

CPMA ACDFL

CANADIAN PRODUCE MARKETING ASSOCIATION

ASSOCIATION CANADIENNE DE LA
DISTRIBUTION DE FRUITS ET LÉGUMES



About CPMA

The produce industry generates \$14 billion annually in economic activity throughout the supply chain and supports over 181,000 jobs across Canada. Based in Ottawa, the Canadian Produce Marketing Association (CPMA) is a not-for-profit organization representing companies active in the marketing of fresh fruit and vegetables in Canada, from the farm gate to the dinner plate spanning the entire produce industry. The Association's members include major growers, shippers, packers and marketers; importers and exporters; transportation and logistics firms; brokers, distributors and wholesalers; retailers and foodservice distributors; and fresh cut operators and processors. Founded in 1925, CPMA is today proud to represent over 860 domestic and international members who are responsible for 90% of fresh fruit and vegetable sales in Canada.

Issues

Financial Protection for Produce Sellers (PACA-like Trust)

Prior to 2014, Canada was the only country in the world to enjoy preferential access to the US' PACA dispute resolution mechanism. This meant that Canadian companies were treated in the same manner as US companies when filing a claim through PACA in cases of slow-pay or no-pay and were charged a maximum of \$500 USD to pursue a formal claim against a US buyer. Canada lost preferential access to PACA's dispute resolution mechanism as it does not have a reciprocal PACA-like deemed trust which provides bankruptcy protection for produce sellers in the event that a produce buyer becomes insolvent.

Since the loss of Canadian preferential access to PACA in October 2014, Canadian produce sellers pursuing a formal complaint under PACA must now post a post a bond equivalent to 200% of their claim against the buyer. For many Canadian produce companies, over 98% of which are small businesses, they do not have the financial means to post a double bond of their claim and are forced to accept a reduced price for their product. As a result of this loss of preferential access, many US buyers have used the high cost of a double bond as leverage against Canadian produce companies as a way of reducing costs and negotiating down the price of the product they have purchased.

The authority to create a PACA-like trust in Canada rests with the Minister of Innovation, Science and Economic Development who is responsible for insolvency law. Fortunately, the loss of preferential access to PACA is an administrative decision and can be reversed by the US Department of Agriculture once the Government of Canada has proven that they have created a reciprocal PACA-like trust in Canada in cases of insolvency. Draft legislation of PACA-like deemed trust in Canada (Appendix I) has been created by Prof. Ron Cuming, an expert in bankruptcy and insolvency law from the University of Saskatchewan, and has been shared with members of the House Standing Committee on Agriculture and Agri-Food as well as officials at Agriculture and Agri-Food Canada (AAFC) and Innovation, Science and Economic Development Canada (ISED). Additionally, the House Standing Committee on Agriculture and Agr-Food recommended the creation of a PACA-like deemed trust in Canada in 2016 as well as the House Standing Committee on Finance as part of the pre-Budget report to the Minister of Finance for both 2018 and 2019.

The legislation drafted by Prof. Cuming in 2016 would do the following:

- Establish a statutory deemed trust to protect the right of sellers of fresh fruit and vegetable products to be paid for products they deliver;

- Would be administered by the Minister of Agriculture and Agri-Food as complimentary legislation to the *Bankruptcy and Insolvency Act* (BIA);
- Cover accounts receivable, cash, and inventory of the buyer stemming from the sale of produce on short-term transactions with payment terms not exceeding 30 days, and
- Require no additional funding by government beyond what would normally be required for the introduction of new legislation.

The below points will provide additional context on the issue in relation to the BIA and other Acts and regulations:

- Current provisions of the Bankruptcy and Insolvency Act (BIA) do not provide a workable tool or mechanism for suppliers of perishable FF&V when buyers become insolvent. The “super priority” provision in the BIA for farmers is not helpful (or relevant) for FF&V suppliers due to the industry’s unique value chain realities;
- The provisions of the *Safe Food for Canadians Act* and the *Safe Food for Canadians Regulations*, while providing protections to suppliers dealing with solvent buyers (dispute resolution, destination inspection, single entity licensing), are not able to address issues of non-payment due to insolvency, and
- These issues can be addressed through introduction of complementary legislation to the BIA with limited statutory deemed trust provisions.

