Via Electronic Mail

July 15, 2014

Mr. Paul Halucha
Director-General
Marketplace Framework Policy Branch
Industry Canada
235 Queen Street, 10th Floor, East Tower
Ottawa, Ontario K1A 0H5

Dear Mr. Halucha,
We the undersigned, representing American growers and suppliers of fresh fruits and vegetables present for your consideration a submission regarding financial risk mitigation for the fresh produce sector in the event of insolvency.

Through the Regulatory Cooperation Council, efforts were made to find solutions that would enhance the comparability between the Canadian and U.S. systems of financial risk mitigation in the fresh produce industry in the event of insolvency. While market-based options such as bonding and insurance were explored, analysis by government and industry representatives showed that these options would be expensive and ineffective.

Reforms to the existing protections for farmers within the *Bankruptcy and Insolvency Act* (BIA)- set out in section 81.2 - would provide improvements to the status quo. This submission articulates changes that we would recommend.

Sincerely,

California Citrus Mutual
California Grape & Tree Fruit League
California Strawberry Commission
Florida Fruit & Vegetable Association
Florida Tomato Exchange
Georgia Fruit & Vegetable Growers Association
Northwest Horticultural Council
Produce Marketing Association
Texas International Produce Assoc.
United Fresh Produce Association
Western Growers Association

Submission to Industry Canada regarding amendments to the *Bankruptcy and Insolvency Act* to provide payment protection for the fresh fruit and vegetable sector

By Fresh Fruit and Vegetable Trade Associations in the U.S.

July 15, 2014

Dear Minister Moore,

We are pleased to respond to the request for public comment made by Industry Canada in reference to changes that should be made to the ***Bankruptcy and Insolvency Act.*** Specifically, we would like to submit comments with respect to language found in section 81.2 of the Act that creates certain rights for agriculture in bankruptcy proceedings. Eleven trade associations representing all levels of the United States' fruit and vegetable sector jointly submit these comments. A short description of each submitter is included in the Appendix, but our organizations collectively account for well over 75% of all American production.

As your request for public comment notes, on February 4, 2011, Canadian Prime Minister Harper and President Obama created the U.S. – Canada Regulatory Cooperation Council (RCC). Through the RCC, both countries committed to "work together to promote economic growth, job creation, and benefits to our consumers and businesses through increased regulatory transparency and coordination."[1] Within the Agriculture and Food portfolio both governments committed to a "[d]eliverable [o]utcome" to "[d]evelop comparable approaches to financial risk mitigation tools to protect Canadian and U.S. fruit and vegetable suppliers from buyers that default on their payment obligations."[2]

Since the RCC process began a large and diverse group of American fruit and vegetable producers and trade associations have been engaged with their Canadian counterparts and representatives from both governments, including Industry Canada, to make real the promise made in the RCC action plan around financial risk mitigation tools. The working groups that were thus formed have meticulously combed Canadian and American law to examine this issue in order to identify changes in Canada that would provide American growers financial risk protection in that country.

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[1] UNITED STATES–CANADA REGULATORY COOPERATION COUNCIL, *Joint Action Plan*, Dec 2011, page i, available at http://www.whitehouse.gov/sites/default/files/omb/oira/irc/us-canada_rcc_joint_action_plan.pdf

[2] *Id*. at p.10.

In the United States, produce growers are afforded the protection of the "PACA Trust".[3] This is a risk mitigation tool, created by Congress in 1984 as an amendment to the Perishable Agricultural Commodities Act ("PACA") which creates a statutory trust. By creating a trust, Congress created a fiduciary relationship between produce sellers and produce buyers that gives produce sellers superior creditor rights over other creditors. Prior to the PACA trust, if a produce buyer became insolvent, produce sellers had to stand in line behind secured creditors such as banks for payments. As last in line, produce sellers often received no money for their produce; produce which they could also not reclaim given the product's inherently perishable nature. The PACA Trust has however ensured that produce buyers utilize the proceeds they generate from the sale of the produce to pay the sellers of that produce. Since the inception of this self-help tool in 1984, suppliers of fresh produce have benefited from the use of the PACA Trust directly with TRO activity in Court as well as bankruptcy proceedings. In fact, Canadian growers and shippers from British Columbia to Nova Scotia who have exported to the United States have availed themselves of the PACA Trust over the last 30 years as well.

