USDA Agricultural Marketing Service

1400 Independence Avenue, SW
Room 1510, STOP 0245
Washington, D.C. 20250-0201

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

Dear Mr. Halucha:

For over 15 years, the United States has been requesting that Canada take action to bring its financial protection regime closer in alignment with the U.S. Perishable Agricultural Commodities Act (PACA) for the benefit of produce industries on both sides of the border. This issue has been repeatedly raised in many bilateral venues, including the U.S.-Canada Consultative Committee on Agriculture.

On February 4, 2011, Prime Minister Harper for Canada and President Obama for the United States created the Regulatory Cooperation Council (RCC) to better align both countries regulatory approaches in a variety of important areas. The two countries agreed to focus efforts on developing "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." The financial risk mitigation goal was focused on situations where produce sellers are negatively impacted by the intentional or unexpected failure to pay for produce deliveries in instances of buyer insolvency and bankruptcy. It is very important for produce to have special treatment as a national bankruptcy policy due to its extremely perishable nature. When these issues are not dealt with quickly and appropriately, it leaves no commercially saleable collateral. In addition, it has linkages to national health, food quality and food security.

While the RCC work has led to stated plans to amend the Safe Foods for Canadians Act in order to require membership in a single, third-party dispute resolution body for fresh produce buyers and sellers, this is only a minor step toward the true and stated RCC intention – finally addressing the need for comparable approaches to financial protection for produce sellers in Canada.

We note that Canada's Bankruptcy and Insolvency Act (BIA) exhibits some recognition of the need for priority status for select persons. However, the results of the RCC demonstrate that the BIA needs serious consultation and discussion in order to expand it to protect all produce traders, including fresh and frozen, in instances of insolvency and bankruptcy. Such an expansion would be another important step in the effort to develop comparable financial mitigation tools in Canada.

We strongly encourage Industry Canada to take advantage of and to benefit from the extensive work already done by the RCC public-private partnership that assessed the differences between

the U.S. and Canadian regimes. To that end, we hereby submit a range of key documents that were the foundation of discussions and/or were developed as a direct result of the focused dialogue conducted under the RCC process. The attached documents include a letter addressed to Agriculture and Agri-Food Canada, providing more context on a comparable financial risk mitigation regime in Canada.

The United States remains committed to helping Canada work toward the development of a financial risk mitigation method that will protect our respective produce industries.

Thank you for your consideration of this information.

Sincerely,

Linda Leary

Chuck Parrot
Deputy Administrator
Fruit and Vegetable Program

Enclosures (11)

Referenced Documents

1. Parrot, Charles (Deputy Administrator, Fruit and Vegetable Program, Agricultural Marketing Service, United States Department of Agriculture). Letter to: Susie Miller (Director General, Agriculture and Agri-Food Canada). 2013, November 8.
2. Edward Belobaba, *Establishing a PACA-Like Trust in Canada* (18 Dec 2003), Legal Opinion for the Fruit and Vegetable Dispute Resolution Corporation.
3. Donald Buckingham, *Constitutional Considerations in Securing Financial Protection…in Canada.* (September 2004).
4. Douglas Hedley, *Report to the Fresh Produce Alliance on the Financial Practices of the Canadian Horticulture Sector Project* (2005)
5. Pierre & Ricard, *Survey of the Commercial Practices in the Canadian Fresh Fruit and Vegetable Value Chain* (October 7, 2008)
6. Patrick Hanemann, *Risk Experience in Canada & Risk Mitigation in the U.S.: Perspective from the Canadian Produce Community* (2 December 2008)
7. *Final Report of the Federal-Provincial Working Group on Fair and Ethical Trading Practices in the Canadian Horticultural Sector* (May 12, 2009)
8. Serecon Management Consulting, *Options for Financial Risk Mitigation in Canada's Fresh Produce Industry* (March 2012), Report for Agriculture and Agrifood Canada.
9. Gomel, Rizwan & Ricketts, *Origins, Creation, and Evolution of the Fruit & Vegetable Dispute Resolution Corporation* (January 2012)
10. Canada * United States Law Institute (CUSLI), *Canada's Road to PACA: Hurdles and Pathways, Final Report* (July 2012)
11. Fresh Produce Alliance (FPA), *Securing Payments and Regulating Business Practices for the Canadian Fresh Fruit & Vegetable Industry* (November 2012)
12. IAO Actuarial Consulting Services Inc., an Aon Company, *Feasibility Study of Private Insurance Models for Canada's Fresh Produce Industry* (January 15, 2014)

USDA Agricultural Marketing Service

1400 Independence Avenue, SW.
Room 2077-S, STOP 0235
Washington, D.C. 20250-0235

NOV - 8 2013

Ms. Susie Miller
Director General
Agriculture and Agri-Food Canada
1341 Baseline Road, Tower 5, Floor 6, Room 322
Ottawa, Ontario K1A 0C5

Dear ~~Ms. Miller~~ Susie:

I trust you and your staff had a wonderful summer and will be back in full swing on the Regulatory Cooperation Council (RCC) Financial Protection for Produce Sellers Initiative this fall. As you know, I sent my Deputy, Bruce Summers, to attend the recent stakeholders meeting in Ottawa on August 13th at which time there was some discussion of the United States' expectations in regard to this project. You very kindly followed up on this meeting with both of us and other members of the Department via a phone call on September 26, 2013.

The Financial Protection for Produce Sellers Working Group was tasked to develop comparable approaches to financial risk mitigation to protect both Canadian and United States produce suppliers from buyers that default on their payment obligations. In the United States, produce suppliers are afforded several financial protections under the Perishable Agricultural Commodities Act (PACA), including a statutory floating trust. Canada is considering a method of financial protection for produce sellers that produces comparable outcomes to those available in the United States. As you requested during our September teleconference, we submit to you that any method of financial protection intended to produce similar results to those achieved in the United States should:

- Provide equal treatment/access to all unpaid produce sellers;
- Be enforced by an administrative or judicial body which has the authority to enforce all phases of the financial protection procedure;
- Establish clear criteria that identify the assets of a produce debtor that are "produce-related" and therefore subject to segregation for payment to produce creditors only;
- Clearly establish that produce-related assets of the debtor are not included in the debtor's bankruptcy estate;
- Establish clear criteria to determine which produce sellers are eligible for payment from the produce-related assets and clear instructions on how to make a claim;
- Afford unpaid produce sellers priority status in bankruptcy;
- Provide for the pro rata distribution of produce-related assets to all eligible claimants;
- Establish a procedure to hold produce-related assets until all available funds are collected and valid claimants are identified (e.g., temporary restraining order or injunction); and

- Promptly pay produce-related assets to valid claimants; for example, within 90 days of bankruptcy filing.

We understand that you and your staff are working towards making a recommendation to the Government of Canada as to what, if any, regulatory and legislative amendments should be sought to improve financial protection for produce dealers. We hope this information helps in developing that recommendation. We look forward to hearing your recommendation and learning what action the Canadian government will undertake to improve financial protection in Canada for produce dealers.

Sincerely,

Charles W. Parrott
Deputy Administrator
Fruit and Vegetable Program

ESTABLISHING A PACA-LIKE TRUST IN CANADA

A LEGAL OPINION

PREPARED BY

EDWARD P. BELOBABA

FOR

THE FRUIT AND VEGETABLE

DISPUTE RESOLUTION CORPORATION

DECEMBER 18, 2003

ESTABLISHING A PACA-LIKE TRUST IN CANADA

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ESTABLISHING A PACA-LIKE TRUST IN CANADA

I. Introduction

You have asked for my legal opinion on the feasibility of establishing a PACA-like trust in Canada similar to the one enacted in the US under the *Perishable Agricultural Commodities Act* ("PACA")[1]. In particular, you have asked me to address the following issues:

(1) The options available to establish a PACA-like trust in Canada;

(2) An assessment of the feasibility and merits of each option;

(3) An implementation plan for the preferred approach; and

(4) The feasibility and practicality of U.S. shippers using the PACA Trust in Canada.

My conclusions with regard to each of these issues are set out below. A detailed analysis then follows, providing first, some context and background; then an examination of each of the four issues set out above. To simplify the terminology, I will refer to the producers, shippers and others on the selling side of the transaction as "sellers", and the agents, brokers and distributors on the buying side of the transaction as "buyers". I have also included, for ease of reference, the relevant excerpts from the Canadian *Bankruptcy and Insolvency Act* [2] ("BIA"), attached under Tab 1.

II. Conclusions

1. Both the provincial and federal governments have the jurisdiction to enact a PACA-like trust law.

2. The provincial laws would be easier to enact, but would require separate legislative

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[1] *Perishable Agricultural Commodities Act*, 7 USC, section 499e et seq.

[2] *Bankruptcy and Insolvency Act*, RSC 1985 c.B-3, as amended.

initiatives in 10 provinces and 3 territories and would be limited in their application: the provincial laws would apply to "slow payment" cases, but not to bankruptcy situations. The federal law would be more difficult to enact, but would apply to both slow payment and bankruptcy.

3. The implementation plan should include a properly documented economic justification (i.e. the economic costs of the bankruptcies); an assessment of the political realities at both the federal and provincial levels; an identification and organization of the governmental and institutional sources of support; and a determination whether a provincial law should be pursued either in parallel with the federal enactment, or as a second best alternative.

4. U.S. sellers cannot use the PACA Trust in Canada.

III. Analysis

1. Context and Background

(1) The U.S. PACA Trust

The PACA was first enacted by Congress in 1930 in order to regulate the inter-state and foreign shipment and handling of perishable agricultural commodities, mainly fresh fruits and vegetables. In 1984, the PACA was further amended to add a "statutory trust" that provided as follows:

> "Perishable agricultural commodities… or products… and any receivables or proceeds from the sale of such commodities or products, shall be held by (the buyer) in trust for the benefit of all unpaid sellers… until full payment of the sums owing… has been received by such unpaid sellers."[3]

This 1984 amendment imposed the statutory trust even if the products or monies were not kept in a separate trust account, but were intermingled or mixed with the buyer's other products or monies. The PACA Trust is a "floating", non-segregated, statutory

[3] *Supra*, note 1, Section 499e(c)(2)

trust – the trust obligation binds the buyers, even if the products or monies have become co-mingled, until the seller has been paid[4].

The statutory trust was added because sellers of perishable agricultural commodities required the additional protection. Because of the need to sell perishable commodities quickly, sellers were often placed in the position of unsecured creditors to companies whose credit worthiness the seller was unable to verify. And, because of a large number of defaults by the buyers, and the sellers' status as unsecured creditors, the sellers ended up recovering very little, if anything, and only after the banks or the other lenders who had obtained security interests in the defaulting buyers' proceeds and receivables. In order to redress this imbalance, Congress added section 499 e(c) to PACA which imposed a statutory trust in favour of the sellers on both the products sold and the proceeds of sale.[5]

In order to protect their trust rights, sellers were required to mail a trust notice to the buyer setting out the seller's intention to preserve its trust rights under the PACA. In 1995, the legislation was further amended to allow PACA licensees a more convenient notification method. Although non-licensees were still required to file written notices within the time periods prescribed, as of 1995 PACA licensees have been able to preserve their PACA rights by including the following statement on their invoice or other billing documents:

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[4] See the *Report of the Committee on Agriculture of the House of Representatives on the Perishable Agricultural Commodities Act Amendments*, (Report No. 98-543, November 10, 1983) at page 2-3.

[5] As the House Committee explained in its Report, *supra*, note 4, at page 9:

> "The grower association witnesses stated that in slow pay or insolvency situations, sellers of perishable commodities are generally unsecured and therefore the last to receive payment. Buyers of such commodities generally use the commodities as collateral in financing their business operations, and should they experience cashflow problems or overextension of credit, their remaining funds and assets go first to their secured creditors. The seller of the perishable commodities, as the unsecured vendor, may then receive compensation dependent upon any remaining equity in the buyer's firm. [This amendment] would rectify such situations through the establishment of a trust which will ensure that sellers be given priority in the disposition of funds and assets of the buyer".

> "The perishable agricultural commodities listed on this invoice are sold subject to the statutory trust authorized by section 5(c) of the *Perishable Agricultural Commodities Act*, 1930 … The seller of these commodities retains a trust claim over these commodities… and any receivables or proceeds from sale of these commodities, until full payment is received."[6]

If these notification requirements are followed, the PACA Trust gives the seller an interest in the products and the proceeds that is superior even to that of the buyer's secured creditors. As discussed in more detail below, this is because the products and proceeds have been statutorily impressed with the quality of a trust, and as such they cannot and do not form part of the bankrupt's estate, and are therefore not subject to the claims of other competing secured or unsecured creditors.

(2) Reasons for using a trust

When certain products or proceeds are required, either by contract or by statute, to be held in trust for a third party (i.e. the seller), these products or proceeds are generally not included in the bankrupt's property or estate. Both Canadian and American bankruptcy legislation provide that property or money that is being held in trust is automatically excluded from the estate of the bankrupt, and not subject to the claims of the secured or unsecured creditors and is thus fully recoverable by the beneficiary of the trust.[7]

Because the products or proceeds being held in trust for the seller are not the buyer's property, the PACA Trust has allowed sellers to move quickly against slow-paying or bankrupt buyers. Because the PACA Trust is federal legislation, sellers can move against slow-paying buyers by bringing a "trust enforcement action" in federal court to enforce payment under the trust. The seller can also seek a temporary restraining order to freeze the bank accounts of the buyer until the seller has been paid. Typically, in the

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[6] *Supra*, note 1, Section 499e(c)(2)

[7] See, for example, section 67(1)(a) of the *Bankruptcy and Insolvency Act*, *supra*, note 2, discussed in more detail below in section 2(1).

U.S., the seller can be in federal court within 7 to 10 days of bringing the motion, often well in time to freeze the buyer's bank accounts before issues are further complicated by bankruptcy proceedings.[8] According to the PACA Branch of the USDA, "many produce sellers have found this a very effective tool to recover payment for produce".[9]

(3) Why the contractual approach is not an option

In theory, sellers could establish trust arrangements with buyers by using contractual agreements – whether by way of a separate written agreement, or an initialled acceptance (with the appropriate trust language) on the invoice. These agreements or invoices would make it clear that the buyer was holding the products or proceeds in trust for the seller until the latter was paid in full. And, if the products or proceeds were actually held in trust, i.e. they were held separate and apart from the buyer's own property, then the trust would be fully effective and the seller could recover these products or proceeds without regard to the claims of the other creditors.

Typically, however, the trust monies are not held in a separate account. Rather, the trust funds are intermingled with the buyer's own funds. The buyer has breached his contractual agreement to hold the proceeds in trust. But the seller's only remedy, absent legislation, is to sue the buyer for breach of the trust agreement. However, if the buyer is bankrupt, the likelihood that the seller will recover any damages for the buyer's breach of the trust agreement is minimal at best.

Consequently, although theoretically possible, the use of contractual agreements to establish a workable trust arrangement with the buyer is not a serious option.

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[8] Discussion with Stephen McCarron, of McCarron and Associates, a Washington D.C. law firm that specializes in PACA Trust enforcement actions.

[9] See *Protecting Your Trust Rights*, (2003) at page 3, a publication of the PACA Branch of the USDA.

(4) Why legislation is needed

The reason why Congress enacted the statutory trust in PACA, and the reason why a similar law may be needed in Canada, is because in most situations the buyer will fail to keep the trust monies in a separate or segregated account, and instead will mix them in with his own funds. Unlike the common law that requires that trust funds be held in a separate account or the trust collapses, a statute can "deem" the statutory trust to be a trust even if the products or proceeds have become mixed or co-mingled with the trustee's own property.

Where the statute requires that certain monies are to be held in trust and the monies are in fact held in trust, there is no need to be concerned about a "deemed trust". The trust monies will not be available to the other creditors, and will be fully recoverable by the beneficiaries of the trust.[10]

But where the trust funds have been mixed with other funds and are not held in a separate account, legislation is needed to "deem" the trust to continue and allow the beneficiary to recover the "trust" funds even in cases where the common law would say that there was no longer a valid trust because the trust funds were no longer identifiable.[11]

(5) Numerous examples of statutory trusts

There are numerous examples of statutory trusts in Canadian law, particularly at the provincial level. Provincial statutory trust laws typically involve taxing statutes that require an employer to withhold tax; or a retailer to collect tax and then remit the tax collected to the Crown. In order to minimize the possibility that not all of the tax will be properly remitted, the statute will require that the collecting agent hold the retained taxes in trust for the Crown. The idea is to create a trust of the retained taxes so that in

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[10] Houlden and Morawetz, *Bankruptcy and Insolvency Law of Canada* (3rd ed. 2003) at page 3- 40.1

[11] *Ibid*, at page 3-40.1

the event of a bankruptcy, the Crown as beneficiary will be entitled to repayment in priority to other creditors. [12]

In addition to provincial laws imposing statutory trusts in favour of Her Majesty to help in the collection of taxes, there are similar provisions in a wide range of other areas – pensions, insurance, health insurance, construction liens, employment standards, and real estate licensing. There are literally dozens of such laws on the books today.

The provincial statutory trust laws typically take two forms. One, exemplified by the Alberta *Livestock and Livestock Products Act*, imposes the statutory trust requirement but says nothing about what happens if the requirement is breached and the funds are co-mingled. Section 7(1) of the *Livestock and Livestock Products Act* provides as follows:

> "All money received by the licensed livestock dealer on account of the sale of livestock or livestock products, constitutes a trust fund… for the benefit of the patron who supplied the livestock… to the dealer, and the livestock dealer shall not appropriate or convert any part of it to the livestock dealer's own use… until the patron… has been paid for them".[13]

The second kind of provincial statutory trust law goes one step further and specifically "deems" that the trust funds shall continue to be held in trust even if the funds have not been segregated and become co-mingled. Section 28(3) of the Manitoba *Pension Benefits Act* is a good example:

> "Any sum required to be paid into a pension plan by an employer… shall be deemed to be held by the employer in trust… whether or not the amount thereof has been kept separate and apart by the employer…"[14]

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[12] Hogg , *Constitutional Law of Canada* , (4th ed. 2002) at page 648.

[13] *Livestock and Livestock Products Act*, RSA 2000, c.L-18

[14] *Pension Benefits Act*, CCSM, c.P-32, section 28(3).

It is interesting to note that the legislative language establishing the PACA Trust in 1984 does not explicitly "deem" the trust to continue if the trust funds are mixed with other monies. However, American courts have interpreted this provision as if this "deeming" language was part of the PACA Trust provision, basing their analysis largely on legislative intent and what they thought Congress was attempting to achieve.[15]

(6) The provincial jurisdiction over property and civil rights in the province

Under section 92(13) of the *Constitution Act*,[16] the provincial legislature has jurisdiction over "property and civil rights in the province". This is a far-reaching legislative jurisdiction that provides a constitutional foundation for provincial laws dealing with contracts and property, including statutory trust laws. Courts have long recognized that the provincial jurisdiction over property and civil rights includes the power to impose and define what constitutes a statutory "trust".[17] Courts have also recognized that in non-bankruptcy situations a provincial statutory trust law can validly "deem" monies to be held in trust even if the monies become co-mingled.[18]

(7) The federal jurisdiction over bankruptcy and insolvency

The federal government's exclusive power over bankruptcy and insolvency, under section 91(21) of the *Constitution Act*, includes the power to provide for the ranking of

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[15] Discussion with Stephen McCarron, supra, note 8, regarding American judicial interpretation of PACA section 499e(c)(2).

[16] (U.K.) 30 & 31 Vict., c.3, reprinted in RSC 1985, at App. II, No. 5.

[17] Hogg, *supra*, note 12, at page 649. Also see *Ward-Price v. Mariners Haven Inc. et al.* (2001) 199 D.L.R.(4th) 68 (Ont.C.A.).

[18] *Ward-Price, supra,* note 17, per Borins JA at page 81: "Because the legislation has said that the purchase money is trust money, it is immaterial whether the purchase money is in fact kept separate and apart from the developer's own money".

debts in bankruptcy. [19] On bankruptcy, the priority of creditors is determined by federal bankruptcy law. [20]

Under the federal BIA, the general rule is that all creditors rank equally, with two important exceptions – first, secured creditors take top priority and are entitled to realize their security as if there were no bankruptcy; secondly, section 136(1) lists the "preferred creditors" in ten categories of declining priority –from funeral expenses if the bankrupt is deceased (1st); to wages and salaries of employees (4th); to rent owing to the landlord (6th); to certain claims of the Crown for non-remitted taxes (10th). These "preferred creditors" must be paid in the order of priority stipulated by section 136(1) of the Act before other ordinary creditors are paid. The caselaw is clear that the federal power over the "scheme of distribution" in bankruptcy is absolute and inviolable.[21]

(8) The federal jurisdiction over international and inter-provincial trade

Section 91(2) of the *Constitution Act* confers upon the federal government the power to make laws in relation to "the regulation of trade and commerce". [22] The federal government's jurisdiction, at least on paper, is much broader than its counterpart in the U.S. where the federal "interstate commerce power" is specifically limited to "regulate commerce with foreign nations, and among the several states".[23] However, over years of judicial interpretation, particularly at the hands of the Judicial Committee of the Privy Council, the federal government's power to regulate trade and commerce has been severely attenuated both in scope and content.

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[19] *Supra*, note 16.

[20] Hogg , *supra*, note 12, at page 646

[21] See the discussion below in Section 2(1) and (2).

[22] Section 91(2) of the *Constitution Act, supra*, note 16.

[23] Hogg, *Constitutional Law of Canada*, (Looseleaf edition, 2002), at page 20-1.

The decisions of Privy Council have confined the federal trade and commerce power to two categories or "branches": (1) international or inter-provincial trade and commerce; and (2) "general" trade and commerce.

Since the abolition of appeals to the Privy Council in 1949, there has been a discernible resurgence of the federal trade and commerce power. The Supreme Court of Canada has given greater force to the federal trade and commerce power particularly in situations where products such as grain or oil were seen to flow across inter-provincial boundaries and therefore required federal regulation.[24]

However, the Supreme Court of Canada has continued to confine the power to the two branches discussed above. The first branch, international and inter-provincial trade and commerce is self-explanatory. The second branch, the "general" trade and commerce power will only been allowed where the federal government can demonstrate the need for a national regulatory scheme involving an area of national trade regulation that the provinces acting together are unable to regulate satisfactorily.[25] In all likelihood, it will be the first branch, the regulation of international and inter-provincial trade and commerce, that will apply to our analysis here.

It is interesting to note that Congress enacted the PACA pursuant to the federal "inter-state commerce power". The PACA Trust provision only applies to inter-state and foreign transactions.[26] Each of the states, of course, has the power to enact a similar law for intra-state transactions, but so far only Minnesota has done so.[27]

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[24] *Murphy v. CPR* (1958) SCR 626; and *Regina v. Klassen* (1959) 20 D.L.R.(2nd) 406 (Man. C.A.) Also see Hogg, *supra*, note 23, at page 21-16.

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[25] *General Motors v. City National Leasing*, (1989) 1 SCR 641.

[26] See the Preamble to the PACA, *supra*, note 1: "An Act to suppress unfair and fraudulent practices in the marketing of perishable agricultural commodities in interstate and foreign commerce".

[27] According to Stephen McCarron, *supra*, note 8.

2. The Legislative Options

(1) A Provincial PACA Trust Law

As discussed above, the provincial jurisdiction over property and civil rights in the province is broad enough to impose a statutory trust upon the buyers of perishable agricultural commodities that are located in the particular province.

With the exception of statutory trusts in favour of the Crown[28], provincial statutory trust laws have been found to be valid and constitutional – but only up to the point of bankruptcy. The Supreme Court of Canada has made clear that legislation that provincial legislation that purports to alter the federally-stipulated order of priority in bankruptcy, although valid for other purposes, is invalid and inapplicable in a bankruptcy situation because it would conflict with the scheme of distribution set out in the BIA.[29]

In *Workers' Compensation Board v. Husky Oil Operations Ltd*.[30] the Supreme Court summarized the law in this area by approving the following four propositions:

> 1. "Provinces cannot create priorities between creditors or change the scheme of distribution on bankruptcy under section 136(1) of the Bankruptcy Act;

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[28] The treatment of statutory trusts in favour of Her Majesty has been the subject of much litigation. The history of this litigation is not directly relevant for our purposes here. What is relevant is that the federal government amended the BIA in 1992 and added sections 67(2) and(3) in order to clarify the matter. Section 67(2) invalidates all deemed trusts created by federal or provincial legislation in favour of Her Majesty, except for those trusts that would be valid without such legislation (namely, cases where the trust funds have in fact been kept separate and would thus satisfy the common law definition of "trust"); and except for the three specific Crown trust laws mentioned in section 67(3) (namely, provisions under the federal *Income Tax Act*, the Canada *Pension Plan Act*, and the *Employment Insurance Act*), or provincial trust laws that are similar to these three laws. Otherwise, the federal government has invalidated statutory trust laws that are in favour of Her Majesty, and do not fall within the exceptions set out in section 67(3). See generally *Houlden and Morawetz, supra,* note 10, at pages 3-40.03 et seq.

[29] The "quartet" of cases are *Deputy Minister of Revenue v. Rainville*, (1980) 1 S.C.R. 35; *Deloitte Haskins and Sells Limited v. Workers' Compensation Board* (1985) 1 S.C.R. 785; *Federal Business Development Bank v. Commission de la Sante et de la Securite du Travail*, (1988) 1 S.C.R. 106; and *British Columbia v. Henfrey Samson Belair Ltd.* (1989) 2 S.C.R. 24. Also see Roman and Sweatman , "*The Conflict Between Canadian Provincial Personal Property Acts and the Federal Bankruptcy Act: The War is Over*." (1992) 71 Can. Bar. Rev. 77, and Hogg, *supra*, note 12 at page 646.

[30] (1995) 128 D.L.R.(4th) 1 (SCC).

> 2. While provincial legislation may validly affect priorities in a non-bankruptcy situation, once bankruptcy has occurred, section 136(1) of the Bankruptcy Act determines the status and priority of the claims specifically dealt with in that section;
>
> 3. If the provinces could create their own priorities or effect priorities under the Bankruptcy Act, this would invite a different scheme of distribution on bankruptcy from province to province, an unacceptable situation;
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> 4. The definition of terms such as "secured creditor" (or "trust") if defined under the Bankruptcy Act, must be interpreted in bankruptcy cases as defined by the federal Parliament, not the provincial legislatures. Provinces cannot affect how such terms are defined for purposes of the Bankruptcy Act". [31]

The result of the Supreme Court decisions is that no priority given to a creditor by a provincial enactment will be of any effect unless that priority is also preserved by the BIA. Only the federal government has the exclusive power to determine by legislation the priorities of creditors when bankruptcy occurs, and to the extent that such priorities may conflict with provincial law, the BIA prevails and the provincial legislation is rendered ineffective and inapplicable.[32] Here is how the leading text puts it:

> "So long as there is no bankruptcy, full effect will be given to statutory provisions which create liens and charges on property of the debtor ranking ahead of pre-existing interests… however, when bankruptcy occurs or proposals are made by a debtor, the provisions of the Bankruptcy and Insolvency Act take effect and the scheme of distribution of the property of the bankrupt coming into the hands of a trustee must be followed."[33]

It is important to remember that if the provincial statutory trust law requires that certain monies be held in trust and these monies are in fact held in trust, then no problem

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[31] *Ibid,* per Gonthier J. at page 16, citing with approval the four propositions set out in the Roman and Sweatman article, *supra,* note 29.