The lack of preferential access to the PACA dispute resolution mechanism in the US and absence of bankruptcy protection for Canadian produce sellers is having a real impact on Canadian growers as outlined in the case studies below:

1. A Manitoba fresh produce buyer entered into receivership in March of 2017. The company had approximately \$7 million in assets and \$10 million in debt. \$6.1 million of the debt is held by secured creditors with \$3.7 million owed to unsecured creditors. Among the unsecured creditors are vegetable farmers who are owed \$900,000, including 3 vegetable farmers who are owed more than \$100,000 each. Under a PACA-like deemed trust in Canada, those vegetable farmers would have been given a priority claim on cash, inventory, and accounts receivable derived from the sale of their products. While those assets would not cover all of the claims by farmers, they would have reduced the financial blow to these vegetable farmers who operate with small margins to begin with.
2. In November 2017, a PEI potato grower had a past due account with a US buyer. They were owed \$70,572.11 USD and as a loss of Canada’s preferential access to the PACA dispute resolution mechanism had to post a cash bond of \$141,144.22 USD in order to pursue a formal claim against the US buyer. In their own words in a letter to their MP: “We were unable to secure a bond and, therefore, had to arrange to submit a cashier’s cheque in the amount of \$141,144.22(US). The result is a significant hardship for our business and ability to contribute to the market success and profitability of PEI potato producers. This hardship and financial risk should not exist.” Loss of Canada’s preferential access to PACA’s dispute resolution mechanism has diminished the competitive advantage of the Canadian fresh fruit and vegetable industry when trading with the US and has put many exporters unnecessarily in financial hardship.

Lot Code Exemption for Fresh Produce on Consumer Pre-Packs

Since the early drafts of the new *Safe Food for Canadians Regulations* (SFCR), CPMA has been working closely with regulators at the Canadian Food Inspection Agency (CFIA) to help inform their regulatory decision making and educate them on unique circumstances within the fresh produce industry due to the perishability of the product. This collaboration has been extremely beneficial and CPMA strongly encourages all political parties to foster an environment of collaboration and partnership between regulators and industry.

However, last minute changes to the SFCR added during the Canada Gazette II phase which does not include consultation, will have a profound and costly impact on the fresh produce industry. Specifically, the regulations include a labelling requirement for fresh produce to include a lot code on all consumer pre-packs. CPMA fully supports food safety traceability and evidence-based regulations to ensure the integrity of the Canadian food system, but this regulation will add significant cost with little improvements to traceability given the reality of the epidemiology of an outbreak and the safeguards already in place. Indeed, this regulations seem counter to the goals of the SFCR to reduce unnecessary administrative burden on business and help to maintain and grow market access for Canada's agri-food sector. CPMA is requesting that a permanent exemption be given to the fresh produce industry in the SFCR for labelling of lot codes on consumer pre-packs. The current requirement would be the only one of its kind in the world for fresh produce and would impact our competitiveness in the global marketplace. Additionally, CPMA undertook a survey of its members to assess the financial implications of this new requirement and received over 120 responses with the total estimated financial impact to industry being approximately \$187 million. Many members, particularly those with smaller farms, will not be able to absorb those costs and a significant number of international growers who export to Canada during the off-season stated that they would cease exporting to Canada if this requirement is implemented. As it currently stands, the fresh produce industry has a one year exemption and will have to be compliant by 2020.

Labour

The fresh produce industry is eager to help feed Canadians and the world while helping to achieve the Government's target of \$75 billion in agri-food exports by 2025. In order to achieve these goals, the industry requires better access to foreign labour. Indeed, the labour gap in horticulture is becoming a crisis with the gap expected to increase to 46,500 jobs by 2025 – the largest labour gap in the agricultural sector.

CPMA is calling on political parties to commit to two labour reforms which will benefit the industry and ensure that we continue to grow the economy and feed Canadians. The first proposal is to establish a Trusted Employer pilot program for the Temporary Foreign Worker Program (TFWP) Agriculture Stream and Seasonal Agricultural Worker Program (SAWP). A Trusted Employer program would ensure that growers who have been in good standing for a number of years and have consistently proven the need for foreign labour are able to use pre-populated Labour Market Impact Assessments (LMIAs) and SAWP application forms with previous year's information. Furthermore, questions that are currently part of the approval process that do not need to be asked on an annual basis can be removed from the mandatory completion fields for those who are part of the program. We are also proposing that the amount of time

required to advertise to Canadians is reduced to one week as the process is time consuming and rarely yields results. The creation of such a program has been recommended by the House Standing Committee on Human Resources, Skills and Social Development and the Status of Persons with Disabilities in 2016, the House Standing Committee on Finance's pre-Budget 2018 report as well as the final report from the Agri-Food and Economic Strategy Table released in September 2018.

Our second proposal is to ensure that pack houses that do not have on-farm operations are eligible to use the TFWP Agriculture Stream, including on a seasonal basis. Employment and Social Development Canada (ESDC) have indicated that they plan to move away from the National Commodities List (NCI) which currently determines eligibility on who can access the TFWP Agriculture Stream and SAWP. To replace the NCI, ESDC will be establishing a definition of eligible users of the TFWP Agriculture Stream and SAWP. Pack houses who do not have on-farm operations are currently ineligible to use the TFWP Agriculture Stream; however, we are seeing more and more pack houses in need of foreign labour to meet their operational requirements and pack agricultural products, often from small growing operations. By including pack houses without on-farm operations as part of the definition to be used by ESDC, they will be able to continue to operate and pack products Canadians enjoy and expect in their local grocery stores.

