



July 15, 2014

Paula Halucha
Director-General,
Marketplace Framework Policy Branch
Industry Canada
235 Queen Street, 10th Floor, East Tower
Ottawa, Ontario K1A 0H5
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Re.: Proposed Amendments to Canada's Bankruptcy and Insolvency Act (BIA) – Extend Financial Protections to Frozen Produce

Dear Director-General Halucha:

The Frozen Potato Products Institute (FPPI) is the trade association representing the interests of the producers and processors of frozen potato products in North America. The frozen potato products industry is committed to producing safe, wholesome, and nutritious products that consumers enjoy. FPPI appreciates this opportunity to provide comments regarding Industry Canada's request for feedback on BIA's existing super-priority for produce sellers, potentially expanding it to benefit U.S.-based fresh produce farmers and extending the delivery period from 15 days to 30 days, which is more consistent with practices in the marketplace.^{1/}

The Canada-U.S. Regulatory Cooperation Council (RCC) action plan^{2/} articulates how Agriculture and Agri-Food Canada (AAFC) and the United States Department of Agriculture (USDA)-Agricultural Marketing Service (AMS) "will establish comparable approaches to achieve the common goal of protecting **Canadian and U.S. fruit and vegetable suppliers** from buyers that default on their payment obligations." RCC did not limit the scope of protection to only *fresh* fruits and vegetables as suggested under *Membership Requirements for Buyers and Sellers of Fresh Fruit and Vegetables* in SFCA's "A New Regulatory Framework for Federal Food Inspection: Overview of Proposed Regulations".^{3/} This has been the principal objective of the U.S. Perishable Agricultural Commodities Act (PACA),^{4/} administered by USDA/AMS for decades, through which sellers of perishable

^{1/} Section on Fruit and Vegetable Suppliers in "Statutory Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act" (<http://www.ic.gc.ca/eic/site/cilp-pdci.nsf/eng/c100873.html#s45>)

^{2/} Agriculture and Food 1 Working Group Record of Decisions (April 27, 2012), <http://www.agr.gc.ca/eng/industry-markets-and-trade/statistics-and-market-information/by-product-sector/horticulture/horticulture-canadian-industry/financial-protection-to-produce-sellers/agriculture-and-food-1-working-group-record-of-decisions-april-27-2012/?id=1344605278540>

^{3/} The Canada-US Regulatory Cooperation Council (RCC) agreement included a commitment to address financial risk mitigation in the trade of fresh fruit and vegetables. (<http://www.inspection.gc.ca/about-the-cfia/accountability/consultations/federal-food-inspection/overview-of-proposed-regulations/eng/1400451508255/1400451811916#a4>)

^{4/} 7 U.S.C. § 499a et seq.

agricultural commodities (fresh and frozen) have been protected from defaulting buyers.^{5/} The PACA trust provides a high level of protection and places suppliers' – whether U.S. or Canadian - interests in a debtor's assets superior to those of other creditors, including secured creditors. Reciprocal protection should be afforded to U.S. suppliers in Canada.

Frozen potato products are the largest single frozen commodity in the U.S. and possibly North America. Once produce is cut, it becomes more perishable. From a quality standpoint, the shelf-life varies for different types of frozen produce and products cannot be stored frozen indefinitely. That is why frozen produce is considered perishable and protected under PACA.^{6/}

Due to the perishability of fresh and frozen potatoes, potato producers, shippers, and processors stand to lose a substantial amount when a buyer declares bankruptcy since repossession of shipments is not possible. A PACA-like trust mechanism and coverage of such products would benefit myriad farmers, shippers, and processors who deal with this commodity. Additionally, a BIA statutory trust mechanism would provide the necessary transparency and security to buyers and sellers of produce – both fresh and frozen – and guarantee access to all suppliers without the need for government funding or administration.

In order to ensure “comparable approaches” between the U.S. and Canada with respect to perishable fruits and vegetables, FPPI members urge Industry Canada to ensure that amendments to and reform of BIA provide PACA-like treatment of both fresh and frozen produce marketed in Canada. Comparable approaches will allow for reciprocity between the U.S./Canadian industries and minimize potential trade barriers across borders.

Specifically, FPPI recommends that financial protections extend to both fresh and frozen produce processors and dealers and not be limited to farmers to account for all members of the supply chain as the produce moves through commerce. FPPI suggested language in Canada's Bankruptcy and Solvency Act Section 81.2. is highlighted in **bold** below:

81.2 (1) Where

(a) a farmer, **processor, or dealer** has sold and delivered products of agriculture, ...

81.2 (2) In this section, ...

“products of agriculture” includes

^{5/} In January 2000, AmeriServe Food Distribution, Inc., the largest food service distributor in the United States, filed bankruptcy. PACA trust claims involving over \$11 million in battered and coated frozen potato products were honored after USDA clarified that battered or coated frozen potato products were considered “perishable agricultural commodities” as the process does not alter the essential character or texture of the potatoes. Likewise, PACA provided trust protection to sellers of battered and coated frozen potato products when Fleming Companies, Inc., a large retail grocery chain filed for bankruptcy.

^{6/} 7 U.S.C. § 499a(b)(4) (defining “perishable agricultural commodity” as including Fresh fruits and Fresh vegetables of every kind and character, “whether or not frozen or packed in ice”).

(a) grain, hay, roots, vegetables, fruits, other crops and all other direct products of the soil, and ...

81.2 (3) For the purposes of this section, each thing included in the following terms as defined in subsection (2), namely,

(a) "products of agriculture", ...

comprises that thing **in any form or state and any part thereof and any product or by-product thereof or derived therefrom** (emphasis added).

It is noteworthy that "products of agriculture" is already defined in BIA to include all forms and states, encompassing fresh, frozen, whole, sliced, chopped, etc.

Alternatively, FPPI suggested amendments to BIA could limit the applicability of the proposed statutory deemed trust mechanism and corresponding financial protections to "perishable agricultural commodities as defined in the U.S. Perishable Agricultural Commodities Act," which, as explained above, encompasses both fresh and frozen produce. ^{7/}

Industry Canada should supplant a trust mechanism for the weaker protections currently afforded by Section 81.2., thereby ensuring reciprocity between U.S. and Canadian industries.

FPPI is grateful for Industry Canada's continued resolve in furtherance of the RCC initiative. FPPI thanks Industry Canada for taking these comments into consideration.

Sincerely,



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Frozen Potato Products Institute

cc Agriculture and Agri-Food Canada (AAFC) Minister Gerry Ritz
Canadian Food Inspection Agency (CFIA) Senior Vice President Neil Bouwer
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^{7/} *Id.*