[32] Houlden and Morawetz *supra*, note 10, at page 5-101.

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[33] *Ibid., supra,* note 10, at pages 5-102 to 5-103.

arises because all of the elements of the common law trust have been satisfied and, according to section 67(1)(a) of the BIA, these trust funds do not become part of the bankrupt's estate and are therefore recoverable. However, where bankruptcy has occurred, and the trust funds have not been kept separate but have been co-mingled with other assets, then the saving provision in the BIA does not apply even though the provincial statutory trust law has "deemed" that the trust continue even if the monies are co-mingled.

A 1989 decision of the Supreme Court of Canada provides a good illustration of this analysis. In *B.C. v. Henfrey Samson Belair,* [34] a bankrupt automobile dealer had collected the sales taxes as required by the provincial law but had not kept the retained money in a separate fund. The provincial taxing statute anticipated this kind of situation and provided that the taxes owing to the Crown were "deemed" to be held in trust and were also "deemed" to have been kept separate and apart from the collecting agent's personal assets, even if no separate fund had in fact been established. The majority of the Supreme Court found that the provincial statutory trust law was ineffective to create a trust because the basic requirements of a common law trust, i.e. actual, identifiable, separate property, were not satisfied. Madam Justice McLachlin, writing for the majority stated that only a trust complying with "general principles of law" would take the trust property out of the bankrupt estate and fall within section 67(1)(a) of the BIA.[35]

The dissent argued that the province had ample jurisdiction under its "property and civil rights" power to define the requirements of a "trust" and that this should include a statutory deemed trust that imposed a trust even where the assets ended up being co-mingled with other assets. The majority rejected this analysis because it would "permit the provinces to create their own priorities under the Bankruptcy Act and invite a

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[34] *B.C.* v. *Henfrey*, *supra*, note 29.

[35] *Supra*, note 29, per McLachlin J. (as she then was) at page 741: "At the moment of the collection of the tax, there is a deemed statutory trust. At that moment, the trust property is identifiable and the trust meets the requirements for a trust under the principles of trust law. The difficulty in this, as in most cases, is that the trust property soon ceases to be identifiable. The tax money is mingled with other money in the hands of the merchant and converted to other property so that it cannot be traced. At this point, it is no longer a trust under general principles of law".

differential scheme of distribution on bankruptcy from province to province".[36] Madam Justice McLachlin continued as follows:

> "The province however argues that it is open to it to define "trust" however it pleases, property and civil rights being matters within provincial competence. The short answer to this submission is that the definition of trust which is operative for the purposes of exemption under the Bankruptcy Act must be that of the federal Parliament, not the provincial legislatures. The provinces may define "trust" as they choose for matters within their own legislative competence, but they cannot dictate to Parliament how it should be defined for purposes of the Bankruptcy Act…"[37]

The decision of the Supreme Court of Canada in *B.C. v. Henfrey Samson Belair*, like the others that form the "quartet" of cases in this area, reaffirms the now well-established principle that a provincial statutory trust law, though otherwise valid and effective for other purposes, will be held inapplicable and ineffective if bankruptcy has occurred. The provincial law is "read down" so as not to apply if bankruptcy has occurred. However, if the trust funds have indeed been held separately and not co-mingled, and can therefore fall within the common law "trust" definition in section 67(1)(a) of the BIA, or if the slow-paying defendant is not yet bankrupt and the plaintiff is simply trying to enforce the statutory trust, then the provincial law continues to be effective because there is no operational conflict with the provisions of the BIA;[38]

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[36] *Ibid*, at page 740.

[37] *Ibid*, at page 742.

[38] See Hogg, *supra*, note 12 at page 648. Also see the decision of the Manitoba Court of Appeal in *Continental Casualty Co. et al. v. MacLeod Stedman Inc.* (1996) 141 D.L.R. (4th) 36 (Man. C.A.) In this case, the Manitoba *Pension Benefits Act* imposed a statutory deemed trust on all employers with regard to the monies that they were required to pay into a pension plan for employees. These monies were deemed to be held in trust by the employer "whether or not the amount thereof has been kept separate and apart from the employer". The employer declared bankruptcy, and the employees commenced an action against the bankrupt company. The Manitoba Court of Appeal found that the provincial statutory deemed trust provisions were ineffective and inoperative because of the employer's bankruptcy. The Court found that because the trust monies had not been held in trust, the common law requirements for a proper trust had not been satisfied, and thus could not fall within the language of section 67(1)(a) of the BIA. As the Court of Appeal explained at page 42:

> "If the effect of the provincial legislation is to secure the rights of some unsecured creditors and remove these creditors from the priority scheme implemented by Parliament, to the detriment of other unsecured creditors, then

In sum, a provincial PACA-like trust law would be constitutionally valid and effective in cases where the buyer was guilty of slow payment but not yet bankrupt; but the law would become inapplicable and ineffective as soon as the buyer became bankrupt.

(2) A federal PACA Trust Law

The federal government has the jurisdiction to enact a PACA-like trust law that would apply to international and inter-provincial transactions, and to both slow payment and bankruptcy situations.

As discussed above, whatever restrictions have been placed on the trade and commerce power by judicial interpretation, the federal government's authority to regulate international or inter-provincial transactions remains undisputed.

This is important because it appears that most of the concern about the need for a PACA-like trust law in Canada relates to American and Mexican sellers encountering problems with slow-paying or bankrupt buyers located in Canada. The DRC has advised that American and Mexican sellers account for 67% of the complaints received (American 64% and Mexican 3%) and Canadian sellers account for the balance. This data could provide the constitutional basis for a federal PACA-like trust law focused primarily on international and inter-provincial transactions. And if the focus was primarily international or inter-provincial, then the caselaw suggests that the federal law could also apply to protect sellers involved in purely intra-provincial transactions.[39]

The federal government's authority over bankruptcy and insolvency, as discussed above, allows the federal government to enact a statutory trust law that alters or amends the scheme of distribution set out in the BIA. Indeed, the PACA-like trust law could be enacted "notwithstanding the Bankruptcy and Insolvency Act."

> the provincial legislation that conflicts with it must give way to the federal enactment."

[39] Hogg, *supra*, note 24, at page 20-5 and 21-16.

As a leading constitutional scholar has noted, "a statutory deemed trust that is created by federal law raises no constitutional issue since the federal Parliament has the constitutional power to alter priorities under the Bankruptcy Act."[40]

In sum, a federal-level PACA-like trust law would address both the slow-payment problem and the bankruptcy problem. Sellers could use the federal law in cases of slow-payment to enforce the statutory trust before the buyer becomes bankrupt; and also in cases where the buyer has filed for or been petitioned into bankruptcy.

The reason why a separate federal law is preferred over simply amending the BIA is that the separate PACA-like trust law would allow more room for statutory language to define the circumstances in which the trust would be triggered; to explain that the trust would be "deemed" to continue even if the monies had become co-mingled;[41] and to set out the required procedures for notification and enforcement.

3. Assessment of the Options

(1) Pros and Cons of Provincial Legislation

Typically, special interest group legislation is more easily and more quickly enacted at the provincial level than at the federal level. Also, many if not all of the provinces already have statutory trust laws providing preferential legislation in such areas as livestock sales[42], carriage of goods[43], and employee pension plans[44].

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[40] Hogg, *supra*, note 12 at page 648. Also see *Canadian Asbestos Services Ltd. V. Bank of Montreal*, (1992) 11 OR (3rd) 353, a decision of the Ontario Court (General Division) holding that the deemed trust provisions of the federal *Income Tax Act*, the *Canada Pension Plan Act* and the *Employment Insurance Act* were constitutionally valid.

[41] Prof. Peter Hogg has noted that "as a matter of statutory interpretation, the decision in *B.C. v. Henfrey Samson Belair* suggests that in the absence of a segregated fund, even a federal deemed trust would not qualify as a "trust" within the meaning of section 67 (1)(a) of the Bankruptcy and Insolvency Act". See Hogg, *supra*, note 12, at page 648, footnote 49. However, in a separate federal law, it could be made clear that the deemed trust would operate even if funds were co-mingled and would do so "notwithstanding the interpretation of "trust" in section 67(1)(a) of the Bankruptcy and Insolvency Act", (or words to that effect).

[42] *Supra*, note 13.

A provincial PACA-like trust law would make it easier and faster for sellers to go to court to enforce the trust in slow-payment cases, before the buyer is in bankruptcy.

The problem with the provincial PACA-like trust law is two-fold: first, the difficulties and logistics involved in getting all 10 provinces and 3 territories to agree to a uniform law; and secondly, and more importantly, the fact that the provincial law could not apply in cases of bankruptcy. If the buyer became bankrupt, the provincial statutory trust law would have to yield to the scheme of distribution set out in the federal BIA, and the unpaid sellers would be relegated to the unsecured creditors queue, falling in line after the secured creditors, and after the ten categories of preferred creditors that are listed in section 136(1) of the BIA – and the likelihood of recovering any of the so-called trust monies would be minimal at best.

(2) Pros and Cons of Federal Legislation

The ideal solution for Canadian, American and Mexican sellers of fresh produce is a federal PACA-like trust law that would apply across the country and would be effective even if the buyer were bankrupt. Conceptually, the PACA-like Trust would best be achieved by the enactment of a separate federal law imposing a statutory deemed trust to protect the sellers of perishable agricultural commodities "notwithstanding the provisions of the Bankruptcy and Insolvency Act".

However, as most special interest groups understand, the enactment of federal legislation is typically slower and more complicated than at the provincial level. The fresh produce sellers lobby would be accused of trying to obtain preferential treatment, taking their claim for payment out of the scheme of distribution already established in the federal BIA, at the expense of the buyer's other unsecured creditors.

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[43] Ontario Reg. 556/92 enacted under the *Truck Transportation Act*, R.S.O. 1990, c.T-22, as amended, provides in section 15(1) that: "Every load broker shall hold in trust…all the money the load broker receives from consignors and consignees in respect of the carriage of goods by carriers…" Analyzed, albeit incorrectly, in *GMAC Commercial Credit Corporation-Canada v. TCT Logistics Inc. et al.* (2002) 61 O.R. (3d) 85 (Ont. Superior Court). See Houlden and Morawetz, *supra*, note 10, at page 3-40.1.

[44] *Supra*, note 14.

However, in response to these criticisms, the sellers of fresh produce could point to the following:

1. The federal BIA already provides a special exemption for farmers, fishermen and aquaculturists. Section 81.2(a) sets out a scheme of "special rights", that provides them with a first charge on the buyer's inventory "notwithstanding any other federal or provincial law" if their products were delivered within 15 days preceding the bankruptcy.[45]

2. Canadian sellers can use the American PACA Trust law against defaulting buyers located in the U.S. – it is only fair that U.S. sellers have the same rights against defaulting buyers located in Canada;

3. The objectives of the fresh produce industry in furthering the enactment of a PACA-like trust law in Canada are wholly consistent with the trade equity objectives already agreed to in NAFTA.

4. Proposed Plan of Implementation

This project can best be implemented by engaging a government consultant who can provide expert advice on the political feasibility of having such a law enacted at the provincial or federal levels. Although my perspective is that of a lawyer and is therefore more limited, I would nonetheless propose the following for your consideration:

(1) Document the economic costs/losses that can be attributed to buyer bankruptcies (especially in Montreal and Toronto) because of the absence of a PACA-like trust law in Canada;

(2) Assess the political realities of both federal and provincial support for this kind of initiative – particularly in the two most important provinces, Ontario

[45] Section 81.2(a) of the BIA, *supra*, note 2.

and Quebec, and determine the sources of potential opposition to a PACA-like trust law at the federal level.[46]

(3) Assess the level of support from Canadian and American lobby groups, including the NAFTA fresh produce industry, for the enactment of a PACA-like Trust law at the federal level in Canada.

(4) If turns out that the federal law is not feasible, or even if it is feasible, determine whether you would still want to obtain a parallel provincial level PACA-like trust law even if only in Ontario and Quebec, that would allow sellers to take speedier action using trust enforcement procedures in slow-payment situations, before the buyer becomes bankrupt.

In sum, determine the legislative priorites of the fresh produce industry and how much time and effort it would be willing to contribute in order to achieve a PACA-like trust law at the federal level, or secondarily, and possibly in parallel, at the provincial level as well.

5. Can US Shippers use the PACA Trust in Canada?

The question is whether a US law, such as the PACA Trust law, applies in Canada. The short answer is no – just as Canadian laws do not apply in the US. American sellers cannot use the US PACA Trust law to bring proceedings in a Canadian court against non-paying buyers located in Canada.

It is fundamental to the principle of national sovereignty that one country's laws cannot apply to another country.[47] The leading commentator on Canadian constitutional law describes this as an "obvious" point.

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[46] It is interesting to note that that in the U.S., the bankers lobby did not take strong objection to the PACA Trust law.

[47] Unless, of course, the extra-territorial impact has been agreed to through international treaties or otherwise, with the other country.

> "Do the Canadian federal Parliament and the provincial legislatures have the power to make laws with extra-territorial effect? It is obvious that they do not have the power to change the law of another country."[48]

That is not to say, however, that one country cannot impose sanctions or penalties on its own territory for conduct occurring in another country. For example, the federal *Corruption of Foreign Public Officials Ac*t makes it a crime in Canada for anyone to bribe a foreign public official.[49] The prosecution would take place in Canada under Canadian law, even though the defendant's misconduct took place in, say, Russia.

Similarly, the US Congress could in theory amend the PACA Trust law and impose penalties or sanctions (enforceable in US courts) against any non-paying foreign buyers who failed to keep the trust funds in a separate account. But if this were to happen, the prosecution of non-paying buyers located, for example, in Canada would have to take place in a US court, and only if it could be established that the Canadian-based defendant was subject to the American court's jurisdiction.[50]

But even with such an amendment, US sellers could not use the American PACA Trust law to bring proceedings in Canadian courts against non-paying buyers located in Canada. U.S. law does not apply in Canada.

6. Conclusions

1. Both the provincial and federal governments have the jurisdiction to enact a PACA-like trust law.

2. The provincial laws would be easier to enact, but would require separate legislative

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[48] Hogg, *supra*, note 24, at page 13-1. The same point would apply to any country, including the U.S.

[49] *Corruption of Foreign Public Officials Act*, S.C. 1998, c.34, section 3(1).

[50] All countries, states or provinces have rules of civil procedure that define and regulate judicial jurisdiction over parties that reside outside the jurisdiction of the court. See, for example, Ontario *Rules of Civil Procedure*, RRO 1990, Reg.194, as enacted under the *Courts of Justice Act*, RSO 1990, c.C-43, as amended, and in particular Rule 17 et seq.

initiatives in 10 provinces and 3 territories and would be limited in their application: the provincial laws would apply to slow payment cases, but not in bankruptcy situations. The federal law would be more difficult to enact, but would apply to both slow payment and bankruptcy.

3. The implementation plan should include a properly documented economic justification (i.e. the economic costs of the bankruptcies); an assessment of the political realities at both the federal and provincial levels; an identification and organization of the governmental and institutional sources of support; and a determination whether a provincial law should be pursued either in parallel with the federal enactment, or as a second best alternative.

4. U.S. sellers cannot use the PACA Trust in Canada.

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I trust that this opinion will be of assistance to you. If you have any questions, please do not hesitate to give me a call.

Yours very truly,

Edward P. Belobaba

December 15, 2003

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Report to
The Fresh Produce Alliance
on the
Financial Practices of the Canadian Horticultural Sector
Project

Completed for:
The Fresh Produce Alliance
(Canadian Produce Marketing Association,
Canadian Horticultural Council and
Dispute Resolution Corporation)

by

Douglas Hedley
6206646 Canada Inc.

December 2005

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Financial Practices in the Fresh Produce Industry

This study was undertaken in response to a request from the Fresh Food Alliance to explore the nature of the wholesale fresh fruit and vegetable market, specifically in Canada and its relationship with the USA and Mexico. The issues prompting the study relate to the very real frustration in much of the industry with the business practices of some within the industry, causing losses to segments of the industry, and the consequent risks to business relationships within Canada, and within the trading partners in NAFTA. The intention of the study is to identify possible avenues in which these industry problems can be mitigated or resolved.

Introduction

The fruit and vegetable industry, spanning field and tree crops and products grown under glass or cover, represents a large component of agricultural production value in seven of the ten provinces of Canada. With the exception of a very few large crops, such as potatoes, it has been historically an industry selling to local markets. With globalization and in particular the North American Free Trade Agreement (NAFTA), and its precursor, the Canada USA Trade Agreement (CUSTA), the fruit and vegetable industry has become an integrated industry, selling locally, across Canada, and internationally. This includes a significant increase in both imported and exported products as consumers increasingly demand fresh product year round, not only of the traditional fruits and vegetables of the temperate zones, but also of the more exotic fresh products available around the world.

The integration across North American markets has placed new and different pressures on both producers and dealers in fresh fruits and vegetables. Because of the numbers and complexity of producers and dealers involved in the industry in the three countries, establishing sound commercial and financial arrangements on a consistent basis has proven difficult and time consuming. The timing involved in moving fresh produce to market is a critical element in the arrangements between producers and dealers, due to the rapid perishability of the product, the range of products and conditions in the industry, the transportation arrangements and the storage aspects for these products. For example, once produce has been shipped to a destination, it must move through dealer and retail markets quickly to preserve quality. As another example, once controlled atmosphere apple storage facilities are opened, the entire contents in storage must be moved quickly to retail level. Any failure in meeting contractual arrangements along this chain in a single transaction, accidentally or by design, can disrupt normal market operations and prices locally and can call into question the viability and soundness of trading relationships more widely than the failure of one arrangement. Nonetheless, contractual and financial arrangements between buyer and seller need to match the speed of movement of the product. Part of the complexity involved in these transactions is that the produce frequently moves across three countries, with different contractual, licensing and arbitration arrangements.

The Canada Agricultural Products Act provides the legislative basis for the movement of fresh produce across Canadian provincial and international boundaries. Dealers involved in inter-provincial or international trade must be licensed either under the Act or registered with the Dispute Resolution Corporation (DRC). Dealers moving produce exclusively within a province are not required to be licensed under the federal Act or with the DRC.

Study Outline

The study begins an overview of some of the problems which provoked this study. Following this, an attempt is made to "define" the industry. While for most industries, definition and available data give a fairly complete measure of an industry, the fresh fruit and vegetable industry proves to be quite elusive, with only some aspects easily portrayed. The third section examines the regulatory systems in place for this industry in Canada and the USA. Because of the difficulty of defining the industry, as well as many of the business practice problems, a survey of members of the Dispute Resolution Corporation (DRC) was undertaken to explore the impacts of business practices on the industry. The results are reported in this study. As well, the business practice problems are not unique to the fruit and vegetable industry and as a result, the solutions used by the cattle industry in Canada are examined. The fifth section examines the available bankruptcy statistics and attempts to relate and compare the frequency of bankruptcy across commodity groupings in agriculture and agri-food. The sixth component of this study explores the specific losses which can occur and the possible means which may offer opportunities to mitigate or resolve the issues. The final section reports on the recommendations arising from the analysis.

Defining the Wholesale Fresh Fruit and Vegetable Industry

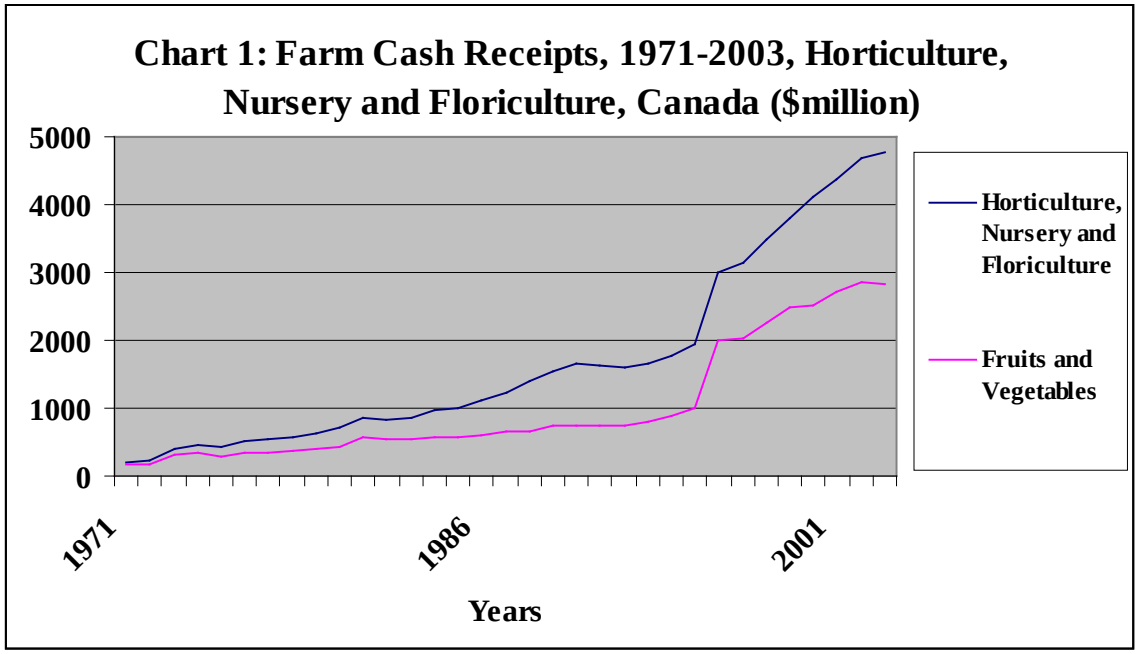
The central focus of the study is on the fresh fruit and vegetable markets in Canada and the players involved in moving this produce from farm to retail and food service markets. Of particular concern is the fresh produce moving through dealers, brokers, and commission merchants, that is, the wholesale marketers of fresh produce. In doing so, defining and "measuring" this industry is the first task.

The horticulture production industry in Canada is an important component of the agriculture and agri-food sector in most provinces. However, the horticulture industry includes a number of products which do not enter the "fresh" market at wholesale level. Certainly the fresh fruits and vegetables sold through farmers' markets and roadside sales do not enter the wholesale trade. Also, the product moving directly from producers to retailers does not enter wholesale markets. The fruits and vegetables moved directly to processing and into frozen form are not included in the fresh market. In some cases, the farm-level data include nursery and floriculture products within the horticulture umbrella. As well, historically, tobacco is often included with horticulture products in the statistical data. By excluding the products which are not specifically fruit and vegetables, and removing from consideration the product which does not move through fresh wholesale

markets, the remainder of the horticulture industry appears to move through the wholesale markets in Canada and into export markets direct from producers as well as from one wholesaler to another. By describing the fresh fruit and vegetable industry in this way (as a residual, in effect), it does not imply it is a small or unimportant market. The fresh produce component has grown substantially in both absolute size and share of the overall produce market for the last two decades.

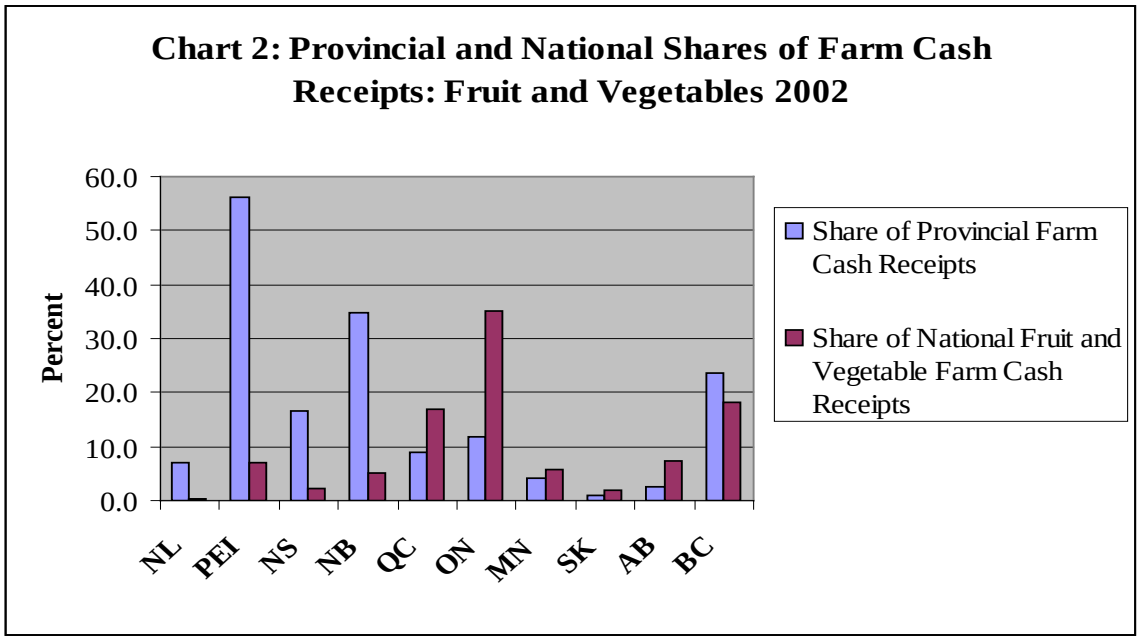
Farm cash receipts in Canada for all fruits and vegetables can give an initial view of industry size. Chart 1 indicates that total fruit and vegetable farm cash receipts (horticulture, floriculture and nursery) have trended steadily upward over the past three decades, reaching nearly $5 billion by 2002. For only fruits and vegetables, sales are nearly $3 billion. However, this represents total farm cash receipts for the industry, including the produce for the frozen and processing trade. There is no breakdown in the farm cash receipts between produce destined for the fresh market and other produce entering the frozen and processing trade.

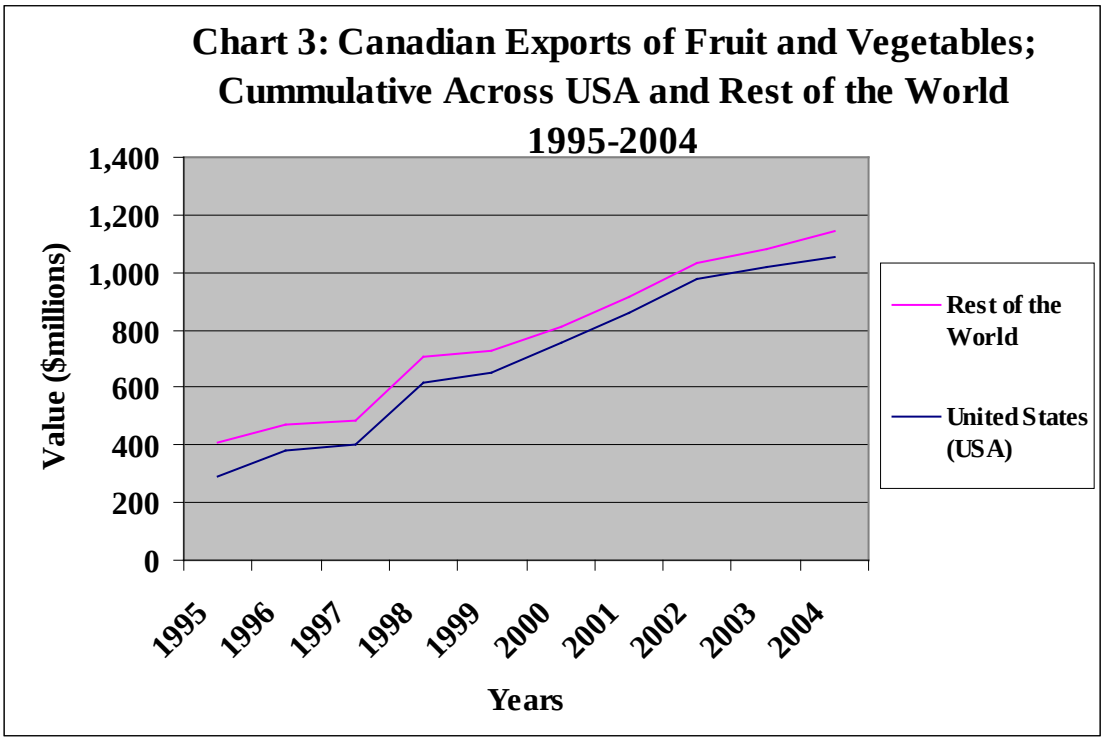
These same data on farm cash receipts are available by province. Chart 2 gives the shares of farm cash receipts within each province, and the provincial share of the national farm cash receipts for fruit and vegetables. Clearly, Ontario, British Columbia and Quebec have the largest shares of the fruit and vegetable production in Canada, while Prince Edward Island has the largest share of its total agricultural receipts in the fruit and vegetable industry.