Taxation

Small businesses are the life blood of the Canadian economy, however, no significant changes to the Small Business Deduction (SBD) have been made since 2009. In fact, the current capital asset limits to qualify for the SBD were established in 1994 and have not changed for the past 15 years. As it stands, small businesses are eligible for the SBD provided their capital assets are below \$15 million with a straight line deduction beginning at \$10 million. Additionally, since 2009, the SBD is applicable on the first \$500,000 of active business income, up from the \$400,000 prior to the 2009 change. It is our recommendation that both the federal business limit of \$500,000 and the capital assets limit be increased and subsequently tied to inflation in order to reflect modern operating costs and business operations. In 2018 numbers, the federal business limit would be increased to \$581,000 and the capital asset limits increased to \$15.7 million with a straight line reduction up until, and eliminated at, \$23.5 million. We believe that this would be a marked improvement on how the SBD currently operates and will ensure that our small businesses remain competitive.

Furthermore, CPMA recommends that political parties commit to expanding the agricultural cooperative exemption for affiliated corporations to include any agricultural affiliated corporation and their shareholders or any affiliated corporation wholly owned by agricultural shareholders and who derive farming income as defined by the Canada Revenue Agency (CRA).

As part of Budget 2016, the Government announced significant changes to the rules of affiliation which have had unintended consequences on the fresh produce industry. While we support the Government's exemption for agricultural cooperatives, we believe that the Government should extend the exemption to affiliated corporations as described above which function in the same manner as an agricultural cooperative, but with a more equitable voting structure amongst its shareholders. In order to be competitive, many small farmers group together and form affiliated corporations to create a critical mass of product to meet the requirements of major retailers and to pool marketing and sales resources. With the changes to the rules of affiliation, the first \$500,000 for qualifying businesses must be divided pro rata amongst the shareholders of the affiliated corporation as well as the affiliated corporation itself. For many of these corporations in the produce industry, this will increase their shareholders' cumulative taxes in the

hundreds of thousands of dollars annually. With such significant increase in taxes, many businesses will have to forego much of their planned growth or reinvestment.

Additionally, the requirements surrounding family members and reporting shares for aunts, uncles, grandparents and others is both extremely challenging and put the onus on the tax filer to have a comprehensive list of their family's financial engagements. Beyond the complexity of this requirement, it raises serious issues of privacy and what expectations the Government has of taxpayers to know their entire family's financial engagements and investments. This issue is further compounded by the fact that no comprehensive guidance document has been released to industry or tax practitioners on these significant changes.

Agriculture and Agri-Food Data Strategy

A key input for global competitiveness is data. Unfortunately, Canadian data, particularly in agriculture and agri-food, is difficult to find, incomplete or onerously expensive for associations and businesses to purchase. A robust and fully funded data strategy must be implemented by the Government if we are to be competitive on the global stage and reach our agri-food export target of \$75 billion by 2025. Data similar to what is collected in Australia and the US for agri-food would allow the fresh produce industry to identify new market opportunities and grow their business.

CPMA encourages political parties to commit to establishing a data working group including AAFC, ISED, and other relevant departments and agencies to prepare and implement a comprehensive, long-term data strategy that will fuel our competitiveness and inform key strategic decisions for Canadian industry. Currently, much of the data captured by Statistics Canada only goes to the Food & Beverage level and does not break down by industry or commodity group. More granular data on consumption, trends, trade, and consumer preferences would act as a catalyst for growth and greater competitiveness.

National Food Policy Council

As part of the Minister of Agriculture and Agri-Food's Mandate Letter, he has been tasked with developing a Food Policy for Canada. CPMA strongly supports this Mandate Letter commitment and has been active on this file since the launch of consultations in Summer 2017.

CPMA has also joined a small group of industry members, civil society organizations, and academics to create a Food Policy Governance Working Group which has undertaken a review of international best practices on food policy governance which culminated in a recommendation report being sent to the Minister for his consideration. CPMA strongly urges all parties to commit to the establishment of a National Food Policy Council, comprised of government, industry, civil society, and academia, to oversee the governance of the new Food Policy for Canada and provide advice to government on issues relating to food. A National Food Policy Council is essential to ensure good governance of the Food Policy and to represent all actors in the Canadian food system. A National Food Policy Council will also allow for the continuity of the Food Policy regardless of which party is in government.

Furthermore, the National Food Policy Council is a unique forum to break down government silos and bring multiple government departments to the table to discuss pressing issues facing the food system in Canada. A whole-of-government approach to food is encouraged and is vital to the success of the Food Policy.

Infrastructure and Rural Broadband

In order for the Canadian fresh produce industry to be competitive, political parties must commit to investing in infrastructure that will enable trade and ensure that our growers can use technology and broadband on their farms so that Canada can be at the cutting edge of agri-food.

To that end, CPMA recommends that political parties pledge greater investments in trade infrastructure, including trade corridors and infrastructure at our ports. Access to food in northern and remote communities remains a significant barrier for the produce industry to supply quality products to those populations. A northern trade corridor that will aim to facilitate the movement of goods to northern and remote communities will open up new markets and opportunities for the produce industry while providing those populations with safe and nutritious fresh fruits and vegetables.