As has been mentioned, Canadian producers enjoy the benefits of the PACA system in the United States yet American producers have no such comparable protection in Canada. Over the years, numerous American growers have been hampered by this inequity. Indeed, since 1980, Eastern Canada has experienced a significant bankruptcy on a nearly yearly basis where the produce industry has had cumulative losses well in excess of $100 million. One of the larger Canadian retailers at the time, Steinberg, Inc., filed bankruptcy in August 1992 and the finalization of that bankruptcy- now more than twenty years later- is still <u>not</u> resolved. Caught up in that company's bankruptcy are numerous American produce sellers who are owed millions of dollars and for those that have been lucky enough to collect anything they have received only a few cents on the dollar.

More recently in 2011, a large produce buyer, North-West Produce Ltd. Vancouver, British Columbia filed an assignment in bankruptcy in which the major secured creditor, a bank, received full payment of $562,000 while 102 unsecured creditors were unable to recover the $2,333,850 owing to them. Among the 102 creditors who were left out in the cold were 59 produce growers or shippers, among whom were 21 American creditors owed more than half a million dollars.[4]

While no exact statistics are available on a nationwide basis, estimates of the magnitude of harm that American sellers are experiencing can be made. In a study by AON commissioned by Agriculture and AgriFood Canada in 2013, actuarial specialists estimated that the average net bankruptcy loss in Canada's fresh fruit and vegetable sector is

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[3] 7 U.S.C. §499e(c).

[4] Office of the Superintendent of Bankruptcy Canada; calculations by DRC.

approximately $19 million per year.[5] Canadian sales are liable for approximately 30 percent of the loss and U.S. sales make up nearly all of the balance.[6]

Obviously this inequity between our two nations cannot continue. Canadian exporters are able to access the PACA Trust system in the United States on equal footing with any American seller, yet American exporters lack similar protection when operating in Canada. This lack of reciprocity not only is inequitable but it also dampens American interest in expanding trade with Canada in this sector. Indeed, these reasons are exactly why the RCC was tasked with tackling this problem.

CHANGES TO *THE BANKRUPTCY AND INSOLVENCY ACT*

The Bankruptcy and Insolvency Act was amended in 1992 to include two provisions s81.1 and s81.2, specifically focused on providing suppliers limited priority rights when a purchaser enters bankruptcy. Over the years those provisions have been specially tailored for fisherman, farmers and aquaculturists, so on its face these changes should provide some of the very protection we are looking for. Unfortunately, as currently structured the law does not work for American exporters selling into Canada.

Definition of farmer

The special rights of 81.2 apply only to "a farmer" who "has sold and delivered products of agriculture." In the Act, farmer is further defined as "the owner, occupier, lessor and lessee of a farm." Products of agriculture refer to "grain, hay, roots, vegetables, fruits, other crops and all other direct products of the soil."[7]

Use of this definition does not reflect the reality of the fresh fruit and vegetable marketing chain. Small shipments are aggregated into larger ones as the product moves from the original grower through dealers, wholesalers, retailers and finally to consumers. As a consequence, the risk of dealing in perishable products is transferred successively along every link in the supply chain. Restricting the 81.2 rights to only 'farmers' thus excludes most members of the supply chain.

A more effective definition would cover any "seller" of fresh fruit and/or vegetables. Such a seller could be either domestic or <u>international</u>. Indeed, making such a change to the definition is especially necessary to provide any protection to American sellers who largely

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[5] AOL Actuarial Consulting (An AON Company). *Feasibility of Private Insurance Models for Canada's Fresh Produce Industry*. Study prepared for AAFC Canada, January 2014.
[6] *Id*.
[7] 81.2 also applies to "indirect products of the soil" including and honey, meat, livestock, dairy products, and eggs.

are not the farmer of origin for the product. By comparison, the PACA provides coverage for any participant in the market, including farmers, packers, dealers, and wholesalers.[8]

Inventory assets

The right of repossession applies only to inventory. For creditors in the fresh fruit and vegetable sector, any inventory left unsold after a few days will be spoiled and worthless. While 81.2 does offer farmers the right to other inventory, this only applies to inventory not claimed by other suppliers (who are given similar repossession rights under 81.1). In order for fresh fruit and vegetable creditors to receive, compensation for unpaid shipments it is necessary to expand the scope of allowable assets from inventory to include cash and accounts receivable related to the fruit or vegetable sale.