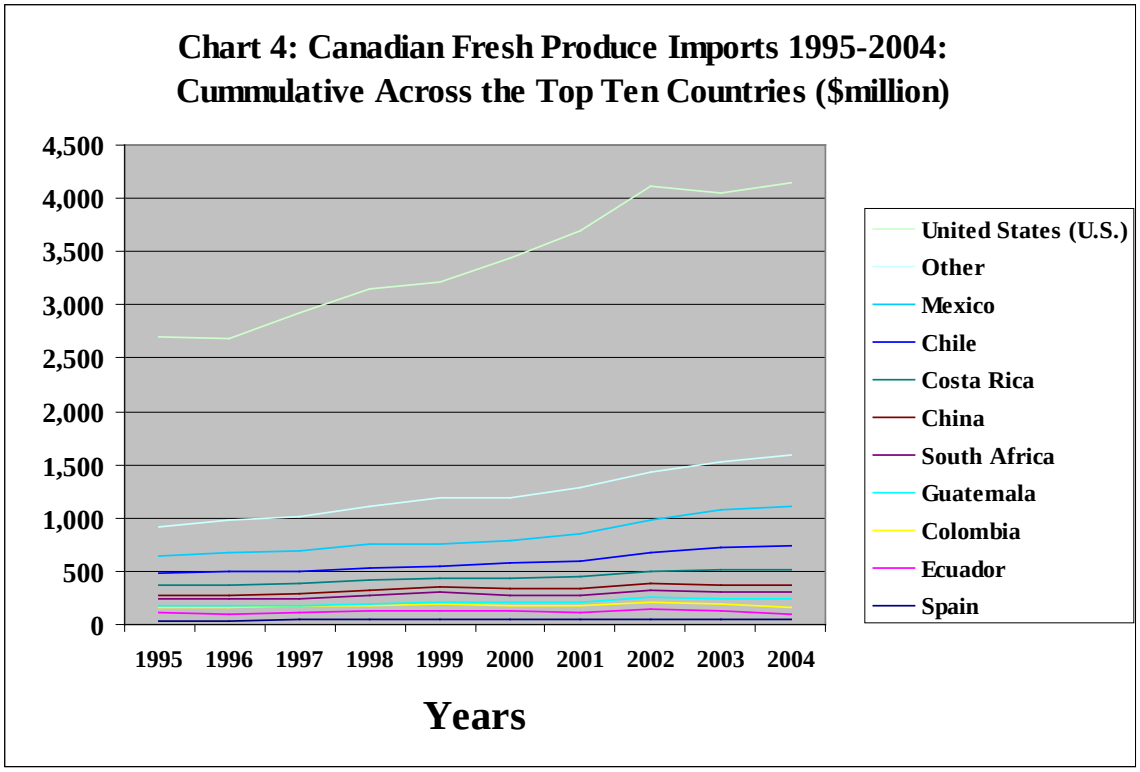


Exports have grown rapidly over the past ten years to well over $1 billion, almost all of it to the USA (Chart 3). Imports have also grown sharply in the same period to over $4

billion (Chart 4), with the USA as the largest source, although there is strong growth in imports from Mexico, Chile, and Costa Rica. These imports and exports move almost exclusively through the wholesale fresh fruit and vegetable market.







Of the 247 thousand farms in the 2001 census of agriculture (Table 1), only a small percentage grew fruit and vegetables. The area in tree crops is declining while grapes and berry area has expanded rapidly in the previous two decades. The most rapid growth is in the greenhouse sector.

Table 1: Horticulture and greenhouse products, by provinces (2001 Census of Agriculture) Canada

	1981	1986	1991	1996	2001
Canada					
Total number of farms	318,361	293,089	280,043	276,548	246,923
Total berries and grapes					
Area in hectares[1]	31,458	40,470	45,759	57,523	69,165
Farms reporting	7,471	7,675	7,175	8,029	7,903
Percentage of total farms	2.3	2.6	2.6	2.9	3.2
Average area in hectares per farm reporting	4	5	6	7	9
Total tree fruits					
Area in hectares[1]	46,525	46,846	45,869	41,668	35,339

Farms reporting	9,348	9,813	8,328	8,282	5,974
Percentage of total farms	2.9	3.3	3.0	3.0	2.4
Average area in hectares per farm reporting	5	5	6	5	6
Total vegetables (excluding greenhouse vegetables)					
Area in hectares[1]	117,216	116,573	122,594	127,697	133,851
Farms reporting	13,208	11,758	10,708	11,440	9,829
Percentage of total farms	4.1	4.0	3.8	4.1	4.0
Average area in hectares per farm reporting	9	10	11	11	14
Total greenhouse products					
Area in square metres[2]	6,648,347	7,188,571	8,438,666	12,740,665	17,933,961
Farms reporting	6,130	4,874	4,986	6,422	6,071
Percentage of total farms	1.9	1.7	1.8	2.3	2.5
Average area in square metres per farm reporting	1,085	1,475	1,692	1,984	2,954

1. Conversion factor: 1 hectare equals 2.471 acres.
2. Conversion factor: 1 square metre equals 10.76391 square feet.
Source: Statistics Canada, Census of Agriculture.
Last modified: 2004-05-30.

The Problems

The failure of any transaction within the movement from farm to dealer to retail market, for whatever reason, can sharply affect the financial viability of any of the parties to the deal. While dispute resolution mechanisms are in place for registered, established, commercial dealers, several problems remain. First, even with dispute resolution, there is no mechanism in place for compensation where contractual and financial arrangements fail. Other industries in agriculture and agri-food have such arrangements either by legislation, bonding or trust accounts. The USA, under the Perishable Agricultural Commodities Act (PACA), has some facilities for assuring payments in such arrangements, and remains the envy of Canadian growers, shippers and dealers. Second, because of the competitive nature of the industry as well as the necessary speed of transactions, unlicensed dealers can disrupt these markets. By taking delivery of product without paying producers or other dealers, by delivering produce not meeting contractual arrangements,[1] and other means, the industry members can sustain financial losses as well as staining the sound commercial image of the industry. These business practices ,

ranging from the illegal to the unethical and to the inadvertent, can undermine market stability and call other legitimate and appropriate business arrangements into question.

Even though the DRC has a strong track record and has clearly established its credentials as a low cost, efficient and timely mechanism to resolve disputes among members, problems remain. The biggest single problem is that many dealers or brokers based in Canada are not members of DRC nor are they licensed under CFIA licensing and arbitration. There are a number of exemptions which allow dealers and brokers to escape CFIA and DRC membership. Clearly, buyers and sellers trading only within a province are exempt. However, the exemptions need careful study based on the experience of the DRC as well as legal decisions regarding these exemptions. CFIA is reviewing some of these exemptions and changes to the regulations have been publicly proposed.

One type of loss which occurs for DRC members arise because one of the parties to the transaction goes out of business through bankruptcy, insolvency, or simply closing the corporation or business. Having delivered produce to a buyer, bankruptcy or business termination intervenes before the seller has been paid. While many of these bankruptcies are entirely legitimate business failures, some of the bankruptcies also appear to be regular cycles of up to one year for a company, then bankruptcy or termination of the business as a means of avoiding payment. This aspect will be the focus of another study running in parallel to the work described in this study.

In general terms, the issue is to find mechanisms or changes in the regulations which more clearly limit the business risks associated with losses to buyers and sellers through non-payment for whatever reasons. This involves exploring both industry and governmental roles in assuring a fair and honest market place for the industry.

Regulation of Fresh Fruit and Vegetable Dealers in Canada

The common titles in the industry for those involved in the movement of fresh fruit and vegetables are ‘brokers’ and ‘dealers’. In general terms, brokers are those who arrange or negotiate purchases and sales on behalf of others, but do not take title to the produce in the transaction. Dealers are those who buy and sell directly, either on their own account or for others, taking title to the produce in the transaction. The regulations in Canada define only “dealer”, including both dealers and brokers within this definition, that is, whether or not the buyer takes title to the produce.

Defining Dealers

Dealers in agricultural products are defined within the Canadian Agricultural Products (CAP) Act as:

> “a person who:
>
> (a) is engaged in the business of purchasing or selling agricultural products,

(b) negotiates consignments, sales, purchases or other transactions involving agricultural products,

(c) receives or handles, on commission, agricultural products, or

(d) is prescribed as a dealer for the purposes of this Act".

In effect, anyone who buys, sells, negotiates on behalf of others, or receives a commission for arranging a purchase or sale of fruits and vegetables is regarded as a "dealer", unless exempt from the requirement. This includes all of the activities described in industry terms as a dealer, broker or commission agent or commission merchant.

Licensing and Exemptions of Dealers under the CAP Act and Regulations

The Regulations (Section 2.1(1))[2] indicate that any dealer who imports, exports, or trades inter-provincially must have a license issued under the CAP Act and its regulations.[3] Within the Licensing and Arbitration Regulations under the CAP Act, any applicant for a license under the regulations is also a dealer. Interestingly, the exemptions (Section 2.01) to this general rule are located in the regulations ahead of the general rule in a different section of the Regulations entitled "Application". The general rule follows in a separate part of the Regulations (Part I Licenses). With the exemptions shown prior to the general rule, the interpretation has been that if an exemption applies, the general rule for licensing does not apply.

Several exceptions to the general rule are provided in Section 2.01, including:

- those who market agricultural products that they grow themselves,
  - this exception exempts farmers from being licensed, whether they market exclusively within the province, or inter-provincially;
- those who market only agricultural products purchased within the province where their business is located
  - this exemption allows anyone who purchases exclusively within the province where their business is located to market anywhere in Canada or abroad, without a license;
- those who market agricultural products directly to consumers so long as their total sales in the preceding year are less than $230,000 or would be less than $230,000 when calculated on a pro rata basis for a full year
  - this exemption has three conditions: "direct to consumer" provision covering farm market and roadside sellers, the "small operation" provision, and the size of operation in the previous year (independent of the level of sales in the current year);
- those who negotiate on behalf of purchasers or sellers so long as their total sales in the preceding year are less than $230,000 or would be less than $230,000 when calculated on a pro rata basis for a full year,
  - this exemption covers small "dealers", in the previous year, independent of the level of sales in the current year;

- those who are members of the Fruit and Vegetable Dispute Resolution Corporation (DRC),
    - The DRC is an alternative licensing system to the registration under the Canadian Food Inspection Agency.

Farmers who market their own product in wholesale markets are not required to be licensed, although some do so. As well, because federal legislation does not apply to those dealing exclusively within a province, dealers working exclusively within a province are not required to be licensed under the federal regulations, although they could be licensed through provincial regulations. However, dealers who purchase product within their own province are also exempt, even though they may sell product outside of the province. That is, a dealer whose business is located in Ontario can buy product (exclusively) within Ontario and market it in another province or internationally without a license under the Licensing and Arbitration Regulations.

This exemption needs exploration. Under the Canada Act 1982, the federal government has no authority to regulate agricultural products bought and sold exclusively within a province because the transaction falls under provincial jurisdiction. If the purchase or sale of the product involves movement across a provincial or international boundary, then federal jurisdiction applies. In this exemption, provincial jurisdiction is respected, because the transaction (purchase) is entirely within a province where the buyer conducts business. If the buyer subsequently sells the produce within the province, the transaction remains within provincial jurisdiction. If the buyer subsequently sells the product inter-provincially or internationally to a buyer not resident in the province, the buyer will be required to have a license, but the seller still does not need a license. The only restriction in the regulation is that the person or corporation involved as a dealer can only make purchases within a single province. Setting up a separate corporation in each of a number of provinces appears to be an easy route around this limitation.

"Small" dealers and brokers[4] are exempt from licensing, with "small" defined as total sales less than $230,000 for a full year. As well, this exemption is measured as sales in the preceding year, so that those who are starting a new business are exempt until the year after their annual (or annualized) sales exceed the threshold of $230,000. Under this regulation, it is possible for an individual to set up a separate corporation annually or more often to operate without a license for a period of years. Simply, without prior year sales records in the corporation, there is no restriction on operating for up to a year without a license, regardless of the level of sales.

There is a further dilemma in establishing federal regulations in fruit and vegetables. The scope of the Act under which these regulations are established relates to marketing within federal jurisdiction, that is, inter-provincial and international trade, and food quality. However, civil law including contract law lies within provincial jurisdiction. It is questionable whether the scope of the federal Act and its regulations can extend to regulating issues surrounding provincial contract law, e.g., breaches of contract. One consequence is that while PACA in the USA includes a section on Business Conduct

relating to financial behaviour of dealers, placing a similar code of financial/transaction conduct within the federal marketing regulations could be challenged as beyond the scope of a marketing act and beyond federal jurisdiction. To a limited extent, some expectations of business behaviour are included in the section entitled "Terms and Conditions of a Licence" although these clauses carefully avoid any reference to contract behaviour.

Finally, Section 7.1 of the Licensing and Arbitration Regulations specifies several actions by an individual or a company which would preclude issuing a license. Many of these actions or conditions relate to prior criminal activity, unrelated to business conduct. Whether these rules would withstand a challenge under the economic provisions of the Charter remains moot. However, this section does include the clause that the Minister shall not issue or extend a license to anyone who "has consistently failed to meet debts as they come due or has conducted business in a manner inconsistent with fair and orderly business practices". Since this provision clearly involves provincial jurisdiction on contract law, it is also questionable whether this clause could withstand a challenge.

Amendments Proposed by CFIA

On 3 September 2005, the CFIA published proposed amendments to the Licensing and Arbitration Regulations, providing 30 days for comment.[5] The proposed amendments repeal the exemptions in Section 2.01 entirely, and place a new set of exemptions under Part I Licences Section 2.1. As a result, the general rule that a license must be obtained for import, export, or inter-provincial trade in fruits and vegetables precedes the exemptions. The implication is that the general rule applies, before any consideration of exemptions. The amendments to the regulations read as follows:

- Section 2.01 and its heading are repealed
- Subsections 2.1(2) and (3) of the regulations are replaced by:

  "(2) Subsection (1) does not apply in the case of:

  (a) dealers who market only agricultural products that they grow themselves;

  (b) dealers who market only agricultural products purchased within the province where their business is located;

  (c) dealers who market agricultural products directly to consumers, if the total invoice value of the products at any time during the current calendar year is less than $230,000;

  (d) agricultural products that are donated to any organization that is a registered charity under the Income Tax Act or is a club, society or association described in paragraph 149(1)(l) of that Act;

  (e) dealers who are members of the Fruit and Vegetable Dispute Resolution Corporation − a corporation incorporated under Part II of the Canada

> Corporations Act, being chapter C-32 of the Revised Statutes of Canada, 1970 − in accordance with the by-laws of that Corporation; and
>
> (f) agricultural products that are imported from the United States onto the Akwesasne Reserve for use by an individual who has established permanent residence on the Akwesasne Reserve."

First, the proposed exceptions to the general licensing rule are now located within the same part of the Regulations as the general rule, and following the general rule.

Second, those marketing directly to retail (consumers) remain exempt so long as transactions do not exceed the threshold of $230,000 in current calendar year. Previously this exemption measured the threshold for the preceding year.

Third, producers remain exempt so long as they market only the produce they grow themselves.

Fourth, the threshold of $230,000 of annual or annualized transactions for dealers has been dropped. The result is that any dealer from the time of the first transaction must be licensed, unless some other exemption applies. This effectively exempts from licensing requirements most dealers/producers selling though roadside and farmers' markets. The analysis provided by CFIA indicates that an additional 300 dealers are likely required to be licensed either with CFIA or the DRC as a result of these changes.

These proposed Regulations on dealers and exemptions from licensing, if accepted, would be nearly in line with similar provisions of the Perishable Agricultural Commodities Act (PACA) in the USA with the exception of the difference in federal jurisdiction in inter-provincial and inter-state commerce between the two countries. Within the USA, federal jurisdiction extends to any transaction where the expectation is that the product will move out of the state, or where the normal "current of commerce" is that the produce, fresh or even after a period of time in processed form, may be transported out of the state.[6]

Dispute Resolution Corporation

There are two licensing systems in Canada. Dealers may register as a member of the DRC or be licensed under the CAP Act's Licensing and Arbitration Regulations through the Canadian Food Inspection Agency. Under the CAP Act through CFIA, approximately 115 dealers are licensed. Under the DRC, 1281 were registered as members in 2004 (Table 2), over 800 Canadian dealers, 150 Mexican and about 300 USA dealers. That is, over 90 percent of the approximately 1400 licensed dealers in 2004 were members of the DRC. However, even with 1400 licensed dealers, many dealers lie outside the provisions of the CAP Act and the Licensing and Arbitration regulations.

The DRC was established following the NAFTA as a non-profit corporation to facilitate the movement of produce across the three countries by providing a low cost, timely

mechanism for resolving disputes among buyers and sellers. There are two categories of membership. Regular Members are those companies whose place of business is in North America (Canada, Mexico or the United States). Associate Members are those companies whose place of business is in a country outside of North America.

Table 2: Active Members of the Dispute Resolution Corporation by Country and Year

	Year					
Country	2000	2001	2002	2003	2004	2005
Canada	627	743	802	811	818	822
USA	192	243	284	298	302	310
Mexico	7	9	35	157	149	96
Other		1	6	9	12	17
Total	826	996	1127	1275	1281	1245

Source: DRC
Notes: Figures for 2005 to November 2005.

The Dispute Resolution Corporation has been in operation since 1 February 2000. Since that time, there have been 683 claims (to November 2005). Of these, 656 have been settled. Of these 656 claims, about 85 percent have been settled in an average of 49 days, with an average value of $4000. Fifteen percent have gone to arbitration, with an average settlement period of 190 days, and an average value of $8000. The membership fee for the DRC is C$900 annually for Canadian-based firms and US$600 for USA- and Mexico-based firms, membership continues to grow each year, and few if any members leave because of the outcomes from the dispute resolution. The DRC, operating under well-established rules within other Conventions regarding dispute resolution, and up-dated regularly, provides the basis for settling claims among DRC membership. Settlement is accomplished by drawing on an agreed list of adjudicators from the three countries with industry and/or legal backgrounds to review the facts of each case and render a decision. Some disputes settled by the DRC have been between buyers and sellers entirely within the USA, although most have at least one party to the dispute in Canada, and quite often, both parties to the dispute are registered within Canada. For the USA, dispute resolution through PACA takes precedence whenever at least one party based in the USA requests PACA as the arbiter.

Evidence of Financial Responsibility

Section 31 of the CAP Act provides the Minister with authority to require a demonstration of financial responsibility on the part of anyone involved in the marketing of agricultural products in import, export or inter-provincial trade. The section reads as follows:

> "The Minister may require any person or class of persons marketing agricultural products in import, export or interprovincial trade to provide evidence of financial responsibility in any form, including an insurance or indemnity bond, or a suretyship, that is satisfactory to the Minister."

This requirement can be extended to any person or class of person, apparently whether or not they are licensed under the regulations to the Act, i.e., Licensing and Arbitration Regulations. Within these regulations, Section 9 indicates:

> "9. (1) The Minister shall require a dealer to post a bond, or to provide other security satisfactory to the Minister, as a guarantee that the dealer will comply with the terms and conditions of a licence issued pursuant to these Regulations, where a person referred to in paragraph 3(3)(n)
>
> (a) is described in any of subparagraphs 3(3)(n)(i) to (ix);[7] or
>
> (b) has a history of slow payment of financial obligations.
>
> (2) Where the bond or other security posted or provided by a dealer is forfeited under section 11 or cancelled by the bonding company, the dealer's licence is cancelled as of the date of that forfeiture or cancellation.
>
> (3) A dealer whose licence has been cancelled under subsection (2) is not entitled to a new licence until he or she posts another bond or provides other security in accordance with subsection (1). SOR/96-363, s. 5."

The section 9(1)(a) requires disclosure of previous problems in following the Licensing and Arbitration Regulations in Canada or the USA (under PACA), as well as criminal convictions, and actions under the Bankruptcy and Insolvency Act. In these cases, the Minister may still issue or extend a license on the condition that a bond or security is posted.

Business Conduct

With regard to business practices, a dealer who "has consistently failed to meet debts as they come due or has conducted business in a manner inconsistent with fair and orderly business practices"[8] cannot receive a license. Section 9(1)(b) shown above appears to weaken this requirement by indicating that a dealer who has a history of slow payment may be licensed so long as a bond or security is provided. There is no clear definition in either of these two sections of appropriate business practices or slow payments. While an Administrative Manual was prepared some years ago to provide guidance on implementation of these regulations, it is out-of-date and not used currently as the basis on which to guide regulators.

The CFIA indicates that only one of the approximately 115 dealers in fresh fruit and vegetables licensed through the CFIA has been requested to demonstrate financial responsibility.[9]

The amount of the bond or security remains undefined in the Act or the Regulations. Currently, bonds or security established through CFIA licensing are sufficient to cover expected payments and fees to CFIA for inspections, certifications, etc., as well as penalties imposed by the Tribunal or Board. The Act allows for the collection of these moneys by the federal government but does not contain the authority to indemnify sellers or to remit funds to cover unpaid invoices within the industry. Without such legislative authority, the funds received must remain within the federal treasury. As a consequence, unless the Act is amended to include this provision for indemnification of sellers from the moneys collected under the Act, the bonding enabled under the Act cannot be used as a means to assure payment to suppliers.

The Perishable Agricultural Commodities Act (PACA)

This USA federal Act regulates the marketing of fresh and frozen fruit and vegetables within the USA. It has a number of important features in comparing it to the CAP Act and regulations in Canada.

Definitions

Dealer, broker, commission merchant, retailer and grocery wholesaler are defined within PACA, and follow well-known industry usage. The term “responsibly connected” is defined as anyone connected to a corporation or entity and actively involved in the business.

Business Conduct

Unlike the CAP Act and its regulations in Canada, the PACA contains a lengthy section (Section 2) defining “unfair conduct” applying to brokers, dealers and commission merchants for perishable agricultural products.[10]

Perishable Agricultural Commodities Act Fund

Section 3(b)(5) provides for the establishment of a fund held within the US Treasury, which receives all fees prescribed under PACA and interest earned on account balances. Of importance is that the fund does not have fiscal year limitation; that is, unused funds are not lost at fiscal year end.

The PACA Trust

In Section 5(c), the PACA prescribes that trade in any produce in any form received by a dealer, broker or commission merchant is regarded under law as a “trust” placing the value of these goods ahead of all other creditors in the event of insolvency, bankruptcy or otherwise failure to pay for such produce, until such time as full payment has been made. Going further, the Act indicates that by simply adding the following paragraph to an invoice, the trust is legally preserved until full payment is made:

> "The perishable agricultural commodities listed on this invoice are sold subject to the statutory trust authorized by section 5(c) of the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. 499e(c)). The seller of these commodities retains a trust claim 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."

Bonding

The Secretary of Agriculture may require a bond from a licensee for a range of reasons. The amount of the bond appears in the PACA to relate to the nature and volume of business, in contrast to the CAP Act regulations, which in practice establishes the amount of the bond on the expected payments due to CFIA for inspections.

Reciprocal Arrangements for Certain Complaints

Whenever a non-resident of the USA (or a USA resident who has assigned a claim to a non-resident), the complainant may be required to furnish a bond for twice the amount estimated at issue under the claim, before any action is taken. The Secretary is authorized to waive this bond in the case where the complainant resides in a country which permits the filing of a complaint by a USA resident without furnishing a bond.

Even though Canada has such a reciprocal arrangement with the USA, there is no requirement under legislation in Canada to force the payment of any reparation, claim or penalty as in the case of the USA PACA, although a license can be revoked if payment is not made. As a result, where there is the possibility that a complainant may not comply with an outcome of a complaint process, the Secretary can require bonding by the complainant based in Canada before any action is taken.[11]

Exemptions from Licensing

The PACA exempts a number of persons from licensing under the Act. Farmers selling their own produce are excluded. Dealers selling less than $230,000 annually at retail level are exempt. Those dealing in commodities, other than potatoes, intended for canning or processing entirely within one state of the USA are excluded. Brokers with annual invoices less than $230,000, operating as independent agents in transactions for frozen fruits and vegetables are exempt.

Any of those exempted from licensing may obtain a license if desired. In doing so, they are deemed to be dealers for the purposes of the Act. Foreign produce traders are required to be licensed if they have or maintain a physical business location in the USA.

The PACA defines interstate and foreign commerce very broadly as movement of product across state and national boundaries, as well as products produced and processed within a state and intended for subsequent shipment out of the state. In general, the

exemptions for fresh fruit and vegetable dealers are very limited, particularly in comparison to the exemptions under the CAP Act regulations.

Persons "Responsibly Connected"

The PACA defines "responsibly connected" persons as those who are actively engaged or affiliated with a commission merchant, dealer, or broker, as partner in a partnership, or an officer, director, or holder of more than 10 percent of the outstanding stock of a corporation or association.[12] This allows the PACA administrators to track individuals actively involved in the fresh fruit and vegetable industry and to trace individuals involved in unethical business practices. Canadian regulations do not require this information on "responsibly connected" individuals, although any licensee through CFIA must provide details of any problems under the CAP and other Acts (see endnote 6). The DRC does require information on "responsibly connected" individuals for each of its members.

PACA Operations[13]

There are 14,885 produce traders licensed under PACA as of August 2005. Retailers have the option of holding individual store licenses, regional corporate licenses or national corporate licenses. The result is that over 30,000 retail stores are under PACA license.

Produce sellers, whether or not they are licensed under PACA, when they sell to PACA licensees, are protected under PACA, and have the right to reparation and trust enforcement. For the greater share of these complaints, informal settlements are mediated by PACA staff, although formal complaints can be filed and handled through an administrative process. The value of restitutions and reparations under PACA for the past five years are shown in Table 3.

These values represent only the reparations made through the informal and formal settlement of complaints handled by PACA staff, that is, payments made by a buyer or seller in response to a contract or PACA regulatory breach. These figures are not comparable to the settlements reached through the DRC and the CFIA Tribunal. As an example, the DRC settlements include some settlements for a buyer and a seller both of whom are located in the USA.