CPMA is also pleased with the Ports Modernization Review currently being conducted by the Government of Canada. This review is long overdue and will bring about much needed reforms to Canada's ports. However, marine container examination facilities currently being built in British Columbia are not being equipped with proper refrigeration to maintain the cold chain of perishable product. Political parties should include in their platform a commitment to designing and building marine container examination facilities that are suitable for all sectors, including agri-food.

As well, rural broadband access remains a perennial issue for Canadian growers. In fact, some CPMA members have broadband on parts of their farm, but other parts are effectively dead zones. This inhibits many of these growers from adopting precision agriculture techniques and technology which would allow them to be more competitive and environmentally responsible. The Connect to Innovate program must be able to meet the needs of rural growers from coast to coast to coast and offer the proper incentives to the telecommunication industry to install broadband in these areas.

Crop Protection

In order to increase market access and sustainability of the Canadian fresh fruit and vegetable industry, harmonization of pesticide regulation, products, and residues must occur. This requires collaboration both within Canadian governmental agencies, and between the Canadian, American, and other governments with which we trade. Industry recognizes that pesticides must be used within the guidelines of good agricultural practices, which consider the needs of environmental quality, human health, agricultural stability, and effective pest management. In addition, the assurance of an affordable supply of quality food for Canadian consumers as well as the continued viability of Canadian agriculture and domestic food processing industries must remain a priority in a competitive global trading environment.

In order to reduce trade barriers and maintain the health of consumers, CPMA proposes the following:

- Maintain and improve the joint review process which simultaneously reviews submissions and registers new active ingredients. To achieve harmonization, industry proposes the Canadian Pest Management Regulatory Agency (PMRA) and the US Environmental Protection Agency (EPA) establish a joint schedule for pesticide re-evaluations of older chemistries which would be facilitated by the inclusion of a benefits assessment in pesticide re-evaluations allowing for risk/benefit balancing in decision making, similar to the EPA;
- Harmonize Maximum Residue Limits (MRLs) between Canada, the US, and other trading partners;

- Fulfill PMRA Regulatory Directive DIR 98-02, *Residue Chemistry Guidelines* – which furthers regulatory harmonization by considering chemistry reviews by the EPA as acceptable to support MRLs here in Canada;
- Continue funding of AAFC’s Minor Use Program, and harmonization between the Minor Use Program and the US IR-4 Program, leading to acceptance of US registrations in Canada for minor use crops, and
- Improve efficiencies in the PMRA and removal of impediments to the introduction of newer, safer, more effective crop protection products.

Spring Weight Restrictions on Highways

The produce industry is active in transporting goods from coast to coast to coast in order to provide Canadians with quality products. However, the lack of alignment of spring weight restrictions on highways during the thaw (February to May annually) increases the costs of moving product interprovincially. While spring weight restrictions on highways is under provincial jurisdiction, CPMA calls on all parties to take a leadership role in these discussions should they be elected in 2019. This issue is part of the 2018-2019 work plan for the Regulatory Reconciliation and Cooperation Table under the Canadian Free Trade Agreement and provides a unique opportunity to address this issue. Federal leadership on this file will help reduce regulatory barriers and costs faced by grower/packer/shippers in the fresh produce industry.

Currently, a CPMA member in PEI pays an additional \$97,000 a year in shipping costs as a result of differing spring weight restrictions across the country. For every 5 trucks they use to ship product interprovincially, they must send out a sixth to make up for the lost weight. The cumulative cost of this lack of alignment across the entire fresh produce industry would be staggering. In an era where truck drivers are becoming scarcer, a long term solution to this problem must be found or interprovincial trade of fresh produce items risk becoming more limited as costs continue to soar.

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Appendix I

*Draft Legislation and Regulations for a PACA-like Trust in Canada***DRAFT MODEL LAW FOR A FRESH FRUIT AND VEGETABLE INSOLVENCY ENHANCEMENT TOOL***Prof. R.C.C. Cuming***Legislative Objective**

The legislative objective of this Act is to provide an important measure of protection for suppliers of fresh fruit and vegetable products from the effect of insolvency when their buyers fail to pay for the products they deliver to the buyers.

Fresh fruit and vegetable products are generally sold under terms that explicitly or implicitly provide that the buyer has a short period of time after delivery to pay the price. If the buyer fails to pay the seller, the seller becomes an unsecured creditor. It is impractical for sellers to take security interests in the products they sell or the proceeds of the sale of those products. The products are perishable and have no value after a very short period of time. Few sellers have the bargaining power or legal sophistication to require their buyers to give them security interests in accounts receivable owing to the buyers from the sale of the products or in any other property of the buyers.

