers in Canada, as provided for in Bill C-280, the *Financial Protection for Fresh Fruit and Vegetable Farmers Act*.

We are greatly appreciative of the opportunity to appear before the Committee on September 26, 2024, for its study of this important legislation, which will provide critical financial protection for produce sellers in the case of an insolvent or bankrupt buyer. As mentioned in our testimony, the need for a deemed trust mechanism has been a longstanding priority of our memberships across the Canadian fresh fruit and vegetable supply chain.

It is critical to note that a significant volume of research, including by experts in bankruptcy, previous government studies and Committee studies, has demonstrated that a deemed trust is the only means by which the Government of Canada can provide effective financial protection to growers and other fresh produce sellers in Canada.

We also find it important to clarify certain points of discussion and to respond to comments made to the Committee by the representatives of the Office of the Superintendent of Bankruptcy Canada and the Canadian Association of Insolvency and Restructuring Professionals, which, while well-intentioned, we believe in some cases provide incomplete and/or potentially misleading information.

Additionally, this document addresses points raised by the BANC committee members during the September 26th meeting, including regarding the outputs from the Regulatory Cooperation Council of 2014, and the suggested utilization of Export Development Canada or factoring as tools to provide protection for our sector (see below).

We have outlined our response to these statements below and would note that these same issues were also considered in the deliberations in the House of Commons, where the Bill ultimately received nearly unanimous support at Third Reading.

Current protections and produce sellers' creditor status and standing under Bill C-280

Suggestion that the *Bankruptcy and Insolvency Act (BIA)* already has provisions, such as right of repossession and farmer super-priority, that adequately protect fresh produce sellers.

Response: Unfortunately, while such protection is clearly the intent of the *Act*, the current provisions do not provide a workable mechanism for cases in which buyers of fresh produce become insolvent. As noted during our testimony to the Committee, given how quickly produce moves through the system and is consumed or spoils, it is generally very rare that fresh fruits and vegetables would be available for repossession. Similarly, the “super priority” provision for farmers in the *Act* is not helpful for fruit and vegetable suppliers, as it states that the product must have been delivered within 15 days of a bankruptcy or the appointment of a receiver. The 15-day period is too short for our sector, given the 30-day or, increasingly, longer payment terms typical for fresh fruits and vegetables. Indeed, the special provisions in the *BIA* have been proven to be ineffectual for fresh produce sellers. Numerous studies, including those by the [Library of Parliament](#), have demonstrated that those provisions do not work in the case of fresh produce, given its highly perishable nature. This is why other commodities have enabled work arounds, as described below.

Suggestion that no other commercial creditor has a deemed trust for unpaid claims.

Response: The government has already circumvented this issue of unique insolvency situations for others. For example, the Canadian Grain Commission holds roughly \$1 billion of financial security from individual grain licence holders (based on complicated formulas) to pay grain sellers in case a grain buyer becomes insolvent. Access to this financial security is denied to all other creditors. Similarly, provinces have introduced bonding or funding programs that are used to pay unsecured agricultural product suppliers in order to by-pass the current limitations under the *Bankruptcy and Insolvency Act* and *Companies' Creditors Arrangement Act (CCAA)*.

Suggestion that Bill C-280 would favour sellers of fresh produce over sellers of other perishable products, and therefore incent others to demand a deemed trust.

Response: Other commodities may already be effectively protected under the farmer super-priority provisions in the *Bankruptcy and Insolvency Act*, but these provisions do not offer a workable mechanism for the fresh produce sector. At the same time, it is also important to recognize that other commodities have enabled further protections. In addition to the Canadian Grain Commission example noted above, Canadian supply management systems indirectly provide forms of financial protection to other commodities. The produce industry is asking for a fit-to-purpose tool, similar to the demonstrated effective tool available in the US.

Government assessments of the need for a deemed trust in Canada

Suggestion that the Government has properly assessed the impacts and found no need.

Response: The need to establish a deemed trust as an effective financial protection tool for the fresh produce sector has in fact been repeatedly recognized by government bodies.