Table 3: Restitutions and Reparations Under PACA, 2000 to 2004

Year	Reparations
2000	US$42,280,416
2001	US$57,292,224
2002	US$47,436,485
2003	US$36,755,056
2004	US$34,744,292
Total	US$218,508,474

In addition to these settlements, the PACA trust funds are used to assure payment when sellers have not been fully compensated. However, the US District Courts, over 90 in total, have jurisdiction in PACA trust enforcement. As well, there are over 90 Bankruptcy Courts in the USA, separate from the US District Courts. There is no single registry for the PACA trust settlements across these courts. An industry estimate of the likely payouts through these courts over the past ten years is about US$150 million, although six cases alone during the past five years have totaled some US$90 million.

Bankruptcy and Insolvency

One of the complaints from fruit and vegetable industry members is that bankruptcy or termination of a business through insolvency of a buyer may deny obtaining full payment for produce sold. In the USA, any licensed dealer, broker or commission merchant is fully protected through the PACA trust, so long as the invoice has the appropriate wording. Finding equivalent protection in Canada has been an objective of the industry since the mid-1980s.

Bankruptcy occurs when a court order has been made against an individual or corporation who cannot meet all obligations from the assets available to the individual or corporation. An insolvent person is one who is not bankrupt, but cannot meet his/her obligations when they become due, has ceased paying current obligations in business, or when the liabilities exceed the available assets valued at fair market prices.[14]

Terminating a corporation can occur in several ways. Clearly, any corporation which is not insolvent can close its business at any time and distribute the proceeds and assets of the corporation to its investors. An insolvent person or corporation can also terminate its business under a negotiated agreement with creditors. As well, a creditor can also petition to have a corporation or person declared bankrupt, having shown that liabilities exceed realizable assets. Finally, a corporation can declare bankruptcy itself and seek the appointment of a receiver under the Bankruptcy and Insolvency Act (BIA) to achieve a settlement of outstanding claims or the negotiation with creditors on the continuation of the business.

In observing the fresh produce industry, several mechanisms can be used to avoid payment by buyers. These include:

- Negotiation with the seller for a price less than originally agreed, even though the produce had been delivered to the buyer and met all specifications of the buyer.
    - Few of these cases are ever recorded, since sellers, quite apart from the business embarrassment which may be caused to them, do not normally report such losses or the transactions involved. As well, there is often a dearth of written evidence on which to base a legal claim.
    - The seller recognizes that a partial payment is likely preferred to no payment.

    - The result is that there is no information on such losses or the magnitudes of the losses, although most in the industry recognize that these events are not uncommon.
    - The DRC will alert its members when knowledge of these transactions is found.
- Closing of a corporation between the time of receipt and subsequent sale by the buyer, and the time of settlement with the original seller.
    - In these cases, only a few of these losses are reported, for many of the same reasons as in the case above.
    - The DRC alerts its membership to such transactions when they become known.
- Bankruptcy of the buyer following receipt of the produce and before payment is made to the seller for the produce.
    - The DRC alerts its members to any bankruptcy proceedings of one of its members or if it has information on unlicensed dealers (non-members) involved in a bankruptcy proceeding.

The federal statute, The Bankruptcy and Insolvency Act (BIA), in Canada carries a provision allowing any supplier who has not been fully paid to recover any identifiable product following a bankruptcy and/or appointment of a receiver. An important element of this section is that the bankruptcy must have occurred prior to the exercise of these rights under the Act; these rights are not extended to those unpaid by an insolvent person or corporation. The goods to be recovered by the seller must be the same as those supplied, identifiable, be in the same state as when they were initially delivered, not been sold at arm's length, and not subject to an agreement for sale at arm's length. While this provision on the surface may seem to offer some recourse for fruit and vegetable sellers in the event of a bankrupt buyer, produce identification is likely impossible. Similarly, because the produce is highly perishable, the produce moves rapidly though to wholesale and retail markets, usually within a few hours of receipt.

A second provision, specifically designed for farmers, fishermen and aquaculturalists to repossess or be paid in full for any produce delivered to a firm which subsequently declares bankruptcy or becomes insolvent, is also unusable in this regard. The timing for movement of the produce and its general lack of identifiability normally prevent exercising this right within the Act.

Beyond these provisions, any seller of produce must stand in line with other unsecured creditors, with all secured creditors ahead in priority for payment in the event of bankruptcy or insolvency of the buyer.

Bankruptcy and insolvency lies within federal jurisdiction under the Constitution Act. Provinces cannot modify the order of creditors through legislation or regulation, but they can provide for deemed or formal "trusts" which provide priority creditor status under the federal Act. An example is the deemed trust established in Alberta for the sale of livestock within the province.

Bankruptcy Data

The Office of the Superintendent of Bankruptcy[15] maintains statistics on the number of formal bankruptcies in Canada, by province, occurring annually. The data are publicly available. The sectoral breakdowns use the Standard Industrial Classification (SIC) system for all years before 2003, and the North American Industrial Classification (NAIC) system for 2003 and later years. The full data set relating to the agriculture and agri-food subsectors for 1995 to 2002 for SIC data and 2003-2004 (NAIC) is included in Annex III. The summary data for 1995 to 2002 (SIC) are shown in Table 4.

Table 4: Bankruptcies by Province, Selected SIC Categories, 1995-2002

Code	Industry Title: SIC Classification	Nfld	NS	PEI	NB	Que	Ont	Man	Sask	Alta	BC	Canada
501	Farm Products, Wholesale	0	6	3	2	60	79	8	2	9	4	173
5011	Livestock, Wholesale	0	4	0	0	11	52	4	0	7	1	79
5012	Grain, Wholesale	0	0	0	0	3	2	3	2	1	0	11
5019	Other Farm Products, Wholesale	0	2	3	2	46	25	1	0	1	3	83
521	Food, Wholesale	13	24	4	9	312	181	15	5	45	44	652
5211	Confectionery, Wholesale	2	8	1	0	34	10	4	3	4	0	66
5212	Frozen Foods (Packaged) Wholesale	0	0	0	1	48	37	3	0	7	11	107
5213	Dairy Products, Wholesale	0	2	0	1	26	12	3	1	9	1	55
5214	Poultry and Eggs, Wholesale	0	0	0	0	3	0	0	0	0	0	3
5215	Fish and Seafood, Wholesale	3	6	2	3	16	6	0	1	7	7	51
5216	Fresh Fruit and Vegetables, Wholesale	0	0	1	0	39	13	0	0	5	5	63
5217	Meat and Meat Products, Wholesale	0	2	0	1	25	23	3	0	4	2	60
5219	Other Foods, Wholesale	8	6	0	3	121	80	2	0	9	18	247

Source: Office of the Superintendent of Bankruptcy, Ottawa, Canada

The data sets using the SIC and NAIC make it very difficult to directly compare bankruptcies across subsectors. As a result, the comparisons below are crude and can only give an indication of problems.

To compare the experience across subsectors in agriculture and agri-food, the farm gate receipts are used as a proxy for the value of product moving through the marketing chain. From the detailed farm cash receipts tables, receipts can be aggregated across commodities to be roughly comparable to the SIC categories for which bankruptcy statistics are maintained.

Because SIC data are only available until 2002, only the years 1995-2002 are considered in the calculations. The occurrences of bankruptcies are not “smooth” across years, so an

aggregation across years is used. The two years of data, 2003-2004 using NAIC, cannot be re-aggregated to approximate the SIC categories. As well, the two years are not a long enough period to offer stable results. Consequently, 2003-2004 data are dropped from the calculations. In examining the farm cash receipts data, the methodology for these records changed in 1996, to explicitly include greenhouse vegetable production. As a result, aggregations across the years 1995-2002 as well as 1996-2002 are used to avoid any effects due to the change in farm income reporting methodology.

Using all farm gate sales as a proxy for the overall size of the farm economy, total farm cash receipts are compared to the number of bankruptcies for wholesale farm products, resulting in 0.69 bankruptcies per billion dollars of sales. Poultry and egg receipts (including chicks and poults) are compared to the number of bankruptcies for wholesale poultry and eggs, yielding 0.17 bankruptcies per billion dollars of sales. This number is substantially lower than the aggregate for all farm cash receipts, likely because of the extensive marketing board arrangements and regulation in this sector. In grains and oilseeds, the rate is 0.17 bankruptcies per billion dollars of sales, comparable to the poultry and egg sector, again likely due to the regulation covering the marketing of grain and oilseeds by the Canadian Grain Commission. For livestock, the cash receipts for all cattle, hogs, sheep and lambs, as well as all miscellaneous animal products are considered. Excluded are dairy, poultry and eggs which for the most part do not go through wholesale trade, but direct to processors. These livestock receipts are compared to wholesale livestock bankruptcies, with 1.04 bankruptcies per billion dollars of sales, substantially above the average for all farm gate sales.

In dairy products, the bankruptcy level is for the wholesale trade in these products such as cheese, icecream, milk powders, etc., not the milk itself coming from farms. The result is that the farm level receipts are being compared to the bankruptcy rate in the dairy product wholesale trade. The result is 1.79 bankruptcies per billion dollars of sales, again higher than the previous subsector results, but generally not comparable to the other categories. It is included only for completeness in these calculations.

One of the SIC categories is “Other Farm Products, Wholesale”. The other categories are “Livestock, Wholesale” and “Grains, Wholesale”. With dairy, poultry and eggs rarely moving through wholesalers, the remaining farm cash receipts to consider for this “Other” category include horticulture (including nursery), tobacco and special crops. The result is 1.6 bankruptcies per billion dollars of sales, higher than any other category measuring farm level product passing through wholesalers.

Within the Food SIC group, fresh fruit and vegetables at wholesale level are included. Comparing farm cash receipts from fruit and vegetables (for fresh as well as processing) to bankruptcies, the result is 2.3 bankruptcies per billion dollars of sales, the highest of any category. In comparing across subsectors, the rates of bankruptcy for farm products moving into wholesale trades are highest for fruit and vegetables, followed by livestock.[16] In livestock, cattle and sheep and lambs are the primary products moving through a “wholesale” level, with most hogs going through marketing boards or direct contract to packer. The expectation is that the bankruptcy rate in hog marketing is very

low, so the estimated rate for bankruptcies in livestock wholesale trade is likely an underestimate.

The general conclusion is that bankruptcies appear substantially higher in the fruit and vegetable wholesale trade than in other subsectors of agriculture, followed by cattle, sheep and lambs. The conclusion holds for both sets of years considered, 1995-2002 and 1996-2002, with bankruptcies in fruit and vegetable wholesale trade running about double the rate in the livestock trade, and over ten times the rates in the highly regulated sectors of grains and poultry.

Table 5: Bankruptcies per Billion Dollars of Farm Gate Sales by Sector

Sector	1995-2002	1996-2002	Notes
All Farm Gate Sales	0.69	0.69	4
Poultry and Eggs	0.17	0.20	2
Grains and Oilseeds	0.17	0.19	5
Livestock (excluding dairy and poultry)	1.04	0.94	1
Dairy Products	1.79	1.79	3
Horticulture, Tobacco and Special Crops	1.60	1.69	6
All Fruit and Vegetables	2.30	1.97	7

Notes:

1. Cattles, calves, hogs, sheep, lambs, wool, honey, furs, misc., compared to bankruptcies for Livestock, Wholesale (SIC 5011).
2. Hens and chickens, turkeys, eggs, chicks and poults, compared to bankruptcies for Poultry and Eggs, Wholesale (SIC 5214).
3. Dairy Products compared to bankruptcies for Dairy Products, Wholesale (SIC 5213).
4. Total Farm Cash Receipts compared to bankruptcies for Farm Products, Wholesale (SIC 501).
5. All grains and oilseeds, excluding special crops, compared to bankruptcies for Grains, Wholesale (SIC 5012).
6. Horticulture and Tobacco, and Special Crops, compared to bankruptcies for Other Farm Products, Wholesale (SIC 5019).
7. Fruit and Vegetables, including Greenhouse, compared to bankruptcies for Fresh Fruit and Vegetable, Wholesale (SIC 5216).

Even though the rate of bankruptcy for fruit and vegetable trade is higher than other parts of agriculture, these data only capture the actual bankruptcies which occur, and do not include the deliberate closure or termination of companies in the trade, either to avoid payment of suppliers, or for purely legitimate business termination, including insolvency. No statistics are available for either closure of businesses or insolvencies that do not lead to formal bankruptcies.

Cattle and Fresh Produce: Similarities and Differences

The problems outlined for the fresh fruit and vegetable industry are not unique to this industry. The cattle industry has faced many of the same issues in the past regarding the non-payment or partial payment from dealers, brokers, auction markets and abattoirs to producers and other dealers. The higher than average bankruptcy rate in the cattle

industry can be seen from Table 5 above. Other industries have not faced these same problems of non-payment to the extent of the cattle and fresh fruit and vegetable markets. Two elements are worth exploring. First, the question is why these two industries faced the same problems. That is, what characteristics in the two industries appear to foster such business practices? Second, what have the cattle industry and governments done to alleviate the problem in cattle marketing?

Characteristics of the Two Industries

The two industries have a few critical similarities which impact on marketing and business arrangements:

- Ease of entry for dealers and brokers
    - There is very low investment to deal or broker cattle and fruit and vegetables; a truck, cell phone and knowledge of the local producers, auction or terminal markets
    - In fresh produce and cattle, even a truck may be unnecessary; hired trucking is common use in both industries
- Many marketing paths
    - Every producer becomes a seller through one or more of several marketing paths and mechanisms; cattle can move directly to abattoir, to auction markets directly from the producer, from producer to another producer, or through dealers and brokers through to abattoirs, auctions or other producers; in fresh produce, product can move from producer to dealer, producer directly to retail, producer roadside sales, from dealer to dealer, and from dealer to terminal markets and retail level.
- Many producers
    - There are nearly 100,000 farms with beef cattle in Canada; there are over 15,000 farms producing fruits and vegetables. The large majority of farmers in both these industries are small; only a minority in both commodity groups are large or very large highly business oriented farms.
    - Unlike cattle, fresh produce is sourced from many producers in many countries on a year-round basis.
    - Other animal industries do not face the same type of marketing chain. In poultry (eggs, broilers and other chickens, turkeys) and hogs, marketing boards have been in existence for a long period in most provinces, regulating the marketing path and the product movement. This has not been true for either the cattle or fresh produce industry.
- Limited marketing regulation
    - Many marketing problems arose over the past 125 years in a number of agricultural commodities. The early problems were in western grains giving rise to the Canada Grain Act and the operations of the Canadian Grain Commission, regulating nearly all aspects of grain handling and marketing.
    - Following World War II, dairy and subsequently poultry producers faced severe marketing difficulties and resolved the problems through supply

management marketing boards. Similarly in hogs, exclusive marketing arrangements were put in place by most provinces although these "single channel marketing paths" have been eroded in recent years.
    - The cattle industry across Canada fought to prevent these restrictive marketing arrangements, leaving many marketing paths and arrangements, with little marketing regulation.
    - For the fruit and vegetable industry, with the exception of some of the "large commodities" (e.g., potatoes and apples), most product moved locally until the past two or three decades. As a result, the marketing arrangements for fruits and vegetables received little attention from governments (other than grades and standards) when the principal federal and provincial marketing arrangements were being put in place in the 1960s and early 1970s.
- High perishability
    - Both cattle and fresh fruits and vegetables are highly perishable as they arrive at market.
    - Finished cattle move rapidly from farm to farm, farm to feedlot and farm to slaughter, one to two days at most.
    - Fresh fruits and vegetables also move rapidly from field to final consumer to prevent rapid deterioration and quality loss unacceptable to the consumer.
    - This characteristic is not necessarily unique to these two industries, but both share this characteristic.

There is one characteristic of the fresh fruit and vegetable market that appears to be unique to this industry:

- Until about three decades ago, the fruit and vegetable industry produced for local demand within season, with a large portion of the produce canned, processed, frozen or stored for subsequent use. However, more recently, Canadian consumers have demanded year-round supply of fresh fruits and vegetables, and as well have widened the range of these products expected in the market. There are several hundred differentiated fruit and vegetable products available year round now, from both domestic production and imports.
    - This dramatic change in the marketing and variety of fresh fruits and vegetables during the past two decades appears to be unmatched in any other sector for <u>fresh</u> product.

Fund for Livestock Producers: Ontario Regulation 469/95

During the late 1970s and early 1980s, cattle producers in Ontario were experiencing the same issues in business arrangements across abattoirs, dealers, brokers, commission agents and auctions as the fruit and vegetable industry is facing now. After some years of work within the Ontario livestock industry to design improved protection for the industry, particularly the beef industry, a large abattoir declared bankruptcy, leaving a large

number of farmers unpaid for cattle. This event spurred the Ontario government to provide regulatory protection for producers on an urgent basis.

Under the Farm Products Payments Act, the Fund for Livestock Producers was created effective 12 June 1982 in which arrangements were made to charge a small fee for (almost) every animal moving through dealers, brokers, abattoirs and commission agents in Ontario.[17] This fund created from the fees was used to compensate producers whenever a buyer was unable to pay and no settlement with the buyer could be reached. The Fund also has the right to pursue buyers for repayment or recoveries after settlement with the seller has been made. The Fund is managed by the Livestock Financial Protection Board, made up of beef industry members.

The licensing arrangements under the Ontario Act require that financial statements of licensed abattoirs, dealers, brokers, auctions and commission agents be provided annually to the Ontario Ministry of Agriculture and Food (OMAF). If the statements do not indicate financial soundness across a number of solvency measures established, the Program requires that a bond or security be provided.

From 1982 to 1997, all administrative costs were paid by OMAF, running up to about $500,000 annually. In 1997, OMAF announced that it intended to devolve the Fund to The Ontario Beef Cattle Financial Protection Program, Inc. Part of the administrative cost of Program operations (now at about $150,000 annually) since 1997 has been paid from the fund. From the establishment of the Fund to 31 March 2005, revenues and expenses are shown in Table 5.

Table 6: Revenues and Expenses of The Ontario Beef Cattle Financial Protection Program, Inc., from Inception to 31 March 2005

Revenues:	
• Fees	$ 5,954,337
• Interest	$ 6,668,351
• Grants	$ 25,000
Total Revenues	$12,647,688
Expenses:	
• Administrative	$ 415,091
• Board Costs	$ 359,397
• FRRC	$ 175,570
• Claims Paid	$ 8,016,584
o Recoveries	$ 1,763,862
• Net Claims Paid	$ 6,252,271
Total Expenses	$ 7,202,779
Fund Balance	$ 5,444,908

Source: Communication from The Ontario Beef Cattle Financial Protection Program, Inc., Toronto, Ontario.

Fees from producers on a per head basis have declined substantially from initial levels established for the program. Total fees paid by producers in fiscal years 2003 and 2004 were $116,558 and $100,233 respectively. Interest income in the same years was $196,465 and $186,020.

A few points are worth noting:

- Over half of all revenue in the Fund comes from interest earned on the fund.
- There was no baseline information collected on the extent of losses in the industry before the fund was established. The result is that there is no factual evidence that the fund and licensing procedures adopted in Ontario for the beef industry have lowered the losses to the industry. However, industry observers are convinced that significant improvement in the business climate has taken place.
- The Fund pays part of the administrative cost of Program operation ($60,000 annually), and all of the Board expenses in managing the fund. That is, the industry bears almost all costs of operation and payments. From the history of operations and its balance sheet above, it could easily be self-sustaining without taxpayer support from this point forward, even though the administrative support and legitimacy provided through OMAF in its early years were likely critical in establishing the Program and Fund.
- All data obtained from the annual financial statements of licensees are fully secured; the Ministry does not have access to these records, nor does the Program management Board. All financial records remain confidential to the Program management officers.
- One payout makes up fully one-quarter of all payouts from the fund since its inception. Most payouts remain small and sporadic.

Livestock Dealers' Regulations in Alberta

Anyone buying or selling cattle or acting as an agent for the purchase and sale of livestock in Alberta is required to be licensed in Alberta. This includes individuals and firms outside of Alberta who buy and sell cattle within Alberta. The only exemption to the various Acts and regulations are for those individual producers who buy and hold cattle longer than 30 days. There are 307 licensed dealers and 71 licensed stockyards in Alberta. This includes those who are resident outside Alberta (USA and other provinces) and are licensed to trade livestock within Alberta.[18]

The Livestock and Livestock Products Act[19] of Alberta contains two separate provisions for the protection of individuals buying and selling cattle. First, Section 7 indicates that the proceeds of a sale of animals is considered a "trust"[20] until full payment is made to the buyer of the animals. This provision effectively places the seller ahead of any other creditors in the event of bankruptcy of the buyer. A related section[21] assures that transfer of title to the animals does not take place until full payment for the sale has been made.

The second mechanism for the protection of sellers of livestock is through the Livestock Dealers' and Livestock Dealers' Agents Regulation.[22] This regulation allows for the establishment of bonds for dealers and dealers' agents which may be called upon if sellers are not fully compensated for animals sold. The level of the bond is established in relation to the declared volume of sales expected or realized by the individual dealer or agent. As well, a fee of $0.05 per head is charged in all transactions to create the Patrons' Fund, a fund which is used to cover some portion of the value of a sale when the buyer does not fully compensate the seller, and the bond is insufficient to cover the entire sale. The Patron's Fund can only bring the overall value of the payment to a producer up to 80 percent of the sale value, whenever the bond is insufficient to cover the sale. This assures that sellers maintain some risk in making a sale, and limits potential abuse of the Fund.

This program is operated by the Livestock Identification Service (LIS), a private, non-profit organization created by the Alberta Government in 1998.[23] The operation of this Patrons' Fund is only one of many functions carried out by the LIS. The Patrons' Fund during its establishment before 1998 was operated by the Government of Alberta which initially paid for the operations of the Fund. Since 1998, the Patrons' Fund has been self-supporting, with $50,000 paid annually from the Fund to LIS for its operations. The balance of LIS operations (about $5-6 million annually) is funded by the Alberta Government and fees collected for services.

Currently, the Fund has a balance of about $5.9 million, with only five to ten payments made from the Fund since its inception. The largest payment made from the Fund was just under $1 million, an event considered to be caused by the BSE crisis. The LIS has the powers to seize any and all records and carry out audits in support of its operations of the Fund, and through the other activities operated by the LIS. All information collected or obtained for Fund operations are available to the Government of Alberta.

No baseline studies were carried out before the initiation of the Fund, and as a result, no indicators can be established to measure the effectiveness of the Fund in deterring losses from the sale of livestock. However, with all dealers and their agents required to be licensed and bonded, along with the Patrons' Fund, and some risk remaining with the seller, any claims on the fund are minimal.

Survey of DRC Members

Survey Design

Because it has been so difficult to find published statistics on the business practices in the fresh fruit and vegetable industry, a survey was designed and carried out via the internet from 18 to 29 August 2005. The survey was sent to all members of the DRC with current e-mail addresses, about 750 to 800, in three languages, English, French and Spanish. Within the time period of the survey, 93 completed responses were received, a return rate of 11 to 12 percent.

The full questionnaire is included in the Annex I. Several "identification" questions were included to define the type of operation, country of operation, and size of business. However, company names/identifiers were not recorded.

To obtain information on business practices, two parallel questions were asked. The first was to determine the portion of sales not covered by a contract[24] at the time of sale over the past three years. Follow-up questions were then asked about the experience with losses and the cause and extent of these losses. The second question was to determine the same information on experience with, cause for, and extent of losses when a contract was in place at the time of sale.

Several questions related to the business practices of the respondents. First, the company was asked to indicate the normal credit or payment terms of the company itself, and the normal credit or payment terms that suppliers offered to that company. Second, respondents were asked whether a reserve for bad debts was budgeted, and its magnitude as a portion of sales, and whether the amount budgeted differed by country of destination for sales. Third, respondents were asked whether the amount budgeted for bad debts had changed during the past five years for each of the country destinations for sales. Finally, respondents were asked whether there were differences in pricing practices by sales destination. The purpose in identifying different business practices by country of sales destination was to determine if the regulatory and market environment by country had impacts on the way in which companies managed their business.

Summary Results

The full results of the survey are shown in graphs in Annex II. To present the results, three minor modifications to the original results were made. First, the results for Foodservice Operators and Foodservice Distributors were combined, since only one of each responded to the survey. Second, Processors and Packers were combined. Third, on the question regarding "normal terms of payment for suppliers", one respondent indicated "Other", and specified that the normal terms were 30 days. As a result, this answer was placed in the category 20 to 30 days.

In exploring the results, some companies indicated that they were located in more than one country, although no "head office" country was indicated. As a result, the results displayed by country include all respondents for the country or countries indicated. That is, the results from a company giving both Canada and the USA as location of business were included in the results for each country, since there was no way to determine which country to which the results should be assigned. Similarly, in other questions, more than one "identifier" was checked. In these cases, the results for that company were included in each of the groups indicated.

Over 43 percent of the respondents were growers, nearly a quarter were wholesalers and 17 percent were brokers. Processors and packers accounted for 10 percent of respondents and the balance was Commission Merchants and Foodservice. Almost two-thirds of the respondents indicated Canada as the location of the business, with 27 percent based in the

USA and 7 percent in Mexico. A few countries indicated they worked in several other countries including Chile, South Africa, Netherlands and Russia. Forty percent of respondents traded between $1 to $10 million annually, 30 percent traded $10 to $50 million per year, 10.6 percent traded $50 to $100 million and 13 percent traded over $100 million each year. Only 7.1 percent traded less than $1 million worth of fresh product per year. In general, the USA-based companies appeared to be slightly larger than the companies based in Canada. Mexican companies appear slightly smaller than the companies in either the USA or Canada. Companies from Canada were included in all size categories; for USA companies, none reported sales less than $1 million annually. For Mexico, all companies reported sales less than $50 million.

In examining the experience of companies with and without a contract in place at the time of sale, there is remarkably little difference in responses by country, nor is there any apparent difference in experience with losses, whether or not a contract was in place (Graphs 6-12, Annex II). Similarly, the causes of the difficulty in payments are the same, with and without a contract. Regardless of the share of transactions for which losses were sustained, all four causes were about equal. These four causes were buyer bankruptcy, buyer ceased operations, payments were rescheduled, and 'other'. The 'other' category was most often cited as a quality or transportation problem on delivery of the produce (Graphs 13-16, Annex II). In comparing experience in Canada and the USA companies with transaction difficulties, buyer bankruptcy and payment rescheduling were slightly more pronounced in Canada than the USA, while 'buyer ceased operations' appears more pronounced in the USA, whether or not a contract was in place (Graphs 17-18, Annex II).

Of greatest interest in looking at these results is that nearly 40 percent of all respondents reported that over 50 percent of their sales were not under contract at the time of sale. The interpretation of this is likely that growers and shippers deal regularly with well-known and trusted buyers and brokers in the industry and do not feel that a written contract at the time of sale is necessary. In fact, over 70 percent of respondents indicated that fewer than one percent of transactions ran into difficulty when no contract was in place.

With respect to credit terms, clearly payment within 30 days was the norm for the industry. However, credit from suppliers tended to be slightly longer than credit offered to buyers (Graphs 19-23, Annex II). In comparing credit terms in Canada and the USA, credit terms offered to buyers and from suppliers appear to be somewhat shorter in the USA than in Canada. For the USA, only 12.5 percent of USA respondents reported credit from suppliers longer than 30 days, while a third of Canadian respondents indicated credit from suppliers of more than 30 days. In offering credit to buyers, 12.5 percent of USA respondents reported credit longer than 30 days, while in Canada, over 28 percent reported credit longer than 30 days.