In the United States, PACA-trust assets include cash, accounts receivable, and inventory derived from the sale of fresh produce.[9] Furthermore, trust assets may be traced to other assets if the debtor has dissipated the trust.[10]

Delivery and demand periods

For a fresh fruit and vegetable seller to use the repossession right in 81.2, the product must have been delivered to the purchaser within the fifteen-day period before the day on which the purchaser became bankrupt or subject to receivership. The seller must also file a written demand for repossession within fifteen days after the purchaser became bankrupt or subject to receivership. While it appears that this fifteen-day window, as compared to thirty-day window for other creditors, was intended to give perishable suppliers some type of priority status, American sellers may experience a diminution in these priority rights due to a lag in receipt of notice of bankruptcy. As such, we would suggest amending the law to take such a time lag in notice into account. Furthermore, it is critical to note that the repossession right must be expanded beyond claims on inventory to other assets.

Limited Statutory Deemed Trust

As part of the RCC process on this issue, the Canada-US Law Institute was commissioned to analyze this issue. The legal analysis provided a thorough examination of existing Canadian federal and provincial laws, but in its recommendations section stated this: "[i]ndustry organizations on both sides favor emulating the PACA in Canada, including the Fresh Produce Alliance (consisting of the Canadian Produce Marketing Association, the Canadian Horticultural Council, and the DRC [Fruit and Vegetable Dispute Resolution

[8] 7 CFR §46.46
[9] 7 U.S.C. §499e(c).
[10] *Id*.

Corporation]). Increasing the stability of the fresh produce market will not only assist farmers and produce traders, but perhaps even consumers through lower prices. In sum, these benefits ultimately would be enjoyed by the general public."[11] Specifically, the report discusses and advocates for the creation of a limited statutory deemed trust to ensure that bankruptcy assets are secure and accessible.

A limited deemed trust:

- Ensures that the debtor's fresh fruit and vegetable-related assets are not included in the bankruptcy estate;
- Ensures that fresh fruit and vegetable creditors are afforded limited priority status with respect to assets;
- Establishes a procedure to hold fresh fruit and vegetable-related assets until all available funds are collected and valid claimants are identified;
- Establishes criteria so that fresh fruit and vegetable creditors share in pro-rata distribution of assets;
- Is limited to the accounts receivable, cash, and inventory stemming from the sale of the suppliers' goods and does not apply to buildings, equipment, vehicles and non-fresh fruit and vegetable related assets;
- Does not require a costly administrative or institutional structure;
- Does not require government funds or credit guarantees.

Providing seller with an opportunity to efficiently utilize the courts to collect past due obligations on a priority basis BEFORE a buyer becomes bankrupt is a preferred solution. Currently debtors threaten a supplier that if they are sued they will simply file bankruptcy and the produce supplier will likely get nothing. A deemed trust removes this threat and supports an orderly marketplace. A limited deemed trust is supported by industry because it provides a tool for sellers before and after an insolvency occurs.

Temporary Restraining Orders and Enabling Legislation

There is a need to have a parallel tool similar to that available in the U.S. to use temporary restraining orders through the court system to freeze the bank accounts of debtors. In the United States under the PACA Trust system sellers are able to file in Court for a temporary restraining order to freeze assets of a buyer before bankruptcies even occur when it is clear that the buyer is dissipating trust assets. The purpose of the TRO is to maintain assets until the trust beneficiaries (seller) are paid.

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[11] THE CANADA-U.S. LAW INSTITUTE, *Canada's Road to PACA: Hurdles and Pathways Final Report*, July 2012, page 47, available at http://www.cusli.org/lawjournals/Reports/CUSLI%20FINAL%20REPORT%20TO%20THE%20USDA.pdf

This is a key self help tool for suppliers to quickly resolve disputes under the PACA in the U.S., which greatly benefits and reduces the risk exposure of shippers in produce transactions. Specifically, the PACA establishes "jurisdiction" in the district courts for two specific types of actions: "(i) actions by trust beneficiaries to enforce payment from the trust, and (ii) actions by the Secretary to prevent and restrain dissipation of the trust."[12] In turn, this grants U.S. District Courts jurisdiction over actions by private parties seeking to enforce payment from the PACA trust.[13] Regardless of other BIA amendments, there should be separate enabling legislation to mirror this provision in PACA.

