

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

March 12, 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 urge you to support this legislation, which will provide critical financial protection for produce sellers in the case of an insolvent or bankrupt buyer.

Growing, harvesting, packing and marketing fruits and vegetables comes with many risks. Overhead and capital costs continue to rise, while returns are delayed until payment is collected down the supply chain – usually long after the perishable product has been purchased and consumed. Ongoing supply chain challenges, a changing climate and inflationary pressures further threaten our food security and the long-term economic viability of the fresh produce sector. Unfortunately, the *Bankruptcy and Insolvency Act* does not provide workable protection for fresh produce sellers in Canada due to the high perishability of our products and the industry's longer payment terms.

The lack of a financial protection mechanism for fresh produce sellers in Canada also means that Canadian sellers remain unable to utilize the preferential treatment they previously enjoyed under the United States *Perishable Agricultural Commodities Act (PACA)*. Instead, Canadians selling fresh produce to our biggest trading partner must pay double the bond on the shipment to access the PACA dispute resolution mechanism – a cost that is simply untenable for many Canadian businesses. Having a financial protection tool in place in Canada would pave the way for the United States Department of Agriculture to restore Canadian produce sellers' preferential access to the U.S. dispute resolution mechanism for fresh fruit and vegetables and would eliminate the current requirement to post costly double bonds to initiate a complaint.

Bill C-280 would establish a critical financial protection mechanism for fresh produce sellers in Canada to help secure payment in the case of a buyer bankruptcy. This mechanism would be in the form of a deemed trust that would operate similarly to the successful PACA model in the U.S. Creating a deemed trust would not impose any additional cost to government, but would help to ensure that fresh produce sellers can continue to support local economies across the country and to provide Canadians with our safe, nutritious fruit and vegetable products.

Response to concerns raised by the Superintendent of Bankruptcy

We also find it important to comment on a letter you received from Elisabeth Lang, Superintendent of Bankruptcy, on February 20, 2024. This letter noted several concerns related to Bill C-280 which we believe need to be addressed. We have outlined our response to these statements below and would note that they were also included in the deliberations in the House of Commons.

Suggestion that Bill C-280 would favour sellers of fresh produce over sellers of other perishable products, such as meat, egg and milk producers.

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 as noted below. At the same time, it is also important to recognize that other commodities have enabled further protections. For example, Canadian supply management systems indirectly provide forms of financial protection to other commodities. In addition, 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 to by-pass the current limitations under the *Bankruptcy Insolvency Act* and *Companies' Creditors Arrangement Act* (CCAA). The produce industry is asking for a fit-to-purpose tool, similar to the PACA tool in the United States, which has been demonstrated to offer effective protection for US produce sellers.

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

Response: Unfortunately, while the intent is admirable, the current *Act* does not provide a workable mechanism for cases in which buyers of fresh produce become insolvent. 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. Furthermore, the "super priority" provision for farmers in the *Act* is not helpful (or relevant) 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 more payment terms typical for fresh fruits and vegetables. 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 above.

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

As noted by Professor Ronald Cuming, 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, 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.

Suggestion that a deemed trust could negatively impact credit within the produce industry or make it more difficult for debtor companies to retain a Licensed Insolvency Trustee.

Response: This has not been the case in the US experience. In fact, sellers protected by the trust in the US have more access to credit, as lenders recognize the security it provides. Industry has provided a white paper by a lawyer/economist whose firm works with banks on both sides of the border in support of this. The writer 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. 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.

Suggested amendment to Coming Into Force clause

Response: We are in agreement with the Superintendent that an appropriate coming into force date should clearly delineate that only transactions made after coming into force are subject to the Act. We would encourage the Senate to make this housecleaning amendment to the Bill C-280 as part of their due diligence efforts.

In closing, it is important to recognize that businesses selling fresh produce operate in rural, urban and suburban communities, contributing nearly \$15 billion to Canada’s GDP and supporting more than 185,400 jobs across the country. All communities that rely on fresh produce are left vulnerable to food insecurity if 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 all-party support received for Bill C-280 in the House of Commons and to move swiftly to pass this important legislation into law.

Sincerely,



Ron Lemaire
President
Canadian Produce Marketing Association
Canada



Amy Argentino
Director of Operations
Fruit and Vegetable Growers of



Luc Mougeot
President and CEO
Fruit and Vegetable Dispute Resolution Corporation

cc:

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