Just over half of all respondents indicated that their company maintained a bad debt reserve in their annual budgeting. Results were virtually identical for both Canada and the USA. However, in looking at the amount of the bad debt reserve, Canadian companies appear to maintain larger reserves than their USA counterparts. The majority of

respondents indicated that there was no change in the planned budgeting for bad debts over the past five years. Nonetheless, roughly one-quarter of respondents indicated that the planned bad debt reserve had increased during the past five years (Graphs 24-26, Annex II).

Over 72 percent of respondents indicated that there was no difference in pricing strategy for sales in and to Canada and Mexico, compared to pricing strategy for the USA market. Only about 15 percent of respondents used a lower pricing strategy for Canada and the USA, about the same number reported a higher pricing strategy. For pricing in markets outside North America, a higher pricing strategy was noted by nearly half of all respondents (Graph 27, Annex II).

Types of Losses in the Fresh Produce Industry

There are several types of losses occurring in the fresh produce industry. To assist in understanding possible solutions, each must be examined to better understand the nature and causes of the losses and to help in identifying ideas for corrective actions by governments and industry. A high proportion of transactions in this industry are by verbal arrangement, without written or implicit contracts in place. Sellers, searching for the best deals, often fail to carry out due diligence in assessing the risks involved in such transactions, and frequently will not have prior experience with a buyer. The result is that these business habits are a contributing factor in the losses throughout the industry, for those not receiving payment, as well as others conducting legitimate and financially sound business arrangements in the industry. Furthermore, these business habits attract those who purposefully defraud those sellers who do not observe the due diligence of risk assessment in dealing with those unknown to them.

Bankruptcy or Insolvency of the Buyer

Within this category, at least two possibilities exist. First, bankruptcy can occur as a normal part of business through poor management or unexpected reversals in market conditions. Losses accrue to the seller who has not been paid for produce prior to the time of bankruptcy. Recovery of the loss from the receiver is usually very limited. The means to offset this risk to the seller include:

- receivables insurance
  - this insurance is available to any seller through the insurance market
  - premiums reflect the seller's business habits; that is, a seller who does not carry out due diligence in selecting a buyer will have more frequent and higher losses than a seller who confirms the identity and financial capability of the buyer, thereby raising premiums for the less diligent seller
  - the seller bears the cost of the insurance, as well as the gains from insurance indemnities eventually paid
  - premiums for a new client will likely remain high until a track record has been established with the insurance underwriter.

In general, few fresh produce sellers use this type of protection. Where potential losses or risk of loss is understood, due diligence on the part of the seller is likely a more efficient, less costly route.

- bonding of the buyer to cover produce received, for which payment has not been made
  - few buyers carry bonds for assuring payment to sellers
  - in some areas of agriculture, bonding for produce received is common, but only where governments have required the bonding by law or regulation, e.g., grain and oilseed buyers through the Canadian Grain Commission
  - bonding would require government action at federal and/or provincial level, and even in this case, likely only for buyers who require licenses for operation; that is, bonding becomes a requirement of licensing
  - the alternative, similar to the provisions for cattle in Ontario, is the requirement for bonding of licensees where the financial health of the buyer is weak
  - costs of bonding would be borne initially by the buyer and vary with the loss experience of the buyer
  - with industry-wide bonding of buyers in Canada, these buyers would find it difficult to pass the bonding costs to the sellers, because sellers in other countries would not be faced with similar bonding costs

- formal trust provisions in the written or implicit contract between buyer and seller
  - a formal trust requires provincial or federal legislation to be established
  - the written or implicit (default) contract would have to be agreed as the basis of the transaction, even for a verbal sale
  - the contract would have to state that the formal trust was established upon agreement, and that ownership of the produce is not transferred to the buyer until full payment has been made or alternative payment arrangement accepted
  - the formal trust requires the separation of funds within the buyer's financial records, which can only be accessed by other creditors after all payments have been made to sellers covered by the trust arrangement

- informal trust provisions in the written or implicit contract between buyer and seller
  - an informal trust also requires provincial or federal legislation to be established
  - the written or implicit (default) contract would have to be agreed as the basis of the transaction, even for a verbal sale
  - the contract would have to state that the informal trust was established upon agreement, and that ownership of the produce is not transferred to the buyer until full payment has been made or alternative payment arrangement accepted
  - the informal trust does not require that funds are separated within the financial records of the buyer, and as a result, there remains some risk to the seller of

non-payment or partial payment in the event that remaining assets of the buyer cannot cover all payments for produce received.

The second type of loss through bankruptcy occurs when bankruptcy is used as a means of not paying creditors, that is, intentional fraud. The difficulty arises in the fresh produce industry because few of these cases are reported by sellers, and little policing appears to be carried out by law enforcement agencies or the Bankruptcy Commissioner.

The options for resolving this issue lie in two areas. First, greater policing and enforcement of fraudulent bankruptcy is needed to prevent the recurrent abuse. The second set of options mirror those where bankruptcy occurs as a normal business failure.

Renegotiated Payment Schedules

In the case of cash flow problems, buyers can seek renegotiated settlements with produce sellers. In some of these cases, full restitution is made, while in others, the seller can accept partial payment for the produce delivered to the buyer. Eliminating or mitigating the risks associated with delayed or partial payments involves due diligence on the part of the seller to assure the financial capacity of the buyer before the sale takes place, or more formal mechanisms. These include:

- government established trust provisions
- bonding of licensed buyers
- a written or implicit (default) contract specifying the credit period coupled with trust provisions or bonding of the buyer; without the linkage between credit period and trust or bond provision, the sellers would be unwilling/unlikely to report any losses from partial payment.

Delayed Cheque Clearing

Within Canada, cheques deposited by a seller will normally clear within five days. As a result, the seller will know promptly if full settlement for the produce has been made. In the case of a NSF (Not Sufficient Funds) cheque, this represents a breach of the Criminal Code in Canada, and action can be taken against the buyer. Costs of these actions are likely high in relation to the value of the loss in many cases. The result is that few cases are reported. Again, due diligence on the part of the seller is one of the most important ways of mitigating this risk in the market.

For shipments from other countries, cheque clearing can take up to several weeks in some cases. These delayed payments, when made in full after 30 days, represent a longer than usual credit period in the industry. When a NSF cheque is involved, a bankruptcy or insolvency or termination of the company can take place unbeknownst to the seller, limiting the possibility in the case of bankruptcy of notifying a receiver of a claim. However, the NSF cheque is still a breach of the Criminal Code and action can be taken although in some cases, the company has ceased business or completed receivership by the time the NSF cheque is identified to the seller.

For foreign sellers, establishing a way to clear cheques within Canada is one way to limit the period of determining if the payment has been made in full. The alternatives involve the trust or bonding procedures noted above and the use of the written or implicit (default) contract with a specified credit period for payment.

Differences in Produce Quality Sought/Received by the Buyer

There can be several reasons for a difference in the quality of produce sought by the buyer and produce received. First, there can be a difference of opinion on the actual quality of the produce sent and received. Second, there can be a delay in transit, leading to deterioration in quality. Third, the produce shipped was not the quality specified by the buyer. All of these events, however they occur, can be resolved through independent inspection on arrival and existing dispute resolution mechanisms through DRC and CFIA. However, access to dispute resolution through CFIA and DRC is limited to licensees/members.

Lack of Written Contract or Documentation

It is clearly frequently the case in transactions where the entire arrangement is based on a verbal understanding of the deal. Without any documentation, the arrangement can be open to both honest mis-interpretation as well as deliberate abuse. There is virtually no recourse for either party if a dispute arises or a partial or no payment is made. Similarly there is little recourse for the buyer if the product does not meet the quality expected in the transaction. Because of the history and "common practice" in the industry of many transactions without explicit contracts, many buyers and sellers likely feel that such arrangements are usually satisfactory when a sound financial relationship has been established over a period of time. Such relationships can lead to a false sense of security and the perception of low risk with the resulting lower level of due diligence on the part of the seller.

The only solution to this problem is improved business practices on the part of both buyer and seller in due diligence and the documentation or explicit recognition and acceptance of a default contract. A fax machine, for example, could easily and immediately confirm the details of the sale and the implicit or explicit conditions of the transaction. It is quite difficult to envisage any reasonable regulatory system by governments which could solve this problem.

Considerations for Reform

Several considerations, relevant in considering reform of the marketing arrangements for fresh produce, are outlined below.

Market Efficiency

Market efficiency refers to the level of costs involved in moving a product through the value chain from input level to consumer. These costs include the normal fees and mark-ups in the marketing chain as well as the costs involved for reconciling contract breaches or breakdowns. To a considerable extent, actions have already been taken with the Tribunal and the DRC which offer rapid, low cost, efficient dispute resolution mechanisms where differing views in a transaction occur. However, this system only covers those who are DRC members and registered dealers under the CFIA. The issue relates to the costs imposed on the industry by non-members and the questionable business practices of those in the value chain.

Market Equity

Equity in a market concerns the fairness of cost and price allocation among participants in the marketing chain. Several factors contribute to the equity in a market including balance of market power between buyers and sellers at each level in the market, symmetry of information among buyers and sellers, clarity in contractual arrangements or industry norms, and the like. The lack of explicit contractual arrangements for many sales in this industry creates risks which are often ignored or remain unknown by sellers. That is, because sellers are not always exercising sufficient caution in using licensed and known dealers and brokers, they are imposing costs on themselves unnecessarily, and can often impose costs on other market participants as well. In parallel, unethical business practice is exploiting this lack of caution by sellers.

Pricing Transparency

Efficient price discovery requires that all parties to transactions have access to knowledge of past and current prices as well as the forces which affect price. For the most part, there is considerable informal knowledge of prices and their movements within the industry by some participants, but this information is not widely available, or published in a timely fashion. However, unethical business practices are occurring, in which higher than normal price bids can attract the unwitting seller, who finds only later to his/her chagrin that the buyer had little intention of paying the agreed price or even a part of the agreed price. For the most part, the costs associated with these practices are borne by the unwitting seller, although in some instances, this seller can impose losses on other parts of the industry. By being intrigued into opening more than normal apples in storage, or by moving large amounts of a product to a distant market in which the expected buyer can no longer be found, individual sellers can cause substantially lower prices for a period of time for other sellers. That is, private treaty sales between a single buyer and single seller can cause losses to others in the industry even though they are completely independent of the transaction.

One difficulty in transparency is that where no payment or only partial payment is made to a seller, for whatever reason, there is no incentive (indeed embarrassment) to report such events. As a result, there is no accumulated knowledge across the industry on either the extent of such losses or the parties involved. It will be impossible for governments to resolve this problem easily, and as a result, the industry may need to look for private

means of offering an incentive to report. A joint insurance program involving buyers and sellers may be a solution.

Symmetry/Asymmetry in Transactions

Where there is substantial asymmetry in information on the part of buyers or sellers, then efficient price discovery and fairness in transactions cannot be achieved. Private markets can often resolve this issue at modest cost, without violating commercial confidentiality by publishing or reporting daily prices and volumes. Another means of resolving asymmetry is the use of standard contracts with established prices and volumes specified at the time of sale and/or rules on price setting (standard or fixed premiums and discounts) when variation in quality occurs. Where private industry cannot resolve these issues, the government may have a role to play in assuring symmetric information for all players in the market.

The critically needed information element in the produce industry appears to be the trustworthiness of the buyer and seller in a transaction, and the position regarding reciprocity under PACA in the event of difficulty in any transaction. An on-line or automated 1-800 telephone system listing all licensees, as well as any financial guarantees offered by the licensee could be maintained for use by the industry.

Role of Government

The issue is primarily whether some form of “market failure” is occurring in the fresh produce industry and whether government action can efficiently resolve this market failure without imposing undue costs on the industry, that is, some net public benefit must derived from added government action. If the net private benefit is positive, the question becomes why the industry is not taking action itself to resolve the issue. In the case of many disparate sellers and few buyers, it is possible to have a net public benefit from government action, even though a net private benefit also occurs. For example, where the costs of collective action by sellers are high in resolving the problem (even though there would be a high consequent private return), government action may have lower overall costs, increase production, lower costs for consumers and achieve greater fairness in markets.

A related issue for Canada is whether only federal action or both federal and provincial actions are needed to resolve the “market failure”.

Basic Issues for Resolution

Registering Dealers

Given the business practices within the industry, some additional regulation is needed to re-establish a track record of sound business practice. Private action alone is unlikely to resolve the problem.

The case for additional regulation can be made on the grounds that Canada's trade relationship with the USA and Mexico is valuable in the public interest in assuring a dynamic, ready supply of reasonably priced product for Canadian consumers. With $4 billion in imports and growing, unethical business practices in Canada can lead to unwillingness by exporting country dealers to offer product into Canada on a continuous basis at reasonable prices, except through foreign dealer direct to retailer. In doing so, these practices in Canada could limit the willingness of retailers to buy Canadian product, or through Canadian dealers.

Unregistered dealers, brokers and commission merchants appear to be the largest single concern with the business practices occurring in the industry. Without knowledge by CFIA or DRC of these dealers, or the 'responsible persons' and their track record, there is little that can be done to alert industry of problems either through awareness campaigns or industry alerts. Only after the fact can this information be provided. The proposed regulations by CFIA appear to resolve much of this problem, at least from the point of view of licensing dealers.

With passage of these proposed federal regulations in their current form, some dealers will remain unregistered. These are the dealers who buy exclusively within the province in which their place of business is located. The only mechanism to register these dealers appears to be through provincial requirement. As a result, federal registry of dealers is an incomplete solution. It will remain possible for an unlicensed dealer to open a business within a province for a period of time and close it down legally after receiving product and before payment has been made to the seller. Other conditions to halt this practice need consideration. In particular, federal and provincial governments, by working together, to arrange comprehensive and aligned licensing arrangements to cover the greatest number of dealers in the industry.

A final consideration in federal licensing arrangements is to place all registration within a single organization. With 85 percent of current license holders under DRC, the DRC appears to be the best candidate for a single registry location. As well, the DRC as a private non-profit organization would be able to take on the licensing arrangements from provinces as well.

Identifying Responsible Persons

A component of the unethical business practices in the industry can be characterized by the successive creation and closing a series of companies, each of which establish an initial reputation with sellers, and then close the business suddenly after product has been received but payment to the seller has not been made. The PACA mitigates this problem by registering "responsible persons" in the licensing arrangement so that the same persons cannot continuously create and close businesses causing a loss to sellers. The DRC requires such information from its members. The CFIA should consider adding this requirement to licensee registration and denying future registration to those involved in such business practices. The CAP Act appears to have the latitude to accomplish this

through regulation. Furthermore, it would bring into line CFIA, DRC and PACA practice on identifying responsible persons under license in the same way.

The simple rule on licensing would be that any company with a named responsible person in a license application would be denied a license if that person has been involved in a company that has in the past failed to meet full financial obligations in the industry, unless a full bond or equivalent is maintained by the company.

Financial Responsibility

Stronger rules on financial responsibility, or more ready use of the existing provisions of the CAP Act and Regulations need to be considered. Three models are available: the PACA-type trust, the Ontario Beef Cattle Financial Protection Program and the Alberta Livestock Identification Service deemed trusts and bonds. A fourth option would be to use the existing financial rules in the regulations to provide for bonding of licensed buyers for the produce they may have on hand at any one time.

The PACA-type trust, envied by Canadian producers and dealers, needs to be considered as a means of assuring financial security. Experience by other farm groups for federally established requirements has seen little success, but the national-level requirement would be a major asset for the industry, and remain within the international rules.

The financial requirements in the case of Ontario cattle appear to be the most stringent for farm product dealers found so far. Nonetheless, while stringent (an independent agency determining the financial soundness of a dealer on an annual basis, with all financial details of the dealer deposited with the agency before the annual license has been issued), the method avoids the bonding requirement for most dealers. That is, the cost to the financially sound, individual licensees is only the cost of providing detailed financial records annually, rather than having to annually finance a bond covering produce which the dealer may hold at any one time.

The Alberta livestock experience with deemed trusts and bonds also appears to be practical. However, the federal government and/or the provinces would have to implement the deemed trust arrangement, likely a hard sell in most cases, to cover all possible dealers. Also, Alberta is considering a formal trust arrangement which may be even more difficult to achieve across most provinces.

The federal regulations provide for financial security mechanisms in transactions through the requirement of a bond for licensees under certain circumstances. Gaining agreement of the federal government to extend and police these arrangements for all licensees may be difficult. Furthermore, while the Minister has the ability to require a bond or surety, no consequential action by the federal government has been taken to date, other than securing the fees owed to CFIA. With limited resources at CFIA, the focus of its attention is food safety. The business practices in the fresh produce industry are clearly commercial in nature and lie almost entirely outside the food safety realm.

A final alternative may be to seek development of a private sector insurance arrangement covering both buyer and seller. A buyer would be able to verify on-line whether a buyer is insured, and a buyer could also determine whether a seller is insured, offering protection to both parties to the transaction. The arrangement would be voluntary, private sector driven, avoid the difficulty of federal and provincial jurisdiction in licensing, and would require considerable awareness for both buyers and sellers. It would need to be tailored to assure that the arrangements met the reciprocity requirements in PACA dispute resolution.

Industry Awareness

Information and awareness campaigns on working through licensed dealers will work only if the licensing, identification of responsible persons and financial responsibility provisions are implemented. These three changes are likely to greatly reduce the truly unethical business practices, but will leave open the possibility of the dealers beyond the potential scope of licensing still engaging in such practice. The survey clearly indicates that the common and widespread practices within the industry of working without contracts in place still leaves participants open to potential losses. Industry awareness campaigns in the industry will be required to demonstrate the benefits of using only licensed dealers.

Provincial Licensing and Financial Protection

At least three provinces, Ontario, Quebec and British Columbia, should be encouraged to consider licensing to cover those beyond the scope of federal licensing regulation. Combined with licensing should be some form of bonding and financial responsibility along the lines of the Ontario and Alberta cattle programs. Regulation in these three provinces will close much of the apparent gap in the federal licensing regulation.

An option would be for provinces to consider turning over the provincial licensing regulation to the DRC, similar to the federal regulations, either as an alternative to provincial licensing or as the sole means of provincial licensing.

Conclusions

The fresh fruit and vegetable market has grown and expanded very substantially over the past 20 years largely based on the facilitation of trade under CUSTA and subsequently NAFTA, as well as a strong and growing demand for fresh produce year round from all corners of the world. This growth has taken place in a poorly regulated business climate at both provincial and federal level which, on the one hand, has attracted unethical and fraudulent players to the market to prey on the unsuspecting, and on the other, has allowed poor and outdated business practices by honest players in the market to persist even in the face of individual and industry-wide losses. Financial frailty among dealers means that the smallest setback in a business operation can lead to business failure with resultant losses for partners in transactions at the time of failure. Even apart from the fraudulent, business failures are more common in this industry than any other subset of

wholesale markets in agricultural products. This aspect carries implications for Canada's reputation in international markets and relations, particularly in NAFTA countries.

As a consequence, improvements in this industry must be based on three pillars:

- considerable strengthening of business practices among members of the industry
- greater regulation by federal and provincial governments to prescribe and proscribe licensing, eligible licensees and the codes of conduct for licensees, and
- some mechanism(s) designed to ensure the financial soundness of a transaction which place(s) a balanced burden of proof on both buyer and seller.

Clearly, many in this industry operate without written contracts in place. Equally clearly, credit lines in Canada are longer in Canada than in the USA, suggesting some lack of attention to business management. Information on players in the industry is largely tombstone data, which is not readily accessible in the timeframes common for transactions by the buyer or seller in this industry. Solutions lie in industry awareness, greater use of a strengthened, common or default contract for transactions, readily accessible information on potential partners in transactions, and some mechanism to encourage participants to report prescribed transaction failures.

For governments, licensing all dealers should be one of their principle goals. Since neither federal nor provincial governments alone can achieve this, some common approach to coverage must be sought. Associated with this is the generation of information on licensees and making it generally available as a requirement for a licensee. As well, greater policing, both in assuring that licenses are appropriately granted, as well as the rigourous pursuit of those fraudulent elements in the market, is a necessity to eliminate the apparent window of opportunity for poor business practices as well as the unethical and fraudulent players to persist.

Finally, the above two areas would normally be sufficient for the efficient operation of a mature marketplace. However, with the common problems across the industry, as well as from the standpoint of Canada's reputation in international trade, some further action is necessary to bring this market to a stable, safe, efficient and balanced state. That is, balanced financial security in a transaction for both buyer and seller needs to be created to encourage modern business practice and to eliminate the attraction of the fraudulent. Balanced onus on both parties in a transaction is critical to generating the information available for the industry to drive out the partial payment or cash settlement problem (legal or illegal) in the industry.

Recommendations

Government Actions

Federal Licensing and Arbitration Regulations

1. Proceed as quickly as possible to adopt the proposed regulatory amendments on the registration and licensing of dealers.
   - This action would close some of the loopholes in the current regulations and bring to a halt many of the deliberate attempts to avoid payment for produce.
   - The proposed regulations would still not require licensing of those who buy exclusively within the province in which the company is based and market produce internationally and inter-provincially.

2. The regulations should be further amended or extended as soon as possible to include those who market inter-provincially and internationally only fresh produce purchased within the province where their business is located
   - This change lies entirely within federal jurisdiction and assures that any and all dealers involved in inter-provincial and/or international trade are licensed.

3. The Licensing and Arbitration Regulations need a complete and thorough overhaul as quickly as possible to clearly understand and reflect the legal boundaries for a federal marketing act and associated regulations, in terms of application of economic contract provisions and the limitations under the Charter of Rights and Freedoms.
   - Many sections of the regulations have been repaired and patched over a very long period of time, with overlapping provisions, questionable legal coverage and application within current laws, loopholes and the like. A complete overhaul is overdue.
   - The objectives for the regulations include:
     - Maximizing the number of licensees,
     - Establishing the codes of business conduct using combined federal and provincial powers, and
     - Driving out the fraudulent and unethical elements in the industry.
   - The desired outcomes sought in the regulations include:
     - A clean and respected industry,
     - A well-documented and open industry, and
     - Achieving full reciprocity with trading partners.

4. It is recommended that additional regulations within the Licensing and Arbitration Regulations be considered by the federal government for the following:
   (a) the collection and publication of “responsible persons” and related corporate identification as a requirement of licensing
   (b) the consolidation of all licensing at federal level in the Dispute Resolution Corporation (DRC) or a parallel agency; that is, eliminate the CFIA as a licensing agent and utilize the resources for policing the licensing arrangement under the DRC.

(c) That a common or default contract is presumed to be in place for any transaction involving fresh fruit and vegetables unless an alternative contract signed by both parties is used.

- The first of these provisions would allow much greater capability to track individuals operating individually or within companies along with their history of business conduct. Even if it is found ultimately that the federal regulations cannot limit or deny access to licensing for those with a track record of questionable business conduct, public knowledge of the responsible persons and corporations allows greater symmetry and transparency within the marketplace.
- The second provision would bring all licensing within a single agency. It may mean that the DRC would have to operate with two parallel sets of licensees, the first as DRC members, and the others as licensees meeting only the requirements of a license within the regulations and not the additional requirements placed on a DRC member.
- The third provision would clearly identify the rules under which transactions would take place in those cases where no formal contract is in place. An outstanding issue is whether this could be done within federal marketing regulations.

CAP Act

5. The CAP Act itself should be amended to:
   (a) allow the payment of any fees or penalties collected under the Act to be remitted to sellers who have not been paid fully for their produce,
   (b) provide a legal basis for establishing a default contract whenever no other written contract is in place
   - These fees and payments could still be used for payment of debts due the Crown.
   - This amendment of the Act, or specification within the associated regulations, should set out clear bonding requirements and levels based on the history of business conduct of a licensee, as well as the basis for the regulations on a default contract.

6. The CAP Act should be amended to allow/enable federal-provincial-territorial agreements for the business conduct of fresh fruit and vegetable dealers under pooled powers of the two orders of government to include explicit recognition within the regulations of ethical business practices within the industry and the requirement for license denial or deferral to companies and their responsible persons in the event of evidence of not meeting these business practices.

7. It is recommended that Agriculture and Agri-food Canada and Statistics Canada strengthen and up-grade the timeliness and coverage of the information available on the fresh produce industry as well as through

InfoHort as a basis for providing greater transparency and information symmetry in the markets.

Discussion:

Finalizing the proposed regulations under the Licensing and Arbitration Regulations would represent the initial step in bringing more dealers within the licensing arrangements. However, with the history of both unethical business practices and the customary lack of due diligence demonstrated in the sector, greater attention needs to be paid to clearly identifying those causing losses in the sector and limiting their future access to doing business in the sector. For this reason, additional steps need to be taken in the regulations to automatically identify responsible persons to enhance the ability to police the regulations, establish single agency licensing, and defining acceptable business practices for the industry.

While any request for additional regulation of an industry needs careful consideration, the context for such a request also needs to be made clear. The federal government has established in the past substantial marketing protection for a number of sectors including dairy, grains and oilseeds, eggs, chickens and turkeys. The emergence of the fresh fruit and vegetable market long after this marketing legislation was put in place could not consider at that time the nature of the problems now facing the industry. Nonetheless, the problems in the fresh fruit and vegetable industry are not dissimilar to those experienced in some of these other sectors years ago, which in turn provoked the federal government to establish such marketing legislation. The alternative to such marketing legislation is the additional licensing and arbitration regulations and enabling powers within the CAP Act as proposed above, and is a preferred and less onerous approach than building entirely new marketing legislation specifically for the fresh produce industry.

Because of the division of powers between federal and provincial governments, the only mechanism to jointly apply both federal and provincial jurisdictions in an industry is through federal-provincial-territorial agreements. Such agreements are not new in Canadian agricultural marketing. Enabling such agreements within the CAP Act and as necessary in provincial legislation, would permit the widest scope for assuring common licensing provisions and business conduct in the industry.

Provincial Governments

8. It is recommended that provinces be encouraged to establish or amend legislation or regulations as required to allow/enable federal-provincial-territorial agreements for the business conduct of fresh fruit and vegetable dealers under pooled powers of the two orders of government to include explicit recognition within the regulations of ethical business practices within

the industry and the requirement for license denial or deferral to companies and their responsible persons in the event of evidence of not meeting these business practices.

9. It is recommended that provinces strongly consider turning over the licensing arrangements within the province to the Dispute Resolution Corporation or a parallel agency under a federal-provincial-territorial agreement. This would assure that the combined federal and provincial licensing covers the largest number of dealers in the industry in a uniform fashion.

Federal and Provincial Governments

10. It is recommended that the federal and provincial governments establish agreements as soon as possible to allow:
    (a) The creation of a single third party organization to license all dealers
    (b) Establish a common default contract where no written contract exists
    (c) Combine the federal and provincial powers to provide marketing and contract requirements for all dealers
    (d) Document and publish information on dealers and responsible persons
    (e) Strengthen data and information on the industry.

11. It is recommended that both orders of government (and where appropriate, municipal governments) strengthen enforcement by police, Canada Revenue Agency, and the Bankruptcy Commissioner for fraud and unethical business conduct.

Industry Actions

Industry Information Systems

1. It is recommended that the DRC establish an on-line and an automated 1-800 telephone service which provides up-to-date information on any licensed dealer in fresh fruit and vegetables.
    a. For an on-line service, the website would provide licensee number, name, location of business, and responsible persons for all federally registered dealers under DRC and under the CFIA.
    b. For an automated telephone service the same information would be provided by keying in the license number of a dealer.