Conclusion

Our two countries share a common commitment to free trade and, as evidenced by the agreement made by President Obama and Prime Minister Harper, a desire to remove barriers separating our two markets. In 2012, Canada imported nearly $3.5 billion worth of fresh produce from the United States. Those products were grown, shipped and delivered by our members and we thus have a strong and compelling interest in ensuring that Canada creates risk mitigation tools that are as strong and as comparable to those available in the United States as possible. While we strongly believe in the need for reciprocity on this issue, unfortunately the RCC process has not thus far met this challenge and provided <u>any</u> real vehicles that address this concern. We believe however that the potential amendment to the Bankruptcy and Insolvency Act that the government of Canada is contemplating now could be beneficial. The reforms suggested above begin to close the gap found between our two countries with respect to risk mitigation and protection of the fruit and vegetable sector. Ideally, these reforms would be coupled with the creation of a limited deemed trust and creation of a TRO. We look forward to continuing to engage with the government of Canada in order to try and successfully resolve this open issue and trade concern.

Sincerely,

California Citrus Mutual
California Grape & Tree Fruit League
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[12] 7 U.S.C.A. § 499e(c)5

[13] FRANCIS LAMER, PRIORITY OF CROWN CLAIMS IN INSOLVENCY at ch. 23 (Scarborough, Ont; Carswell, looseleaf 1996).

Appendix: List and Description of Submitting Organizations

California Citrus Mutual is a voluntary membership, grower based organization representing some 2000 producers. The industry is a $2b industry supplying 85% of the nation's fresh citrus needs. Our mission is to enhance the environment in order to obtain our economic goals via information, education and advocacy.

California Grape and Tree Fruit League is a voluntary association that represents, by volume, approximately eighty-five percent of the state's table grape, blueberry, kiwi and deciduous tree fruit production in public policy issues.

The California Strawberry Commission is a state government agency representing all of California's strawberry shippers, processors and farmers. With an emphasis on food safety education, Commission activities focus on production and nutrition research, trade relations, public policy, marketing and communications. California produces more than 85 percent of all strawberries grown in the United States.

The Florida Fruit & Vegetable Association is a full-service organization serving Florida's grower-shipper community since 1943. FFVA represents a broad range of crops: vegetables, citrus, tropical fruit, berries, sod, sugar cane, tree crops and more.

The Florida Tomato Exchange is an association of Growers/Shippers of fresh tomatoes that produce over 90% of the Fresh Tomatoes shipped from Florida, "America's #1 Fresh Tomato production area".

The Georgia Fruit and Vegetable Growers Association is an agricultural trade association founded in 1996 to provide support and assistance to fruit and vegetable producers in Georgia and the Southeast. In 2012 the farm gate value of Georgia's fruit and vegetable industry was over $1.1 billion dollars.

The Northwest Horticultural Council (NHC) was incorporated in 1947 with the broad purpose of coordinating the activities of its members and to assist in handling problems common to the Northwest tree fruit industry. Its current work focuses on national and international policy issues affecting growers and shippers in Idaho, Oregon and Washington.

The Produce Marketing Association is a trade organization representing companies from every segment of the global fresh produce and floral supply chain.

The Texas International Produce Association (TIPA) was created in 1942 by a group of industry leaders who shared a vision to expand the Texas produce.

United Fresh represents more than 1,200 companies at the forefront of the fresh and fresh-cut produce industry, including growers, shippers, fresh-cut processors, wholesalers, distributors, retailers, foodservice operators, industry suppliers and allied associations. United Fresh works to increase consumption of fresh produce for public health, shape legislative and regulatory policies that serve the public and provide for a sound business climate for its members, while providing scientific and technical leadership in food safety, quality assurance, nutrition and health, and develop educational programs and business opportunities to assist member companies in growing successful businesses.

Western Growers Association is an agricultural trade association founded more than 80 years ago whose members grow, pack and ship roughly 50 percent of the annual U.S. production of fresh fruit, vegetables and tree nuts.