As an unsecured creditor, a seller has a very weak legal status under current law to enforce payment should a buyer become insolvent. There is a very good chance that the buyer has granted a security interest in his property (including accounts receivable) to a commercial lender such as a bank. This security interest gives to the lender priority over unsecured creditors. If the buyer becomes a bankrupt, all of the buyer's property that is not subject to a security interest vests in the trustee in bankruptcy. While the seller would qualify as a creditor with a provable claim in the bankruptcy proceedings, the chances of getting substantial recovery of the claim from the bankruptcy distribution are very small. At best, the seller will get a few cents on each dollar of claim. If the buyer invokes proceedings under Part III, Division I of *the Bankruptcy and Insolvency Act* or the *Companies' Creditors Arrangement Act*, a seller is likely to be only in a marginally better position. At the very best, the buyer's reorganization proposal will not be implemented for many months and is very unlikely to provide to unsecured creditors more than a fraction of the amount of their claims.

The effect of the Act would be to change the priority position of unpaid sellers through the use of a limited statutory deemed trust. The legal effect of the trust is to give to the seller who is the beneficiary under the trust a first priority status with respect to trust property. This includes priority over secured creditors and other unsecured creditors of the buyer and over the buyer's trustee in bankruptcy. In addition, a seller is not negatively affected should the buyer invoke proceedings under Part III, Division I of *the Bankruptcy and Insolvency Act* or the *Companies' Creditors Arrangement Act*.

In order to have the benefit of the statutory trust, the seller need not establish that the product and proceeds that are subject to the trust are connected directly to his or her contract. Consequently, any products and proceeds covered by the trust that buyer has in his or her possession or control are also subject to the trust so long as any seller from whom the product was acquired remains unpaid.

The Act provides an administrative mechanism through which the claims of sellers to trust property are recognized and enforced.

The Act does not guarantee complete protection to unpaid sellers. The buyer is a trustee under the law of trust and is subject to the control of the court. However, there is no way to ensure that the buyer will fully or honestly discharge trust obligations. There are legal mechanisms through which a person who acts in breach of trust can be punished. However, this does not result in the debt owing to a seller being paid.

The Act applies only when the buyer has failed to pay a seller because of his or her insolvency. If the buyer is solvent at the date of delivery of the product, and remains solvent or for any reason does not pay a seller, the trust does not come into existence. The seller must rely on his rights under provincial law or the Fruit and Vegetable Dispute Resolution Corporation to enforce payment. However, if product is supplied when the buyer is solvent, but the seller is not paid by the time the buyer becomes insolvent, the trust automatically comes into effect. Under the Act, at this point any product or proceeds in the hands of the buyer is deemed to be subject to a deemed trust. However, until this point is reached, provincial law and not the Act governs the relationship between the seller and the buyer.

The Role of Trust Law

The central feature of the Act is the deemed trust that arises when product has been supplied to a buyer for which the seller has not been paid. The Act expressly invokes the law of trusts. Trust is an important and well-developed feature of the non-statutory law of common law jurisdictions of Canada and all other countries and states whose laws are based on the common law tradition. It has a statutory base in Quebec. The following is a simplified explanation of how basic trust law functions.

A, who owns property, transfers ownership of that property to B subject to conditions specified by A. These conditions usually provide that B will hold and administer the trust property for the benefit of a third person, C. In this scenario, B is the trustee and C is the beneficiary. While legal title to the trust property is held by B, the law requires B to hold and administer the property as required by the conditions under which he obtained it. The result is that, for many purposes, C is viewed as the “beneficial owner” of the trust property.

An aspect of trust law is that, should the trustee dispose of the trust property, any property of any kind received by the trustee (cash or accounts receivable) is treated as trust property so long as it can be identified or traced. This property is referred to in the draft Act as proceeds.

The law of trusts would operate in the context of the *Fresh Fruit and Vegetable Products Protection Act* in the following way.

The Act creates a statutory trust of product supplied by the seller to a buyer under a deferred payment contract providing for payment not later than 30 days from the date of delivery. The sellers offering terms longer than 30 days would not qualify for protection under this Act. The result is that, if the procedural requisites are met (the appropriate notice is given to the buyer by the seller) the product delivered to the buyer is in law not treated as the buyer’s property. It is property that is “beneficially owned” by the seller. The trust arises automatically if the failure on the part of the buyer to pay result from his or her insolvency. In the context of the Act, the seller is deemed to have transferred property (product) to the buyer to be held under the trust condition that it or its proceeds will be held for the benefit of all unpaid sellers who qualify for the protection of the Act.

There are significant implications associated with the legal conclusion that the property held in trust by the buyer is beneficially owned by the seller. Should the buyer become a bankrupt, the trust property does not become part of the buyer's bankruptcy estate. The trustee in bankruptcy may not treat trust property as property that can be sold and the money received distributed to the unsecured creditors of the buyer. If the buyer invokes insolvency proceedings, the trust property cannot be treated as property of the buyer that can be included in an insolvency proposal.