2. The industry organizations collectively (CHC, CPMA) should mount a significant information campaign to alert members to the problems in the industry, the individual risks and industry-wide costs associated with the lack of due diligence in selecting a partner in a transaction.
    - the campaign should also provide information on:
        - ease of use of the on-line and telephone service available to anyone,
        - the use of a default contract and the means of accessing it, and

- the need for improved business practices in having a written contract containing specific credit arrangements.

Private Sector Financial Security

3. The producer industry should explore the possibility of payment/receivables insurance arrangements covering both buyer and seller.
    - the Private Sector Risk Management Partnerships Program (PSRMP at AAFC) can provide assistance for the establishment of innovative business risk management systems operated in the private sector
    - this element, if it proves feasible, could become a common feature of a default contract.
    - These insurance arrangements offer the most easily achieved means of balancing responsibility of the buyer and seller in assuring the financial soundness of a transaction. However, the weakness of this arrangement is that failures to pay or partial payments and cash settlements are unlikely to be reported unless the mechanism can be designed to affect the insurance premiums only for the party at fault.

Government-Established Financial Responsibility and Security of Contract

1. It is recommended that federal and provincial governments establish trust provisions within appropriate legislation to parallel the arrangements established through the PACA in the USA. These trust arrangements may be possible within a federal-provincial-territorial agreement on licensing.
    - the preference would be formal trusts, although a starting point is likely deemed trusts
    - the trust provisions would require that the trust be established as a component of the default contract used by licensees.

ANNEX I: QUESTIONNAIRE

Introduction

The Dispute Resolution Corporation is committed to helping its members resolve commercial disputes with other DRC produce and transportation member companies across North America. Since the best way to resolve disputes is to avoid them in the first place, we are trying to identify how problems arise, and to develop systems which will help to reduce their frequency. Your willingness to share your experiences with us by responding to this 17-question survey is essential to the success of this effort.

With this particular survey, we hope to develop a better understanding of how often, and under what circumstances, you encounter buyers who cannot, or will not, pay you for what they have received. Future surveys will focus on claims and adjustments relating to when or in what condition the product arrived at destination. Today, however, we are interested solely in exploring issues of non-payment stemming from the receiver's unwillingness or inability to meet his/her financial obligations.

1. Please indicate your principal type of business:
   - Grower/Shipper
   - Foodservice Operator
   - Foodservice Distributor
   - Broker
   - Retailer
   - Wholesaler
   - Fresh Processor
   - Commission Merchant
   - Other (Please specify)

2. In which country are you located?
   - Canada
   - USA
   - Mexico
   - Other (Please specify)

3. Over the past three years, what percentage of your sales has not been covered by a written contract? (Remember that the DRC defines a written contract as 1) A broker's confirmation of sale; 2) A broker's memorandum of understanding; or 3) A written agreement signed both by shipper and receiver).
   - < 10%
   - 10-20%
   - 20-30%
   - 30-40%
   - 40-50%

>50%

4. In those cases where your sales were not covered by written contracts, in what percentage of transactions did you face difficulty in collecting in full?

< 1%
1-3%
3-5%
5-10%
> 10%

5. In the cases you mention in Question # 4, what was the cause of the non-payment problem?

	<10%	10-20%	20-30%	30-40%	40-50%	>50%
Buyer declared bankruptcy						
Buyer ceased operations						
Buyer Requested re-scheduling of payment						
Other						

6. Did you answer "Other" to the previous question? If so, please specify the causes you have encountered.

No
Yes (Please specify)

7. Over the past three years, what percentage of your sales have been covered by a written contract?
(Remember that the DRC defines a written contract as 1) A broker's confirmation of sale; 2) A broker's memorandum of understanding; or 3) A written agreement signed both by shipper and receiver).

< 10%
10-20%
20-30%
30-40%
40-50%
>50%

8. In those cases where your sales were covered by written contracts, in what percentage of transactions did you face difficulty in collecting in full?

< 1%
1-3%
3-5%
5-10%
> 10%

9. In the cases you mention in Question # 8, what was the cause of the non-payment problem?

	<10%	10-20%	20-30%	30-40%	40-50%	>50%

Buyer declared bankruptcy
Buyer ceased operations
Buyer Requested re-scheduling of payment
Other

10. Did you answer "Other" to the previous question? If so, please specify the causes you have encountered.

No
Yes (Please specify)

11. What are the normal payment terms which you extend to your customers?

<10 days
10-20 days
20-30 days
30-40 days
>40 days
Other (please specify)

12. What are the normal payment terms which your suppliers extend to you?

<10 days
10-20 days
20-30 days
30-40 days
>40 days
Other (please specify)

13. Does your company budget a reserve for "Bad Debt"?

Yes
No

14. If you answered "Yes" to # 13, what percentage of the company's sales are reserved for bad debts on sales to:

	<0.1%	0.1-0.5%	0.5-1.0%	1-5%	> 5%
Canada?					
USA?					
Mexico?					
Other export markets?					
All markets combined?					

15. How have your answers to # 14 changed over the past five years, with respect to:

	Higher	Lower	Unchanged
sales to Canada?			
sales to USA?			
sales to Mexico?			
Total sales?			

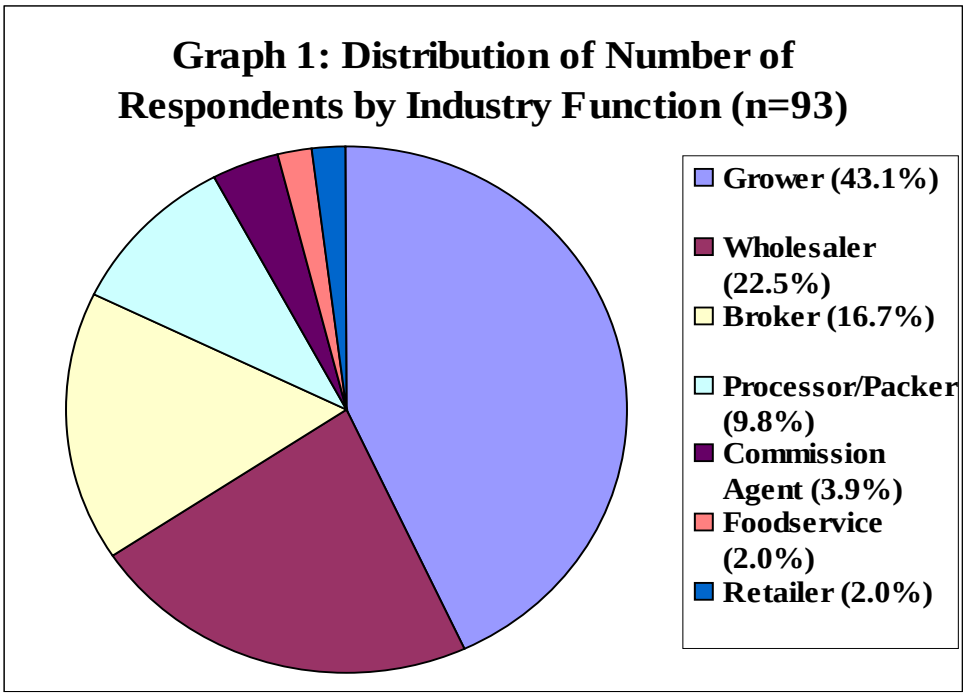
16. Compared to the prices you charge your customers in the U.S.A., are the prices you charge for the same commodities (same sizes/ same grades)

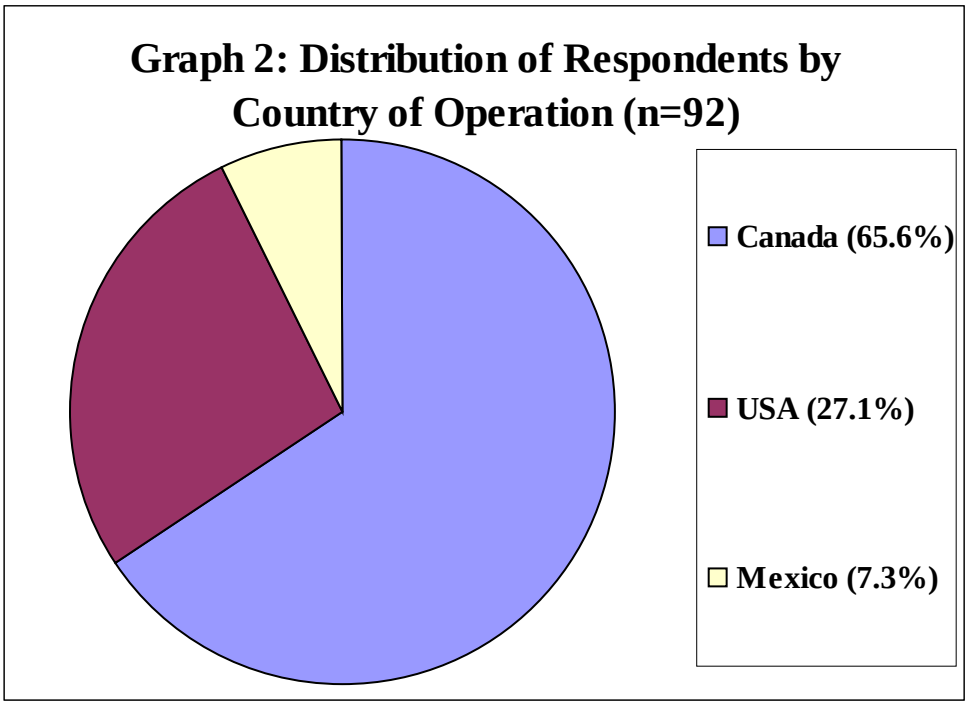
	Higher?	Lower?	The same?
To Canada			
To Mexico			
To other export markets			

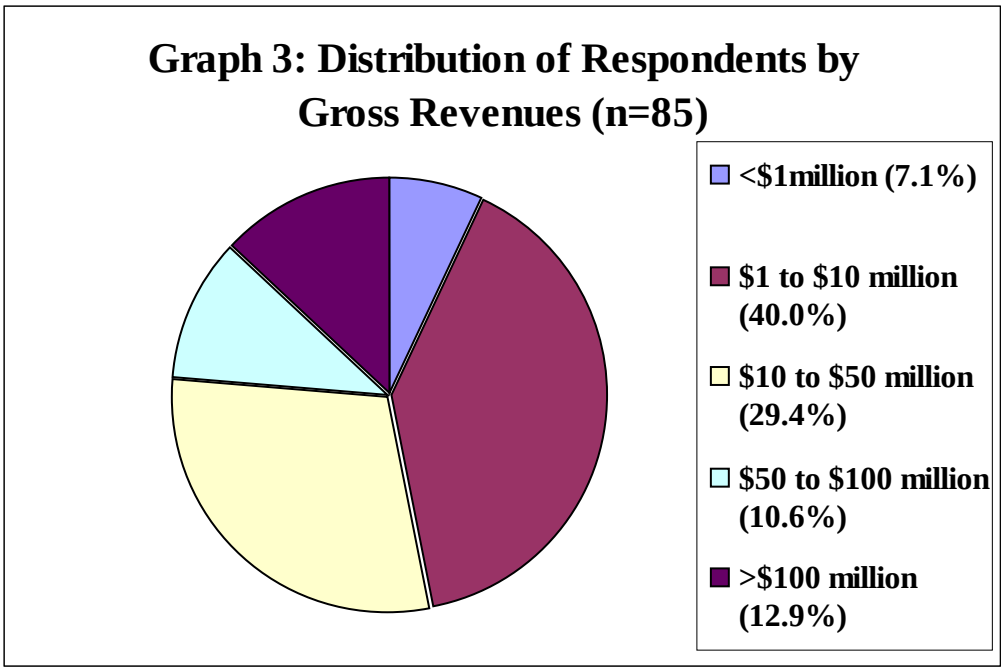
17. Please indicate your company's total annual revenues.

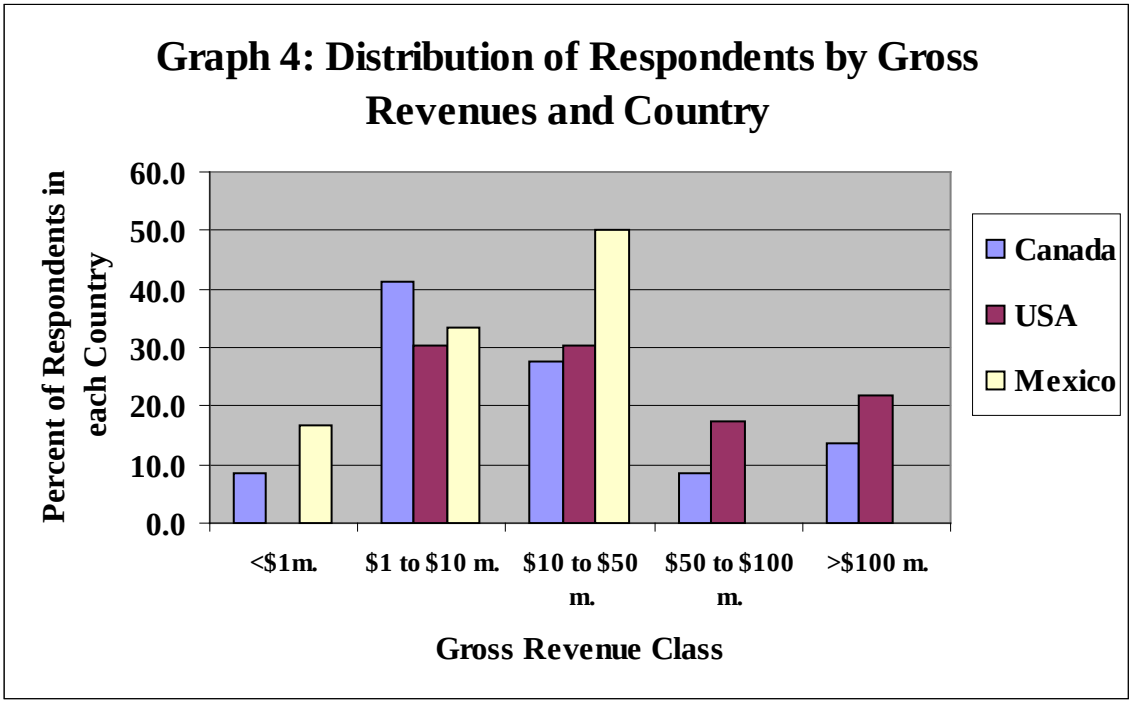
- < $1 million
- $1 million - $10 million
- $10 million - $50 million
- $50 million - $100 million
- >$100 million

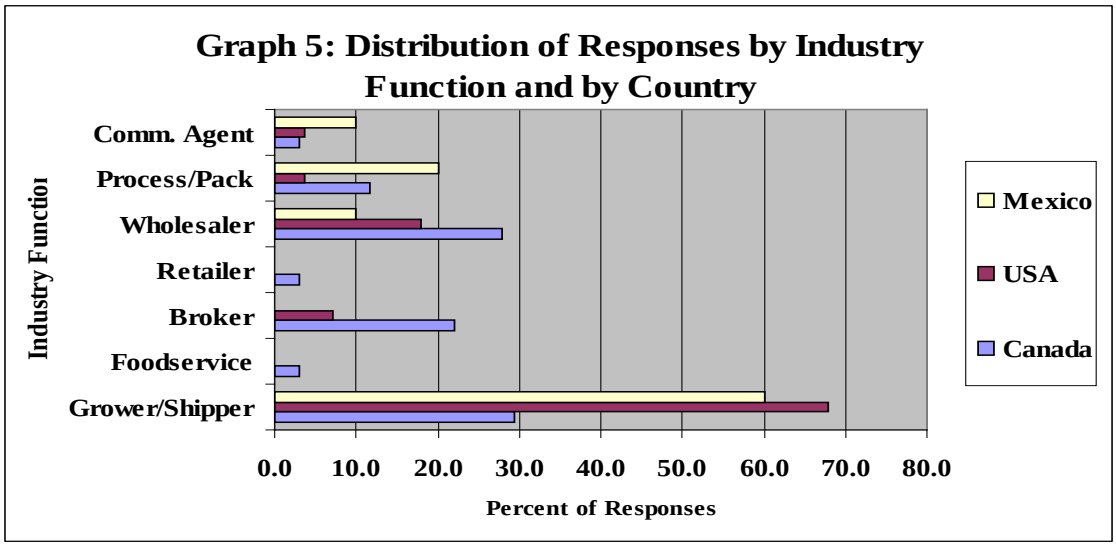
ANNEX II: DETAILED SURVEY RESULTS

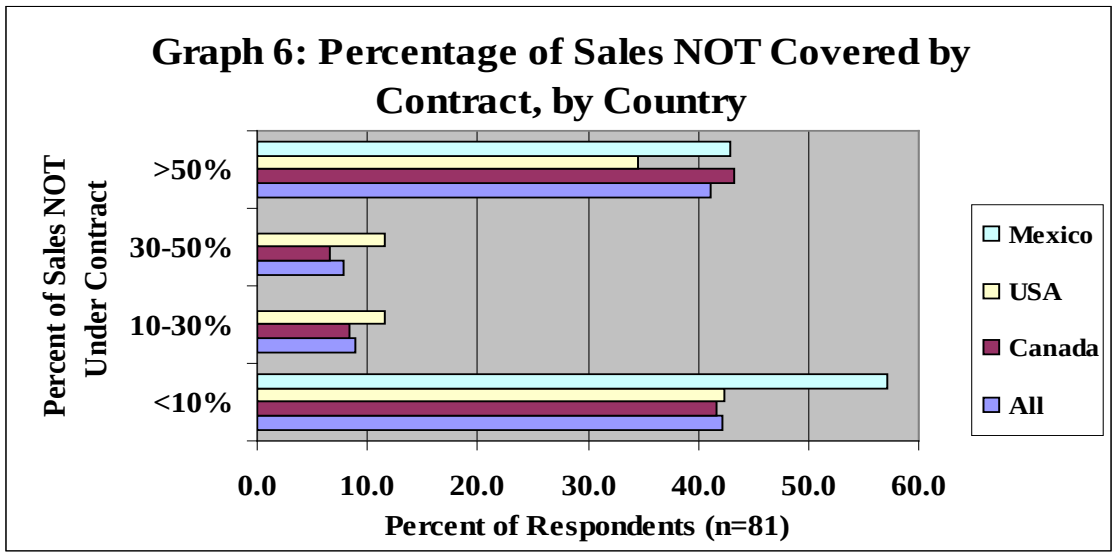


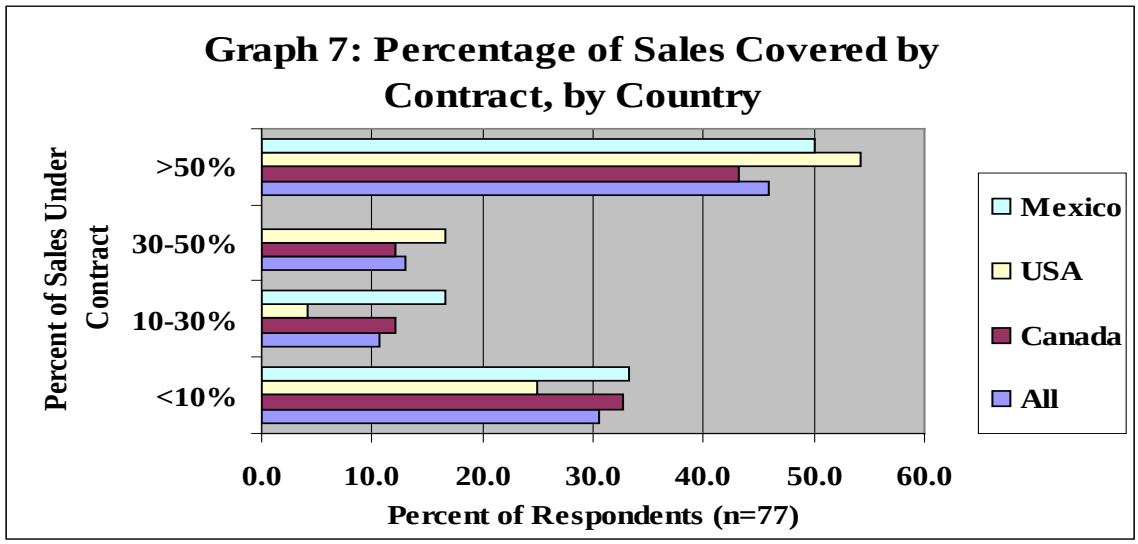


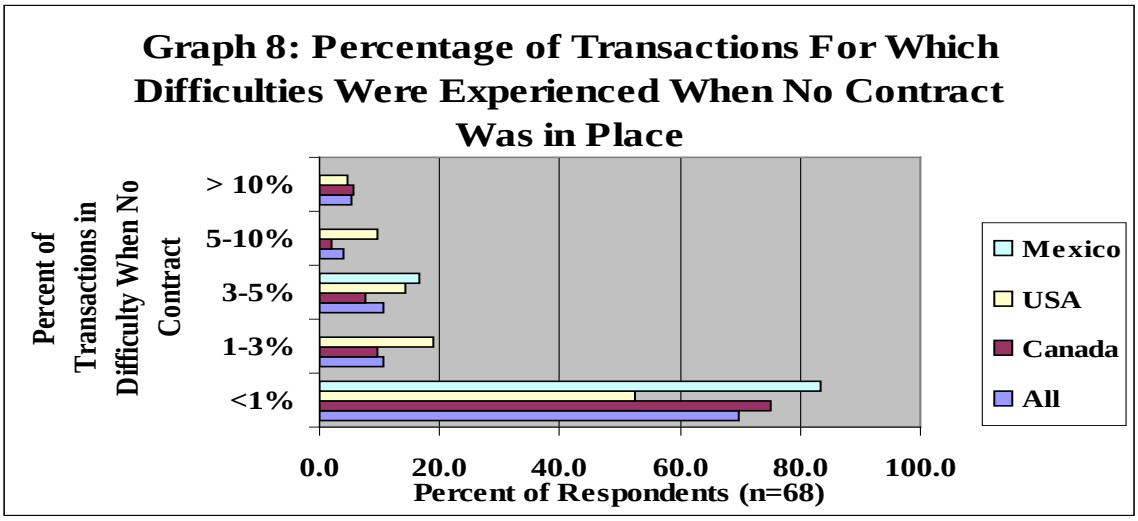

Graph 3: Distribution of Respondents by Gross Revenues (n=85)
<$1million (7.1%)
$1 to $10 million (40.0%)
$10 to $50 million (29.4%)
$50 to $100 million (10.6%)
>$100 million (12.9%)

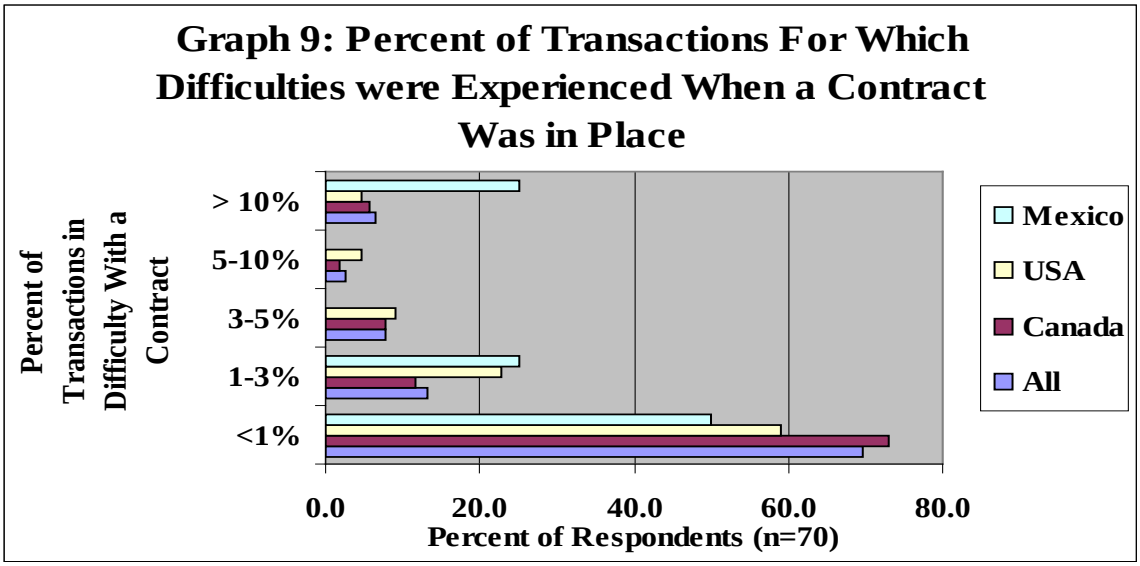

Graph 4: Distribution of Respondents by Gross Revenues and Country
Percent of Respondents in each Country
60.0
50.0
40.0
30.0
20.0
10.0
0.0
<$1m.
$1 to $10 m.
$10 to $50 m.
$50 to $100 m.
>$100 m.
Gross Revenue Class
Canada
USA
Mexico

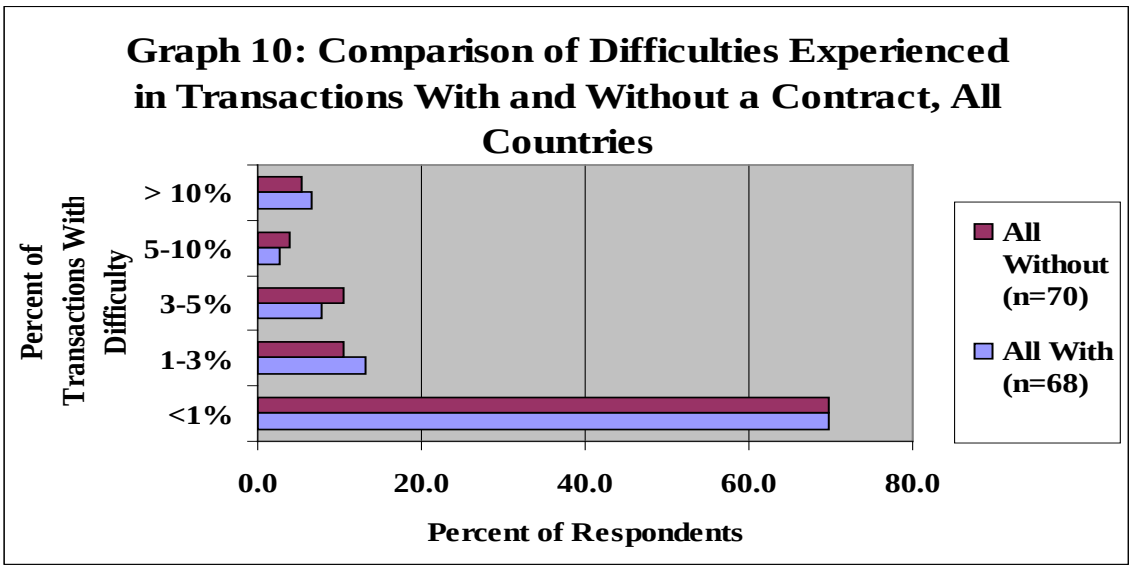

Graph 5: Distribution of Responses by Industry Function and by Country
Industry Function
Comm. Agent
Process/Pack
Wholesaler
Retailer
Broker
Foodservice
Grower/Shipper
0.0
10.0
20.0
30.0
40.0
50.0
60.0
70.0
80.0
Percent of Responses
Mexico
USA
Canada