The House of Commons Standing Committee on Agriculture and Agri-food has recommended the establishment of a deemed trust for produce sellers multiple times in recent years, including as recently as June 2024, in its report: [Improving the Resilience of Canada's Horticultural Sector](#). The House of

Commons Standing Committee on Finance has also repeatedly included the establishment of a deemed trust for produce sellers among its pre-budget recommendations, including [most recently in 2023](#). In addition, as noted above, the [Library of Parliament](#) has also identified gaps in the current provisions of the BIA, which do not effectively protect sellers of fresh produce.

Suggestion that the Canada-US Regulatory Cooperation Council (RCC) agreed with the Federal-Provincial Working Group position against a deemed trust and other payment protection options (insurance, bonding).

Response: This is inaccurate. The US PACA model was never included as an option in the RCC discussions, Agriculture and Agri-food Canada led this component of the RCC exercise and took a strict regulatory definition of potential solutions, rather than exploring a broader Instrument of Choice approach, which would have been more consistent with Treasury Board directives of the time. In fact, the PACA model was specifically excluded from the scope of the study, which directly led to the USDA withdrawing Canada's preferential access to the US dispute resolution mechanism.

Suggestion that factoring or insurance, such as through Export Development Canada (EDC), would be potential solutions to effectively address non-payment issues and mitigate insolvency problems in the fresh produce sector.

Response: As noted throughout our testimony, Canadian fresh produce growers and sellers work with very tight margins (3-7%). Factoring costs are roughly 10% of receivables and do not address insolvency situations. Insurance costs are roughly 2-4% of gross sales per transaction, which would effectively reduce these already slim margins by half. In addition to these prohibitive costs, insurance claims are lengthy and very difficult to process.

Furthermore, while, EDC covers exports from Canada, it would not provide any protection for domestic transactions as would be provided under a deemed trust. Since Canadians producers are still able to access the US deemed trust mechanism under PACA, there is little to no appetite to pay for insurance and further reduce margins on shipment to the US.

Suggestion that there is limited evidence to suggest there is widespread harm created by the absence of a deemed trust.

Response: As [noted by Professor Ronald Cuming](#), recipient of a Lifetime Achievement Award from the Canadian Bar Association for his work on bankruptcy law, there is an inherent harm associated with producing and selling fresh fruits and vegetables because sellers immediately become unsecured creditors. As an unsecured creditor under the current legal framework, there are limited means to enforce payment should a buyer become insolvent. At best, a seller in this situation would only be able to recuperate a few cents on each dollar they claim. This unequal power distribution between sellers of fresh produce and their buyers has exposed a gap in the current legal framework, which places residual harm on those who lack protection.

In addition, it is important to note that we have seen recent bankruptcies with major impacts to the Canadian fresh produce sector. In January 2023, Lakeside Produce in Leamington, Ontario, filed for bankruptcy, with creditors owed nearly \$188 million. Among those creditors are 17 Canadian produce companies with more than \$1.6 million in unsecured claims, and another 45 produce companies across North America owed more than \$4.8 million. The significant ripple effects of this one example clearly demonstrate why a financial protection tool is needed to protect our essential sector and food security in Canada.

Canada-US reciprocity

Suggestion that US sellers would benefit more than Canadian sellers from the establishment of a deemed trust mechanism in Canada.

Response:

The fresh produce supply chain is highly integrated around the globe. In Canada, our climatic limitations and shorter growing season means that we rely upon imported product to ensure that Canadians are able to put a variety of fruits and vegetables on their tables year-round. As in many sectors, the United States is our largest trading partner in fresh produce, in both imports and exports.

In 2023 alone, Canada imported just over \$5 billion in fresh produce from the United States, representing a little less than half of all fresh produce imports. Just as important, Canadian companies exported just over \$4 billion in fresh produce to the United States, comprising more than 95% of all fresh produce exports (Statistics Canada). A deemed trust mechanism in Canada would further strengthen the robust Canada-US trading relationship that provides significant economic and food security benefits on both sides of the border.