One of the features of trust law that is implicitly imported into the Act is the concept of tracing. Tracing rules (actually, legal presumptions) were developed to deal with situations in which trustees used trust property for purposes not authorized by the trust conditions on which the property was transferred to them. These rules were designed to protect the interests of the beneficiaries of trusts. Using tracing rules, a court can conclude that the beneficial interest in the original trust property can be "traced" into other property acquired by the trustee even though there is no factual connection between the two. For example, when the buyer deposits trust property in the form of cash in his or her personal account and not, as required by the Act, in a separate account, the funds remains trust property. This is so even though the buyer makes withdrawals from the deposit account and dissipates the money so withdrawn, and subsequently makes additional deposits of his individual funds in the account.

The deemed trust has important implications for a lender who has taken a security interest in property of the buyer to secure operating loans made to the buyer. Under the secured transactions laws of all provinces and territories, it is possible for a lender to contract for a security interest in existing and future acquired property other than land. Under these laws, as soon as the borrower acquires property that falls within the description of the property taken as security, a security interest (charge) comes into existence. Generally, so long as the secured creditor has effected a registration in a public registry as required by the secured transactions law, it has priority over subsequent interests in the property that buyer acquires. This creates a problem if the statutory trust comes into existence only after the product is delivered and the seller is unpaid. In other contexts, the Supreme Court has concluded that the trust can only affect the interest of the buyer existing at the date the trust comes into effect. However, this interest is subject to the security interest that came into existence as soon as the product was delivered.

The Act deals with this issue by making it clear that the deemed trust takes priority over any security interest in the product or the proceeds regardless of when the trust comes into effect or when the security agreement creating the security interest came into effect.

Typical Scenario

The legal structure contemplated by the proposed *Fresh Fruit and Vegetable Products Protection Act* would function as follows:

Seller 1 (as defined in section 2, including the definition of "unpaid seller") and Buyer (hereafter, "Debtor" as defined in section 2, including the definition of "insolvent debtor") enter into a contract under which Seller agrees to supply "product" (as defined in section 2 of the Act and section 1 of the Regulations) to Debtor. Payment of the price is to be made at a date other than the date of delivery but not later than 30 days from the date of delivery. The product is delivered to Debtor.

Seller 1 sends with the invoice, or in an email message, a notice as provided in section 8 of the Act and section 4 of the Regulations. The message must be received by the Debtor not more than 30 days from the date payment was due under the contract.

The effect of this notice is that, should the Debtor be insolvent upon its receipt or any time thereafter when Seller 1 has not been paid, a trust comes into existence on all product then in possession of the Debtor or thereafter acquired and on any proceeds of the sale of product (*e.g.*, accounts and other payment obligations) sections 3 and 4. Debtor is under obligation to segregate trust property in the form of cash or a deposit account. Subsection 3(3). Money in a deposit account cannot be taken in set-off against an obligation owing by the Debtor to the deposit-taking institution. Subsection 6(4).

Assume that the event described above with respect to Seller 1 occurred also with respect to Seller 2. The trust that arose in the context of the Seller 1 transaction now gives corresponding rights to Seller 2. It automatically encompasses any product supplied by Seller 1 and Seller 2 and any proceeds obtained by Debtor as a result of the disposition of that product. In effect, the trust property is all product and proceeds of Debtor and the joint beneficiaries are Seller 1 and Seller 2. Section 5.

Notwithstanding the trust, Debtor is able to continue selling perishable agricultural products obtained from Seller 1 and Seller 2 so long as Debtor has not become a bankrupt, its assets are not under the control of a receiver or a court has not ordered seizure of the trust property under section 9. Ordinary course buyers of product take the product free from the trust. Section 6. However, any other type of buyer of the product or proceeds of the product or any secured party who is given a security interest in the trust property takes subject to the trust if the buyer or secured party is aware or has reasonable basis to be aware of the trust. Subsection 6(1). If either or both sellers register their beneficial interests in the Personal Property Registry (or the Quebec Registre des droit personnels et réels mobiliers), buyers of trust property, other than ordinary course buyers, and secured parties are deemed to know of the existence of the trust and, consequently, take subject to it. Subsection 6(2). However, registration is not required in order for the trust to come into effect.

If the Debtor pays Seller 1 and Seller 2, the trust disappears. If Debtor pays only one of them, the trust continues for the benefit of the unpaid seller. Section 5.

If the Debtor becomes a bankrupt, any trust property existing at the date of the bankruptcy does not vest in the trustee and is not part of the bankruptcy estate. It must be held by the trustee for the benefit of Seller 1 and Seller 2. Subsection 3(5).

One or more of the unpaid sellers, a trade organization acting on behalf of unpaid sellers, or any other “interested party” may apply to the superior court of the province in which the debtor is located for an order requiring collection, sale and distribution of the trust property. Section 9.

Draft Act

An Act to provide for a statutory trust to protect the right of sellers of fresh fruit and vegetable products to be paid for the products they deliver.

Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

SHORT TITLE

1. This Act may be cited as the *Fresh Fruit and Vegetable Products Protection Act*
2. The definitions in this subsection apply to this Act.