Graph 6: Percentage of Sales NOT Covered by Contract, by Country
Percent of Sales NOT Under Contract
>50%
30-50%
10-30%
<10%
0.0
10.0
20.0
30.0
40.0
50.0
60.0
Percent of Respondents (n=81)
Mexico
USA
Canada
All

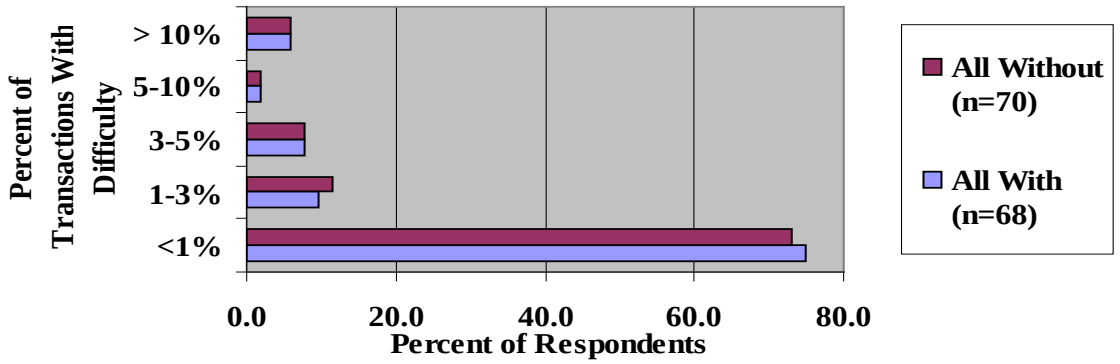

Graph 7: Percentage of Sales Covered by Contract, by Country
Percent of Sales Under Contract
>50%
30-50%
10-30%
<10%
0.0
10.0
20.0
30.0
40.0
50.0
60.0
Percent of Respondents (n=77)
Mexico
USA
Canada
All


Graph 8: Percentage of Transactions For Which Difficulties Were Experienced When No Contract Was in Place
Percent of Transactions in Difficulty When No Contract
> 10%
5-10%
3-5%
1-1%
<1%
Mexico
USA
Canada
All
0.0
20.0
40.0
60.0
80.0
100.0
Percent of Respondents (n=68)

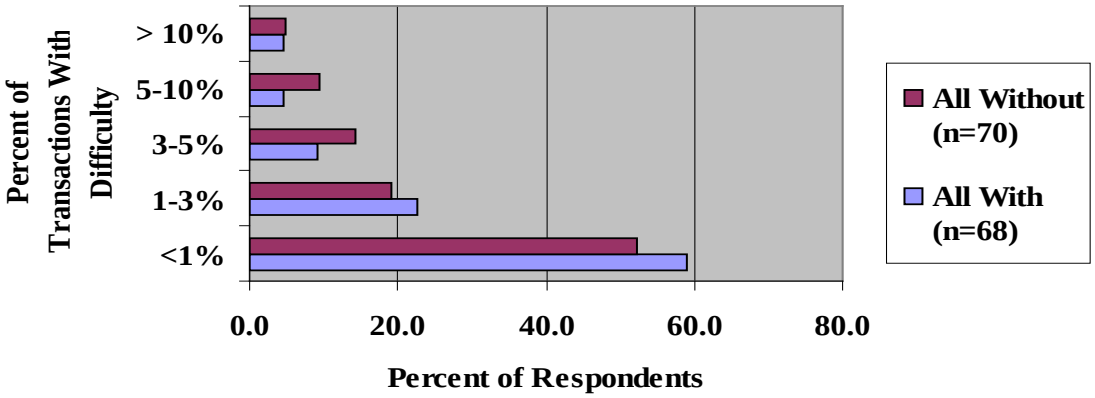

Graph 9: Percent of Transactions For Which Difficulties were Experienced When a Contract Was in Place
Percent of Transactions in Difficulty With a Contract
> 10%
5-10%
3-5%
1-3%
<1%
Mexico
USA
Canada
All
0.0
20.0
40.0
60.0
80.0
Percent of Respondents (n=70)


Graph 10: Comparison of Difficulties Experienced in Transactions With and Without a Contract, All Countries
Percent of Transactions With Difficulty
> 10%
5-10%
3-5%
1-3%
<1%
All Without (n=70)
All With (n=68)
0.0
20.0
40.0
60.0
80.0
Percent of Respondents

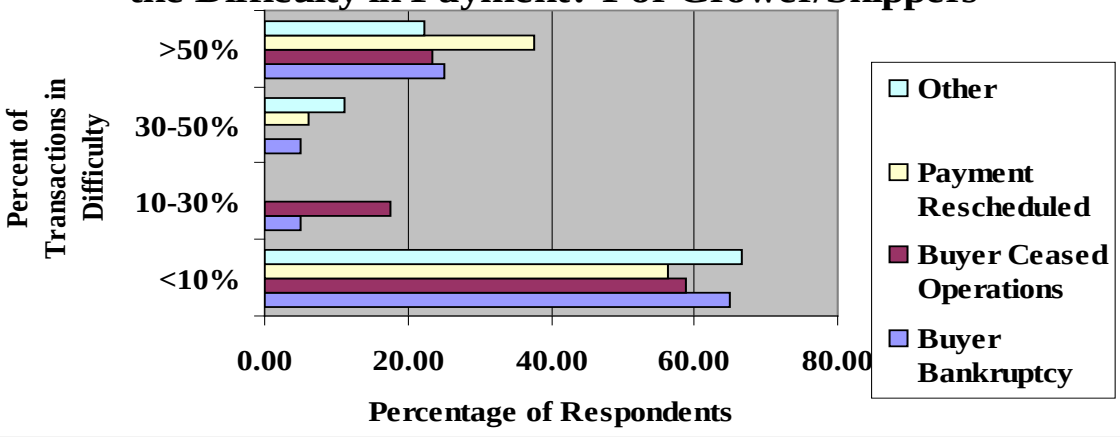
Graph 11: Comparison of Difficulties Experienced in Transactions With and Without a Contract, Canada

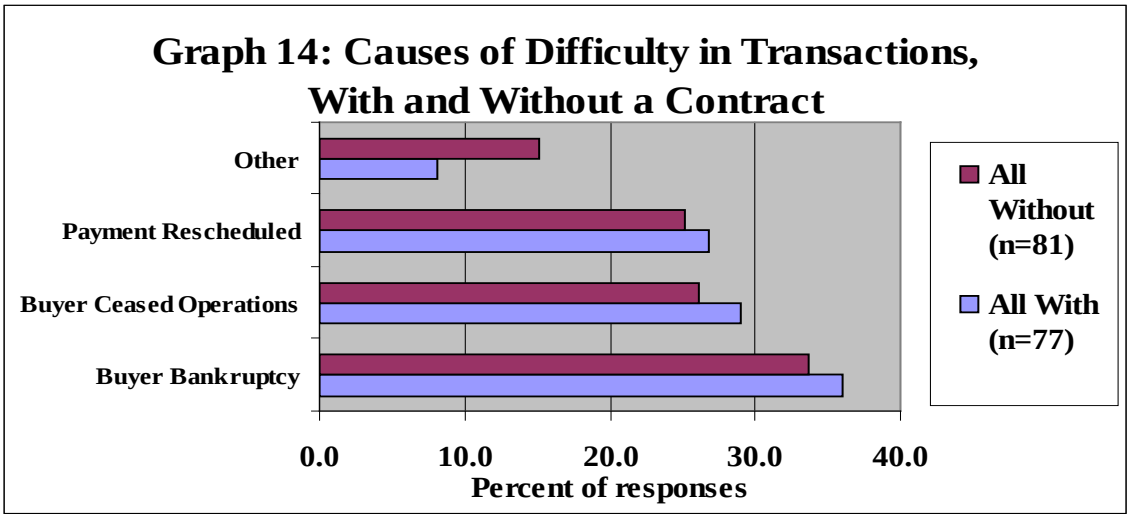


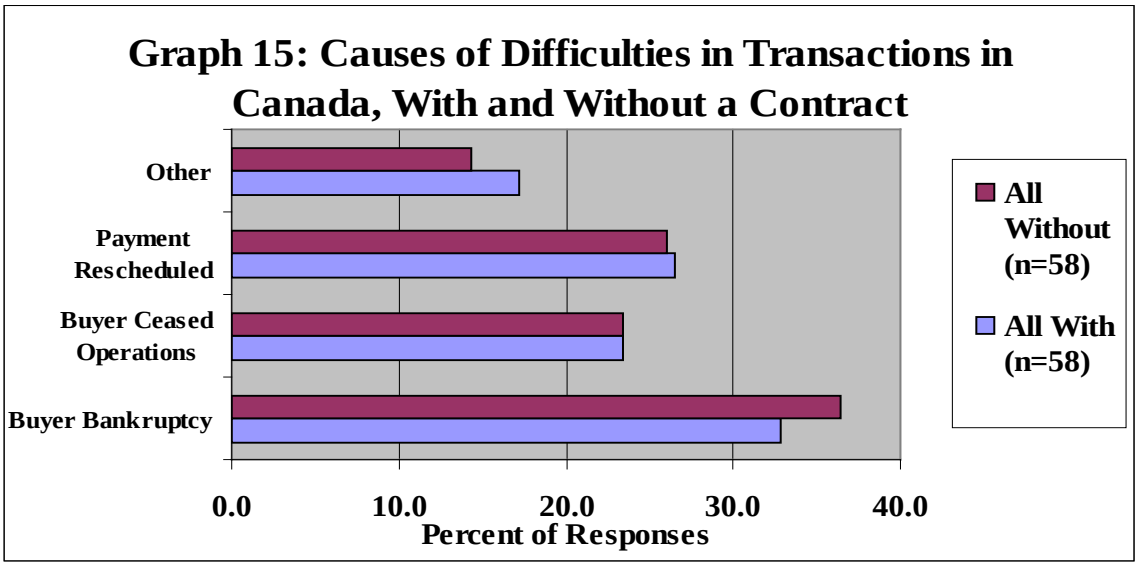
Graph 12: Comparison of Difficulties in Transactions With and Without a Contract, USA

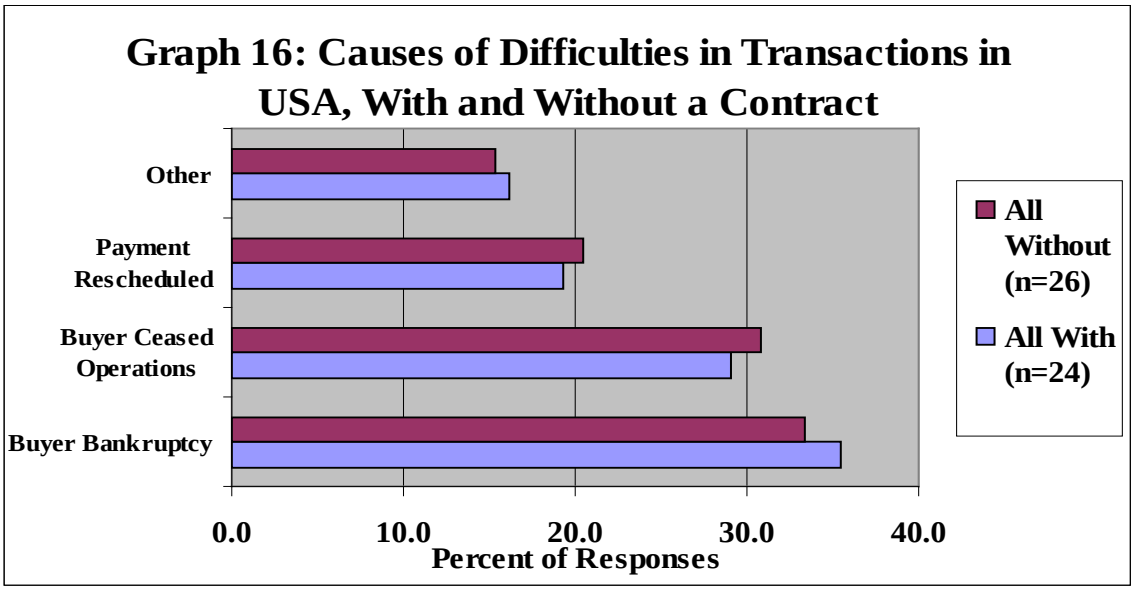


Graph 13: With No Contract in Place, What Was the Difficulty in Payment? For Grower/Shippers

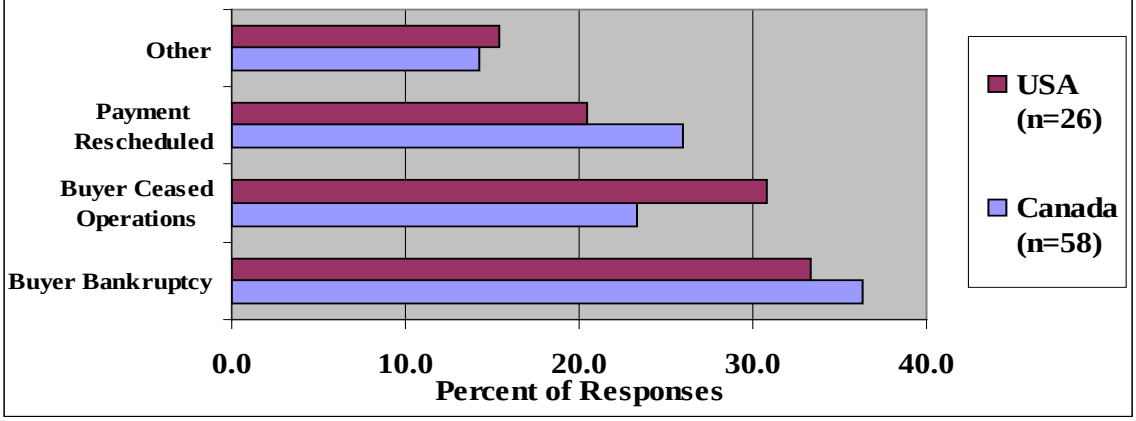



Graph 14: Causes of Difficulty in Transactions, With and Without a Contract
Other
Payment Rescheduled
Buyer Ceased Operations
Buyer Bankruptcy
All Without (n=81)
All With (n=77)
0.0
10.0
20.0
30.0
40.0
Percent of responses

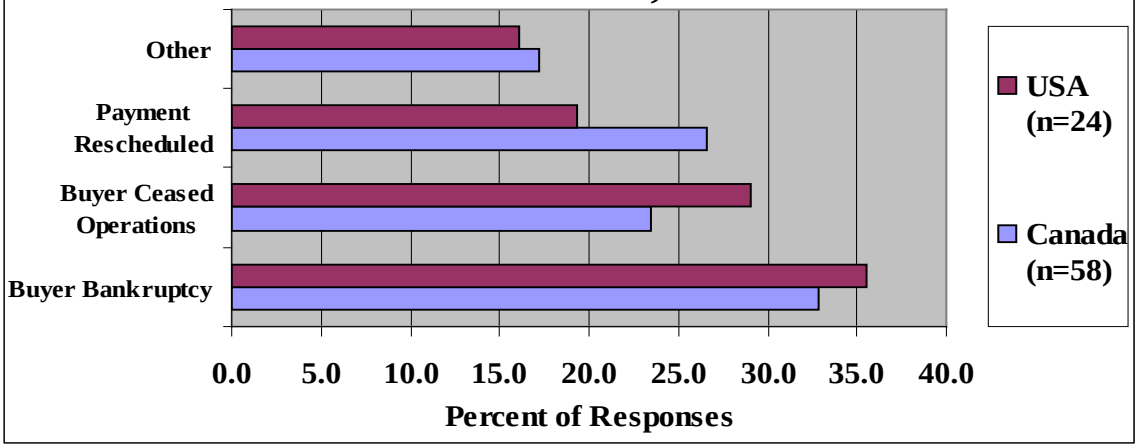

Graph 15: Causes of Difficulties in Transactions in Canada, With and Without a Contract
Other
Payment Rescheduled
Buyer Ceased Operations
Buyer Bankruptcy
All Without (n=58)
All With (n=58)
0.0
10.0
20.0
30.0
40.0
Percent of Responses


Graph 16: Causes of Difficulties in Transactions in USA, With and Without a Contract
Other
Payment Rescheduled
Buyer Ceased Operations
Buyer Bankruptcy
All Without (n=26)
All With (n=24)
0.0
10.0
20.0
30.0
40.0
Percent of Responses

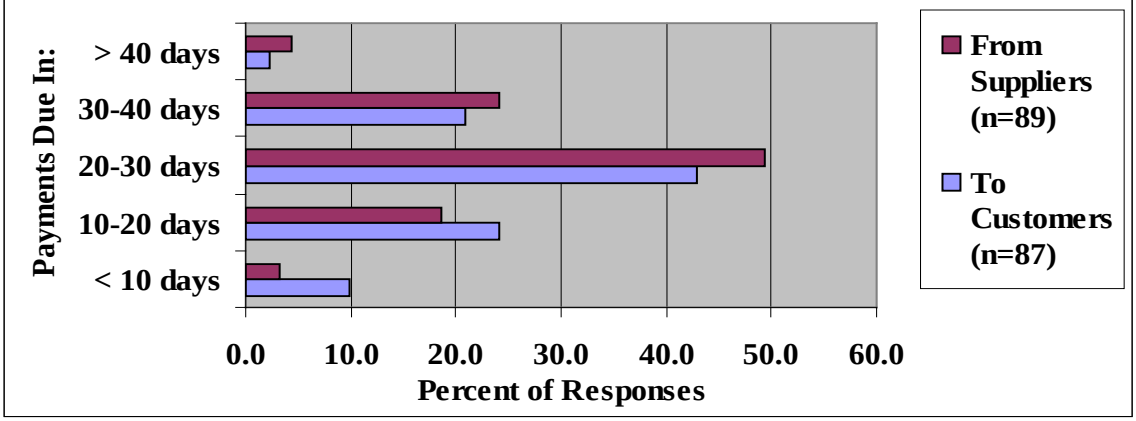
Graph 17: Canada-USA Comparison of Difficulties in Transactions, Without a Contract

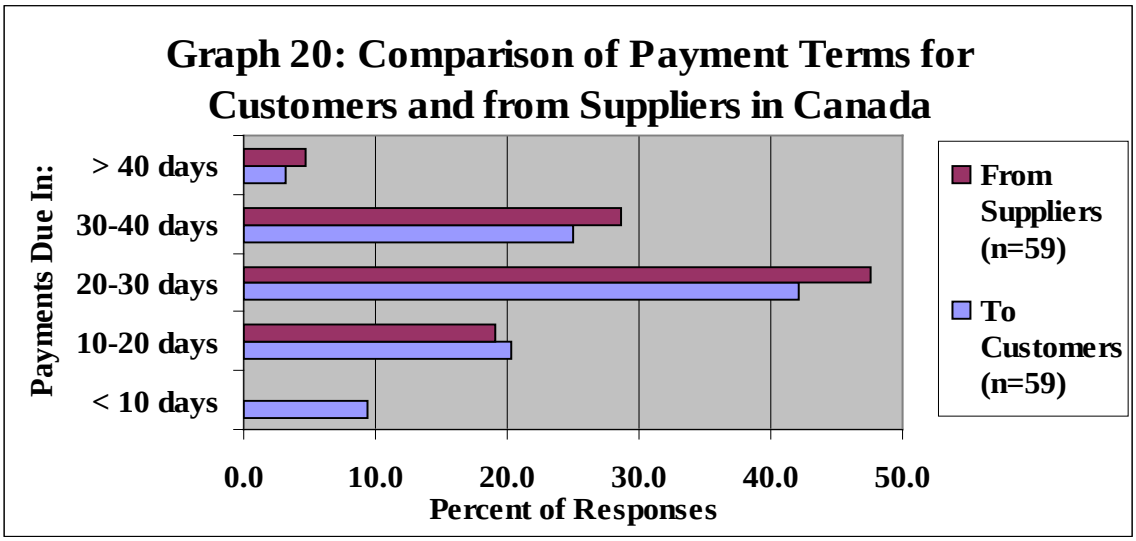


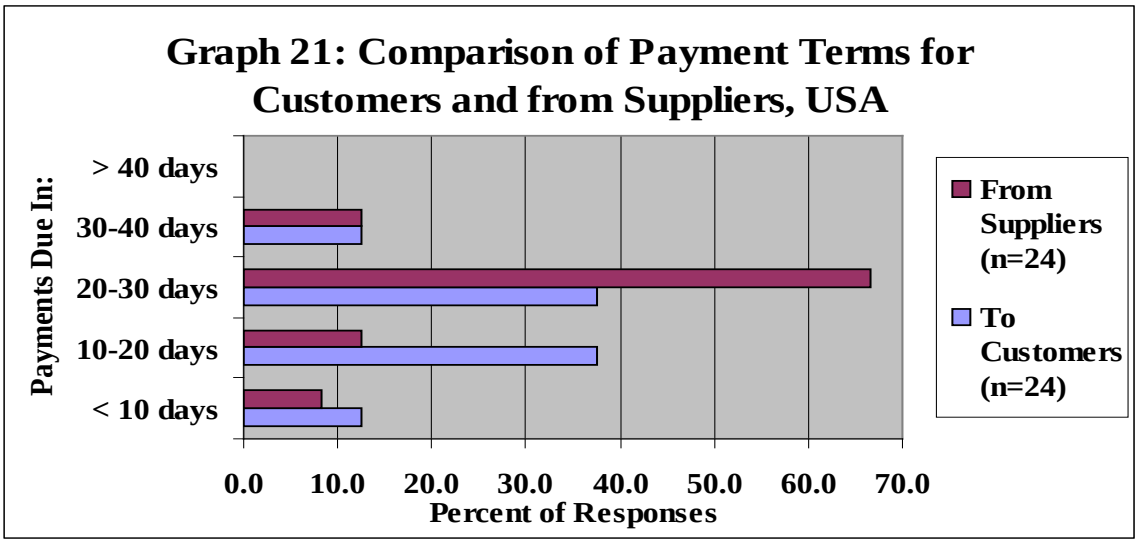
Graph 18: Canada-USA Comparison of Difficulties in Transactions, With a Contract

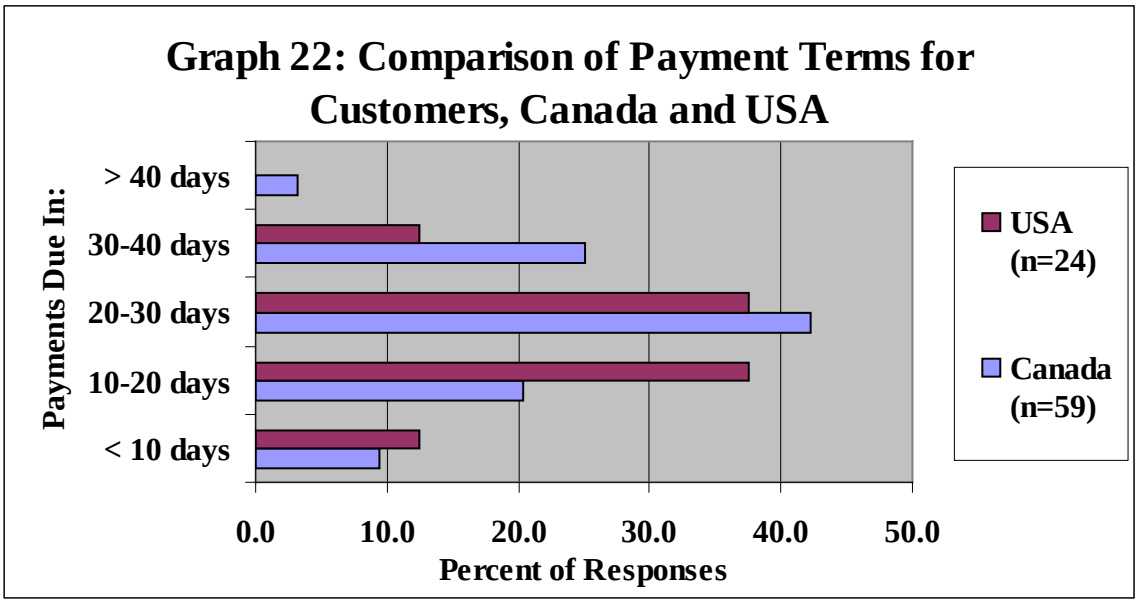


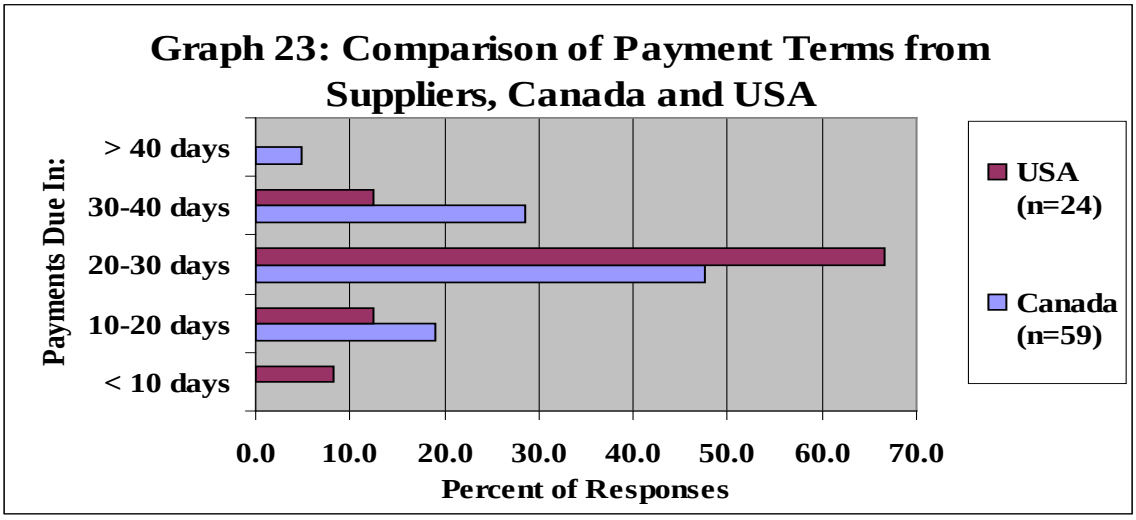
Graph 19: Comparison of Payment Terms for Customers and from Suppliers, All Respondents