Furthermore, it is important to note that, while Canadian sellers have lost preferential access to the US dispute resolution system under the *Perishable Agricultural Commodities Act (PACA)*, they still retain the ability to access PACA deemed trust provisions. In addition, during the 2014 Regulatory Cooperation Council study, the USDA surveyed US shippers of fresh produce and discovered that Canadians importers of US products are charged a 10-15% price premium directly related to the absence of a Canadian insolvency tool. Combined, these factors contribute to food security/sovereignty issues and increased prices for Canadians.

Given the roughly equal trade balance for fresh produce between Canada and the US, a Canadian insolvency tool would put both countries on the same playing field.

Suggestion that because Bill C-280 does not include dispute resolution provisions it will not be accepted by the U.S. as providing comparable protection to the US *Perishable Agricultural Commodities Act (PACA)*.

Response: As noted by MP Scot Davidson during his testimony to the Committee, these statements were misleading. Bill C-280 does not include dispute resolution provisions because the Fruit and Vegetable Dispute Resolution Corporation (DRC) already provides such a mechanism to sellers in Canada.

In the US system, PACA provides three key tools: federal licencing of producer buyers/sellers, a dispute resolution system, and a deemed trust for insolvency for fresh produce. In Canada, we have two of these three tools in place. The Canadian Food Inspection Agency requires companies to be licenced to buy/sell across provincial lines and to import/export fresh produce, and also requires Canadian companies to be members of the DRC to take care of disputes. Canada is still missing the insolvency tool.

It should also be noted that DRC is only able to help when companies are willing to work to continue being solvent. As noted during testimony, many struggling companies simply walk away from their obligations, and suppliers cannot afford to file formal insolvency proceedings against reluctant participants. In these cases, suppliers must wait for long processes to try and recover funds as

unsecured creditors, with little to no chance of recovery. These common instances of “walk aways” will not show up in formal records kept under the BIA.

Suggestion that a deemed trust in insolvency is no guarantee of restored access for “comparable” treatment for Canadian sellers under the US PACA.

Response: These statements ignore the fact that the USDA has confirmed on numerous occasions in writing to Canadian officials that a deemed trust would be the basis for restoring preferential treatment under PACA dispute processes. Restoring reciprocity is not a US regulatory process, it is purely administrative within USDA.

As recently as April, this was confirmed by US representatives again in meetings in Washington, between Canadian Parliamentarians, including MP Davidson and Senator Brent Cotter, and U.S. Congressional Representatives. Bruce Summers, the Administrator of the USDA Agricultural Marketing Service, the body responsible for PACA, also confirmed this directly to the participants.

As noted by Senator Cotter in his testimony to the Committee last week, the U.S. officials were supportive of Canada moving forward with a deemed trust for fresh produce and reiterated that the passage of Bill C-280 would allow for the reinstatement of Canada’s preferential access under PACA.

Other potential impacts

Suggestion that a deemed trust could negatively impact credit within the produce industry.

Response: As noted in our testimony, this has simply not been the case in the US experience, which has successfully been operating the PACA model for 40 years (since 1984). In fact, sellers protected by the trust in the US have more access to credit, as lenders recognize the security it provides.

A [2015 white paper](#) by a lawyer/economist whose firm works with banks on both sides of the border called the risk/benefit a “wash” for banks as they benefit when their client is protected by the trust. The “wash” for banks provided another reason for them to take a non-interference role when the US equivalent was introduced. The “wash” for banks provided another reason for them to take a non-interference role when the US equivalent was introduced. An honest discussion with Canadian agricultural lenders would confirm that it would be similar in Canada. If agricultural lenders could, they would probably admit that this Bill would strengthen the security of their overall agriculture portfolios related to fresh produce, knowing that their clients (as suppliers) were protected.

In closing, it is important to recognize that businesses selling fresh produce operate in rural, urban and suburban communities, and all communities are left vulnerable to food insecurity if fresh produce sellers cannot remain financially viable. It is crucial that we work to provide all possible safeguards for the food supply chain and protect one of our most essential sectors and the families that rely on it.

We strongly urge you to build on the nearly unanimous support received for Bill C-280 in the House of Commons and to move swiftly to pass this important legislation into law.

Thank you for your consideration of this important matter. We would be pleased to answer any further questions you may have.

Sincerely,



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Canadian Produce Marketing Association



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President and CEO
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Massimo Bergamini
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cc:

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