“product” means the items prescribed that are intended for human consumption supplied by a seller and received by a debtor whether or not the debtor was an insolvent debtor at the time the product was supplied;

“court” means the superior court referred to in subsection 183(1) or (1.1) of the *Bankruptcy and Insolvency Act* of the jurisdiction in which the debtor carries on business.

“debtor” includes a person who acting in the ordinary course of business as agent, commission merchant, dealer, broker, consignee or consignor engages or has engaged in or facilitates or has facilitated on behalf of another person, the purchase and sale of a product, and, where the context permits, includes an insolvent debtor, but does not include:

(a) a person who sells product directly to consumers if that person paid less than the sum prescribed, for the product purchased by the person within the previous 12 month period;

(b) a person who sells principally product he or she grows himself or herself; or

(c) a person who only purchases less than the quantity prescribed of fresh fruits and vegetables on any day.

(d) an organization that is a registered charity as defined in subsection 248(1) of the *Income Tax Act* or is a club, society or association described in paragraph 149(1) (l) of that Act.

(e) a person engaged in a business as prescribed;

“insolvent debtor” means a debtor:

(a) who is for any reason unable to meet his or her obligations as they generally become due;

(b) who has ceased paying his or her current obligations in the ordinary course of business as they generally become due;

(c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his or her obligations, due and accruing due;

(d) who has made or is deemed to have made an assignment in bankruptcy or is the subject to a bankruptcy order under section 43 of the *Bankruptcy and Insolvency Act*;

(e) whose property is in the possession or control of a receiver within the meaning of subsection 234(2) of the *Bankruptcy and Insolvency Act*; or,

(f) with respect to whom proceedings under the *Bankruptcy and Insolvency Act* or the *Companies' Creditors Arrangement Act* have been commenced.

“proceeds” includes all identifiable or traceable personal property of any kind, whether tangible or intangible, derived directly or indirectly by a debtor from any processing, manufacturing, repacking or other dealing with product subject to a trust provided in section 3, and includes proceeds of proceeds.

“seller” means a person who in the ordinary course of business supplied a product to a debtor;

“trust” means the trust as provided in section 3;

“unpaid seller” means a seller who:

- (a) supplied a product to a debtor under a contract providing for payment before the expiry of 30 days from the date of delivery;
- (b) has not received the consideration payable by the debtor in the amount provided in the contract; and
- (b) delivered to the debtor the notice referred to in section 8.

3. (1) Notwithstanding any other enactment of Canada, any enactment of a province or any other law, where an insolvent debtor has defaulted in payment to an unpaid seller, the product held by the insolvent debtor and proceeds of a product, equal in value to the amount or amounts in default and such other amounts as prescribed are deemed:

- (a) not to be and never to have been part of the estate or property of the insolvent debtor whether or not the property has been kept separate and apart as property held in trust;
- (b) to be held in trust from the time that the property was received by the debtor;
- (c) to be beneficially owned by the unpaid seller.

(2) Subsection (1) applies without regard to:

- (a) the terms of a security agreement between the debtor and a secured party under which the product or proceeds is collateral;
- (b) the date attachment of a security interest arising under such security agreement; or
- (c) date when the insolvency of the debtor arose.

(3) Property deemed held in trust in the form of cash or a deposit at a deposit-taking institution shall be segregated and kept separate from property of the debtor that is not trust property.

(4) An unpaid seller:

(a) is not required to prove as a condition of being a beneficiary under a trust referred to in subsection (1) that trust property held by the debtor is proceeds of the same product supplied to the debtor by the unpaid seller; and

(b) does not cease to be a beneficiary under the trust when the product supplied by the unpaid seller to the debtor or the proceeds of that product have been sold or otherwise disposed of.

(5) A trust arising under subsection (3) is deemed to be a trust within clause 67(1) (a) of the *Bankruptcy and Insolvency Act*.

4. Personal property acquired by an insolvent debtor while any amount remains owing to a seller is outstanding is presumed to be subject to the trust unless it is established that the property was not obtained by the debtor from proceeds of a product.

5. The trust referred to in section 3 is discharged when all payment obligations owing to all unpaid sellers who supplied product to a debtor have been paid.

6(1) A person who acquires an interest in property subject to a trust referred to in section 3 takes the property subject to the trust interest unless:

(a) the person gave full value for the interest and did not know and did not have reasonable basis for knowing that the property is subject to the trust; or,

(b) the property subject to the trust was acquired by the person in a sale occurring in the ordinary course of the debtor's business.

(2) A person referred to in subsection (1) (a) is deemed to know of the trust if a notice of the trust is registered as prescribed.

(3) For the purposes of subsection (1) cancellation of a debt owing by the debtor to the person does not constitute value.

(4) An account debtor of the debtor may not set-off against an account that is trust property an obligation of the debtor to the account debtor.

7. Except as otherwise provided in this Act, the law of trusts as established by the courts of equity and law apply to a trust referred to in section 3.

8. (1) In order to be beneficiary of a trust referred to in section 3, a seller must deliver a written notice, as prescribed, to a debtor of his or her intention to assert rights as a beneficiary under the trust not more than 30 days after the date payment is due under the contract of sale.

(2) The notice referred to in subsection (1) may be:

(a) contained on an invoice or billing document delivered separately or accompanying delivery of the product to the debtor; or

(b) delivered by sending it as electronic mail to the address of the debtor set out on a universal resource locator or any public documentation of the debtor.

9. On application of an unpaid seller, the debtor or other interested person, the court may:

(a) determine the property that is subject to the trust;

(b) determine the sellers who are beneficiaries of the trust;

(c) designate a person to act with or without security as administrator of the trust property and give directions to such person with respect administration of the trust and compliance with this Act;

(d) grant to the person referred to in (c) the power to take possession of the trust property and deeds, books, records and documents relating thereto;

(e) order delivery of trust property and deeds, books, records and documents relating thereto to the person referred to in (c);

(f) order account debtors to make payment to the person referred to in (d) trust property in the form of accounts that are due and payable and accounts that are due when the accounts become payable;

(g) order a trustee appointed pursuant to the *Bankruptcy and Insolvency Act* or a liquidator appointed pursuant to the *Winding-up and Restructuring Act* who is in possession or control of the property to transfer it the person referred to in (c);

(h) set a date for distribution of the trust property held by the person referred to in (c);

(i) order payment out of the amount held by the person referred to in (c) or payable to such person:

(i) the court and administrative costs; and

(ii) the balance pro rata to the unpaid sellers who became trust beneficiaries before the date set for distribution of the amounts paid to the person referred to in (a);

(j) order discharge and, when appropriate replacement, of a person referred to in clause (c);

(k) make any other order the court considers appropriate in order to implement the provisions of this Act.

10. (1) An application under section 9 is not an action, suit or proceeding to which sections 11, 11.01 or 11.02 of the *Companies' Creditors Arrangement Act* apply.

(2) The rights of an unpaid seller under this Act are not affected by Part III of the *Bankruptcy and Insolvency Act* or the *Companies' Creditors Arrangement Act*.

11. The obligations of a debtor under this Act apply with necessary modifications to a receiver within the meaning of subsection 234(2) of the *Bankruptcy and Insolvency Act*, and any other person who has been lawfully appointed to take or has lawfully taken possession or control of any property of the debtor that is an product or proceeds of an product.

12. Any agreement or undertaking providing that this Act does not apply to a contract between a seller and a debtor is void.

13. The Governor in Council may make regulations for carrying out the purposes and provisions of this Act and prescribing anything that is to be prescribed under this Act and, without limiting the generality of the foregoing, may make regulations:

- (a) defining the kinds of fresh fruits and vegetables included in the definition of "product";
- (b) setting the amount referred to in clause (a) and (c) of the definition of "debtor";
- (c) setting the amount referred to in subsection 3(1);
- (d) defining the kinds of persons engaged in a businesses to which this Act does not apply;
- (e) defining the contents of notice which may be given referred to in subsection 8(1).
- (f) prescribing the procedures for applications under subsection 9(1).

14. The Act comes into force on a day or days to be fixed by the Governor General.

Fresh Fruit and Vegetable Products Protection Regulations

FRESH FRUIT AND VEGETABLE PRODUCTS PROTECTION ACT

SOR/2016-___

His Excellency the Governor General in Council, on the recommendation of the Minister of Agriculture, pursuant to section 13 of the *Fresh Fruit and Vegetable Products Protection Act* hereby makes the annexed Fresh Fruit and Vegetable Products Protection Regulations.

1. In section 2 of the Act, the term "product" means all fresh fruits and vegetables and edible fungi but does not include:
 - (a) any fruit or vegetable that has been planted as seed;
 - (b) nuts and wild fungi.

2. The amount referred to in clause (a) of the definition of “debtor” in section 2 of the Act is \$100,000.
3. The amount referred to in clause (c) of the definition of “debtor” in section 2 of the Act is one metric ton (2205 lbs).
4. The notice referred to in subsection 8(1) shall be clearly titled “Notice of Intent to Preserve Trust Benefits” and shall contain:
 - i. Name and address of debtor;
 - ii. Name and address of seller;
 - iii. Date of the transaction,
 - iv. A brief description of the product sold,
 - v. Invoice price;
 - vi. Terms of payment;
 - vii. Amount unpaid.
5. Members of the Fruit and Vegetable Dispute Resolution Corporation may provide the notice referred to in subsection 8(1) by alternatively including the exact statutory wording below on all invoices and billing statements:

The products listed on this notice are sold subject to the trust authorized by subsection 3(1) of the Fresh Fruit and Vegetable Products Protection Act. The seller of these commodities retains beneficiary status over these commodities, all inventories of food or other products derived from these commodities, and any receivables or proceeds from the sale of these commodities until full payment is received.