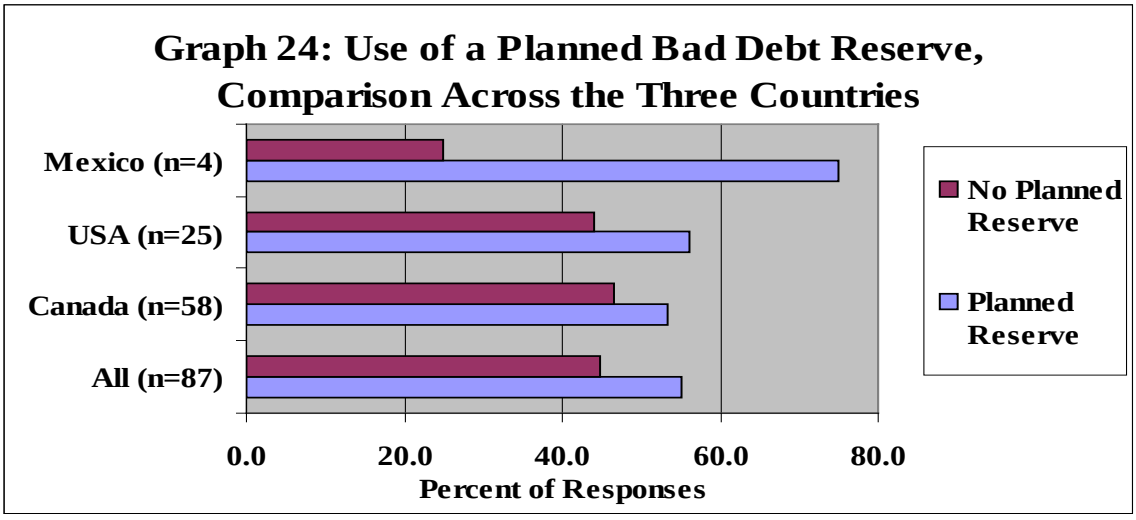


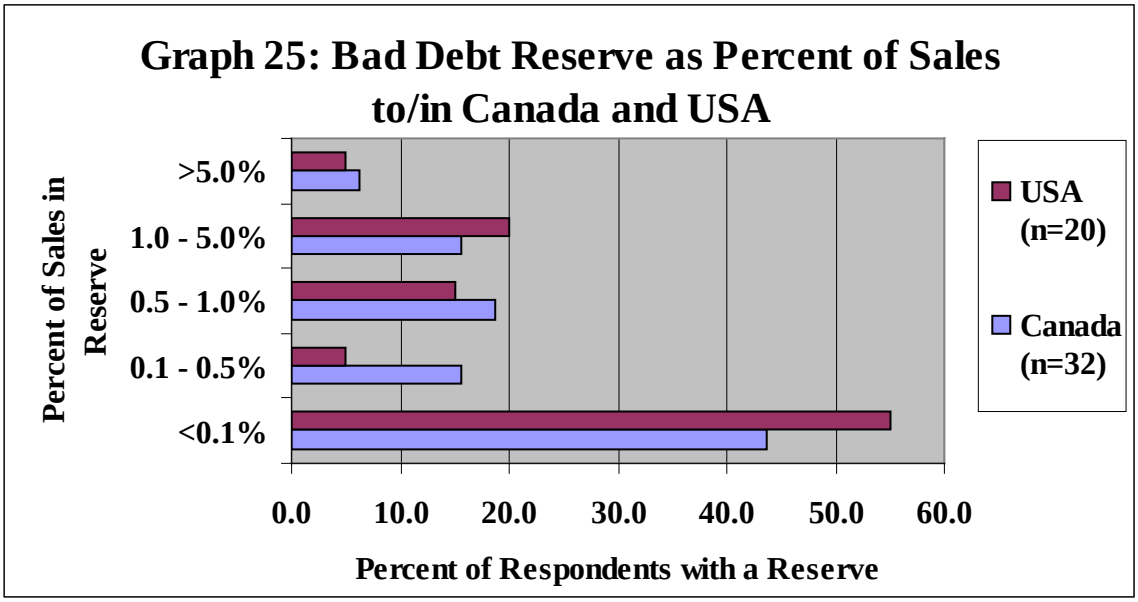

Graph 20: Comparison of Payment Terms for Customers and from Suppliers in Canada
Payments Due In:
> 40 days
30-40 days
20-30 days
10-20 days
< 10 days
0.0
10.0
20.0
30.0
40.0
50.0
Percent of Responses
From Suppliers (n=59)
To Customers (n=59)

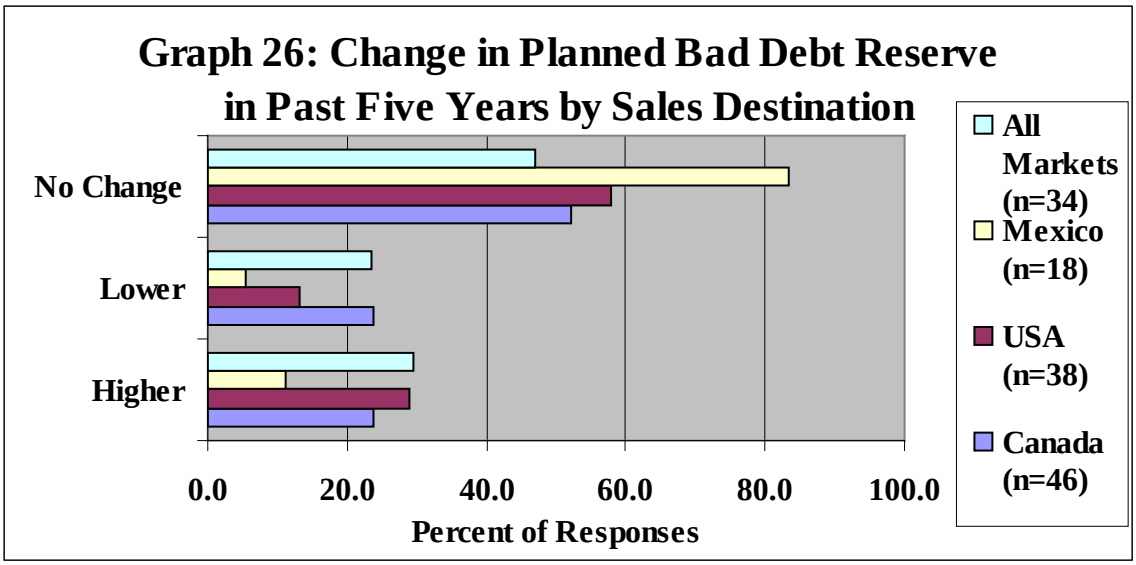

Graph 21: Comparison of Payment Terms for Customers and from Suppliers, USA
Payments Due In:
> 40 days
30-40 days
20-30 days
10-20 days
< 10 days
0.0
10.0
20.0
30.0
40.0
50.0
60.0
70.0
Percent of Responses
From Suppliers (n=24)
To Customers (n=24)

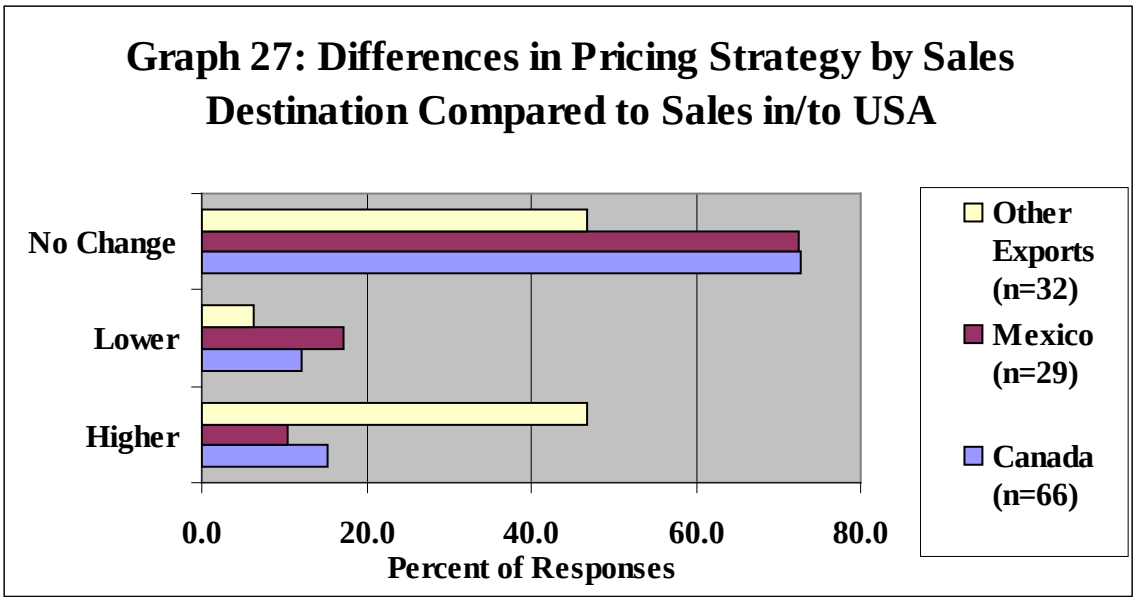

Graph 22: Comparison of Payment Terms for Customers, Canada and USA
Payments Due In:
> 40 days
30-40 days
20-30 days
10-20 days
< 10 days
0.0
10.0
20.0
30.0
40.0
50.0
Percent of Responses
USA (n=24)
Canada (n=59)


Graph 23: Comparison of Payment Terms from Suppliers, Canada and USA
Payments Due In:
> 40 days
30-40 days
20-30 days
10-20 days
< 10 days
0.0
10.0
20.0
30.0
40.0
50.0
60.0
70.0
Percent of Responses
USA (n=24)
Canada (n=59)


Graph 24: Use of a Planned Bad Debt Reserve, Comparison Across the Three Countries
Mexico (n=4)
USA (n=25)
Canada (n=58)
All (n=87)
0.0
20.0
40.0
60.0
80.0
Percent of Responses
No Planned Reserve
Planned Reserve


Graph 25: Bad Debt Reserve as Percent of Sales to/in Canada and USA
Percent of Sales in Reserve
>5.0%
1.0 - 5.0%
0.5 - 1.0%
0.1 - 0.5%
<0.1%
0.0
10.0
20.0
30.0
40.0
50.0
60.0
Percent of Respondents with a Reserve
USA (n=20)
Canada (n=32)


Graph 26: Change in Planned Bad Debt Reserve in Past Five Years by Sales Destination
No Change
Lower
Higher
0.0
20.0
40.0
60.0
80.0
100.0
Percent of Responses
All Markets (n=34)
Mexico (n=18)
USA (n=38)
Canada (n=46)


Graph 27: Differences in Pricing Strategy by Sales Destination Compared to Sales in/to USA
No Change
Lower
Higher
0.0
20.0
40.0
60.0
80.0
Percent of Responses
Other Exports (n=32)
Mexico (n=29)
Canada (n=66)

ANNEX III: SIC AND NAIC BANKRUPTCY STATISTICS, 1995-2004

Because of the size of these spreadsheets, a copy of the results is provided in electronic form only.

ANNEX IV: DATA SOURCES FOR FARM RECEIPTS AND TRADE

Farm Cash Receipts

Farm income data are taken from the tables prepared by Statistics Canada. The crops included in the farm income measures are potatoes, greenhouse vegetables, other vegetables, apples, other tree fruits, strawberries, other berries and grapes. For the years 1996-2002, greenhouse vegetables and other vegetables are shown separately; for previous years, all vegetables from both field crops and greenhouses are shown together.

Trade Data

The import and export data are drawn from the Industry Canada website. The data selected to represent the fresh fruit and vegetable trade are taken from the Harmonized System of classification and include the following groups:

HS 0701	Potatoes - fresh or chilled
HS 0702	Tomatoes - fresh or chilled
HS 0703	Onions, shallots, garlic, leeks, chives and other alliaceous vegetables - fresh or chilled
HS 0704	Cauliflowers, broccoli, brussels sprouts and edible brasicas - fresh or chilled
HS 0705	Lettuce and chicory - fresh or chilled
HS 0706	Carrots, turnips, salad beetroot, salsify, radishes and similar edible roots - fresh or chilled
HS 0707	Cucumbers and gherkins - fresh or chilled
HS 0708	Leguminous vegetables, shelled or unshelled - fresh or chilled
HS 0709	Mushrooms and other vegetables - fresh or chilled
HS 0712	Vegetables - dried but not further prepared
HS 0801	Coconuts, brazil nuts and cashews - fresh or dried, whether or not shelled or peeled
HS 0802	Other nuts - fresh or dried, whether or not shelled or peeled
HS 0803	Bananas, including plantains - fresh or dried
HS 0804	Dates, figs, pineapples, avocadoes, guavas, mangoes and mangosteens - fresh or dried
HS 0805	Citrus fruits - fresh or dried
HS 0806	Grapes - fresh or dried
HS 0807	Melons, papayas and watermelons - fresh
HS 0808	Apples, pears and quinces - fresh
HS 0809	Apricots, cherries, peaches, plums and sloes - fresh
HS 0810	Berries and other fruits - fresh

Footnotes

[1] In many cases, produce arriving at a wholesaler's or a retailer's door may not meet the original qualities expected in the trade. There can be many reasons for this, including delay in transport and the subsequent loss of quality. The industry has several mechanisms to deal efficiently with these problems through dispute resolution under DRC or the CFIA. The difficulty is that not all of these events, particularly by unlicensed dealers, are inadvertent.

[2] Section 2.1(1) reads: "Subject to subsection (2), no dealer shall market in import, export or interprovincial trade any agricultural product prescribed by section 8 unless a licence has been issued to the dealer therefor."

[3] One exception to this is any person involved in importation of agricultural products from the USA into the Akwesasne Reserve.

[4] For the purpose of this report, when dealer and broker occur together, a "broker" is a person who negotiates on behalf of a buyer or seller but does not take ownership of the produce in the transaction, while a dealer takes title to the produce.

[5] See: http://www.inspection.gc.ca/english/toce.shtml. Also see: Canada Gazette, Part I, Vol. 139, No. 36. 3 September 2005, Ottawa, pp. 2858-2862.

[6] Section 1(b) 8. of the PACA reads as follows: **"**A transaction in respect of any perishable agricultural commodity shall be considered in interstate or foreign commerce if such commodity is part of that current of commerce usual in the trade in that commodity whereby such commodity and/or the products of such commodity are sent from one State with the expectation that they will end their transit, after purchase, in another, including, in addition to cases within the above general description, all cases where sale is either for shipment to another State, or for processing within the State and the shipment outside the State of the products resulting from such processing. Commodities normally in such current of commerce shall not be considered out of such commerce through resort being had to any means or device intended to remove transactions in respect thereto from the provisions of this Act.

[7] Section 3(3)(n) "[The applicant … shall include the following information:] disclosure of whether, in the 10 years preceding the day on which the application is submitted, any of the following persons, namely, the applicant or, to the best of the applicant's knowledge, any individual named in the application or any employee of the applicant, or any corporation of which the applicant, the individual or the employee is or has been a director or officer, or any partner of a partnership of which the applicant, the individual or the employee is or has been a partner, or any member of a growers' cooperative association of which the applicant, the individual or the employee is or has been a member, has, as the case may be,

(i) failed to comply with an order of the Board or the Tribunal,

(ii) had a licence that was cancelled or suspended under these Regulations,

(iii) had a licence that was issued under the Perishable Agricultural Commodities Act, 1930 of the United States and was cancelled or suspended under that Act,

(iv) made an assignment of his or her property for the benefit of a creditor or been the subject of a receiving order made under the Bankruptcy and Insolvency Act,

(v) had any of his or her property taken possession of or taken control of by a receiver or receiver-manager,

(vi) entered into an arrangement with a creditor under any Act of Parliament or of the legislature of a province,

(vii) been convicted of an offence under the Criminal Code for which pardon has not been granted or for which pardon was granted but subsequently revoked, where the offence is an offence referred to in any of clauses 7(1)(a)(iv)(A) to (X) of these Regulations,

(viii) had a criminal record outside Canada as a result of an offence that, if committed in Canada, would have been an offence referred to in any of clauses 7(1)(a)(iv)(A) to (X), or

(ix) been named in an outstanding federal or provincial court order regarding matters related to the operation of any business."

[8] Licensing and Arbitration Regulations, Section 7.(1)(b)(vi), under the CAP Act.

[9] As of August 2005.

[10] Canada is not the only country facing problems in business practice in the horticultural industry. See for example, Horticulture Code of Conduct: A Regulation Impact Statement, Prepared for the department of Agriculture, Fisheries and Forestry (Australia), by The Centre for International Economics and Allens Arthur Robinson. See http://www.thecie.com.au/publications/CIE-Draft_Horticultural_Code_RIS.pdf.

[11] See for example: PACA Docket R-04-017; Delorme International Brokers, Inc. v. Fresh Network, LLC, 23 March 2004. Delorme was not licensed under either the DRC or the CFIA Regulations.

[12] See Section 1(b)9 of the PACA.

[13] The information in this section has been provided very kindly by the Office of the Associate Administrator, Agricultural Marketing Service, USDA.

[14] See Definitions and Section 2.1 of the Bankruptcy and Insolvency Act, R.S., 1985, c. B-3, s. 1; 1992, c. 27, s. 2.

[15] The Office of the Superintendent of Bankruptcies reports to the Minister of Industry.

[16] Dairy products are excluded from this comparison because the wholesale products in question are processed products, not farm gate products.

[17] Information in this section was kindly provided by J. Wideman, The Ontario Beef Cattle Financial Protection Program, Inc., Toronto, Ontario.

[18] This licensing information, as well as the information on payments and operation of the fund was kindly provided by Livestock Identification Service in Alberta, as well as Alberta Agriculture, Food and Rural Development, Edmonton, Alberta.

[19] Livestock and Livestock Products Act, RSA 2000 c. L-18.

[20] This is a "deemed trust". The Government of Alberta is examining whether to make this a formal trust arrangement.

[21] Section 8 (Title to and property in livestock), Livestock and Livestock Products Act, RSA 2000 c. L-18.

[22] Livestock Dealers and Livestock Dealers' Agents Regulation, Alberta Regulation 66/1998, under the Livestock and Livestock Products Act, RSA 2000 c. L-18.

[23] LIS was established under the Livestock Identification and Brand Inspection Act, RSA 2000, c. L-16, and the regulation under this Act, the LIS Delegated Authority Regulation, Alberta Regulation 221/1998.

[24] The survey specifically indicated as part of the questions the definition of “contract”, i.e., “the DRC defines a written contract as 1) a broker's confirmation of sale; 2) a broker's memorandum of understanding; or 3) a written agreement signed both by shipper and receiver”.

ANNEX B

SURVEY OF THE COMMERCIAL PRACTICES IN THE CANADIAN FRESH FRUIT AND VEGETABLE VALUE CHAIN

MARKET RESEARCH AND ANALYSIS SECTION
ECONOMIC AND INDUSTRY ANALYSIS DIVISION
AGRICULTURE AND AGRI-FOOD CANADA

October 7, 2008

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- Market and Industry Services Branch, Horticulture and Special Crops Division
- Strategic Policy Branch, Research and Analysis Directorate, Market Research and Analysis Section, EIAD

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PROJECT COORDINATOR:

Keva McKennirey, Project Coordinator, Horticulture and Special Crops Division

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1 EXECUTIVE SUMMARY

This report presents the results of an internet survey designed to measure the frequency and impact of losses, in 2007, to members of the Canadian fresh fruit and vegetable value chain as a result of delayed, adjusted and non-payment.

The survey was conducted in February – March, 2008, by the Market Research and Analysis Section (MRAS), Research and Analysis Directorate (RAD), Agriculture and Agri-Food Canada (AAFC), for the Federal-Provincial Working Group on Fair and Ethical Trading Practices in the Canadian Horticultural Sector. The Working Group was established by the Federal/Provincial/Territorial Assistant Deputy Ministers for Agricultural Policy (FPT Policy ADMs) in the fall of 2006, in response to concerns expressed by the Fresh Produce Alliance[1] (FPA) representing the Canadian fresh fruit and vegetable industry, regarding fraud and imprudent business practices by market participants in the Canadian fresh produce sector. A mandate of the Working Group was to validate the pervasiveness of imprudent and unethical business practices in the sector.

The target population was developed from a compilation of lists (membership email addresses) provided by the Fruit and Vegetable Dispute Resolution Council (DRC), the Canadian Produce Marketing Association (CPMA), the British Columbia Produce Marketing Association, the Ontario Produce Marketing Association and the Quebec Produce Marketing Association. The DRC and CPMA membership lists along with the national and provincial marketing associations lists represent the best available population lists as they cover most members of the Canadian fresh fruit and vegetables value chain, except growers who do not distribute, pack, or process their product ("growers-only"). AAFC did not have access to a grower-only list, however some email addresses of growers-only were provided by provincial producer/grower associations. Therefore these survey results are statistically representative of members of the Canadian fresh fruit and vegetables value chain, except "growers-only".

The main business activities of members of the Canadian fresh fruit and vegetables value chain include growers, grower cooperatives or grower marketing groups, packers, repackers, shippers, jobbers, brokers, commission merchants, grower's agents, distributors, receivers, wholesalers, food service distributors, processors, food service operators and retailers.

The total response rate to the online survey is 27% and the margin of error is ± 5.9%, 19 times out of 20.

The internet survey questionnaire was designed by MRAS, RAD, AAFC, and a steering committee comprised of the DRC, the CPMA, the Horticulture and Special Crops Division,

[1] The Fresh Produce Alliance is an industry association comprised of the Canadian Produce Marketing Association, the Fruit and Vegetable Dispute Resolution Corporation, and the Canadian Horticultural Council.

AAFC, and the Canadian Food Inspection Agency (CFIA). The FPA and other members of the Working Group also provided input into the questionnaire.

An objective of the survey was to identify methods used by respondents to validate the reliability of a new trading partner. The key findings are:

- When trading fresh fruit and vegetables with new clients, the majority of respondents (54%) reported that they verified the credit rating of new clients with a credit research agency, *all* or *most of the time*. However, 32% *rarely* or *never* verified their new client's credit rating with a credit research agency.
- The second most frequent practice used to validate the reliability of a potential new client is to consult other members of the industry to obtain background information on a potential new client. Results show that 42% of respondents use this practice *all* or *most of the time*.
- Peer recognition of the reliability of a member of the fresh fruit and vegetable chain seems to carry more weight than membership in either an industry association or the possession of a licence. Only 20% of the value chain members will verify *all* or *most of the time* that a new client has a Canadian Food Inspection Agency license. About a quarter (27%) will verify *all* or *most of the time* that a new client is a member of the Dispute Resolution Council.

Another objective of the survey was to quantify the frequency of non-payments, partial payments, delayed payments, and to determine mechanisms used to recoup financial losses.

- Roughly 50% of respondents reported at least one instance of non-payment in the trade of fresh fruit and vegetables in 2007. Of those that reported non-payment, about 6 respondents in 10 said that these non-payments occurred on 1 to 5 transactions.
- The average number of transactions done in 2007 by the fresh fruit and vegetables value chain members in Canada was 28,770.
- About two-thirds of respondents reported at least one instance of partial payment in the trade of fresh fruit and vegetables. Of those that reported partial payment, about half of the respondents said that partial payment occurred on less than 10 transactions.
- Almost half of those that experienced partial payment reported that the client did not pay the full amount due to invoice clipping, not related to any documented condition problems with the products. For example market decline is cited as one of the reasons for partial payment.
- Delayed payments are quite common in the Canadian fresh fruit and vegetable industry. More than 75% of businesses reported at least one instance of delayed payment in the trade of fresh fruit and vegetables. Delayed payments affect a higher number of transactions compared to instances of both non-payments and partial payments. For example, 84% of the businesses that reported delayed payments were affected on 6 or more transactions. This contrasts with partial payments and non-payments, where

respectively, 31% and 61% of the affected businesses reported them on 1 to 5 transactions.

- The most frequent action taken by between 80-90% of respondents to recover non-payments, partial payments or delayed payments is to contact the clients directly.

A final objective of the survey was to estimate the financial losses incurred by the Canadian fresh fruit and vegetable value chain market due to non-payment, partial payment or delayed payment.

- In 2007, the total average net loss from non-payments, partial payments or delayed payments in the trade of fresh fruits and vegetables in Canada represented 1.53% of value chain member's reported gross revenue.

Summary Table : Payment Difficulties Experienced in the Trade of Fresh Fruits and Vegetables in Canada

Type of payment difficulties	Respondents reporting difficulties (%)	Transactions with payment difficulties (number and %)	Success in recovering losses due to payment difficulties (%)	Total net financial lost due to payment difficulties (mean)	% of gross revenue in total losses (mean)
Non Payments	51%	1-5 = 61% 6-10 = 16% 50 + = 7%	Yes for all = 14% Yes for some = 49%	$27,810.51	0.81%
Partial Payments	67%	1-5 = 31% 6-10 = 17% 50 + = 17%	Yes for all = 12% Yes for some = 55%	$44,832.17	1.25%
Delayed Payments	77%	1-5 = 16% 6-10 = 14% 46 + = 29%	Yes for all = 52% Yes for some = 34%	$24,709.14	0.4%
Total All Types of Difficulties				$55,594.08	1.53%

To summarise, a majority of businesses in the Canadian fresh fruit and vegetable value chain take actions to validate the credit worthiness of their clients but a significant proportion do not.

The majority of the businesses that experienced non-payment, partial or delayed payment were affected on a small number of transactions and their net financial losses were also relatively small.

2 BACKGROUND

This survey was conducted for the Federal-Provincial Working Group on Fair and Ethical Trading Practices in the Canadian Horticultural Sector, established by the Federal-Provincial-Territorial (FPT) Assistant Deputy Minister (ADM) Agriculture Policy Committee in June 2006, in response to concerns raised by representatives of the Canadian fresh produce industry involving perceived fraud, imprudent business practices and financial risks to traders in the Canadian fresh produce markets.

The Working Group had a mandate to:

1. determine the pervasiveness of imprudent and unethical business practices in the fresh produce sector from the national and provincial perspectives;
2. analyse and evaluate the measures and actions recommended for government in the *Report to the Fresh Produce Alliance on the Financial Practices of the Canadian Horticulture Sector,* generally referred to as *The Hedley Report*;[2]
3. identify options for industry and/or government action to improve the financial security of sellers; and
4. provide advice to FPT Policy ADMs in the form of conclusions and recommendations.

This survey on the commercial practices of members of the Canadian fresh fruit and vegetable value chain was conducted by the Market Research and Analysis Section (MRAS), AAFC, to assist the Working Group in meeting the first point of its mandate, i.e. to "determine the pervasiveness of imprudent and unethical business practices in the fresh produce sector".[3] Results of the survey inform the Final Report and recommendations provided by the Working Group to the FPT ADM Agriculture Policy Committee.

The Working Group and MRAS are grateful to the Fresh Produce Alliance (FPA) and its constituent members, the Canadian Produce Marketing Association (CPMA), and the Fruit and Vegetable Dispute Resolution Corporation (DRC) for contributing to the development of the qualitative and quantitative survey questionnaires, for providing contact lists, and encouraging their membership participation in those surveys.

[2] The *Report to the Fresh Produce Alliance on the Financial Practices of the Canadian Horticulture Sector*, by Douglas Hedley, 2005, published for the Fresh Produce Alliance, an industry association comprised of the Canadian Produce Marketing Association, the Fruit and Vegetable Dispute Resolution Corporation, and the Canadian Horticultural Council, available at http://freshproducealliance.com/Download/Hort%20Study%20Report%20Revised%2017%20Jan.doc

[3] The final sample in some provinces was below the minimum number of respondents needed to have an acceptable margin of error. For this reason it was not possible to conduct valid data analysis on a provincial basis.

3 SURVEY OBJECTIVES

3.1 GENERAL OBJECTIVE

The results of this survey will quantify the frequency of non payments, delayed payments, partial payments and the financial losses incurred by those practices in the Canadian fresh fruit and vegetable value chain market.

The survey will also identify methods used by respondents to validate the solvency of a potential trading partner and to recoup financial losses.

3.2 SPECIFIC OBJECTIVES

- Quantify financial losses incurred by Canadian fresh fruit and vegetable value chain members as a result of partial, delayed and non payments that occurred within the Canadian fresh produce market in 2007.
- Identify the methods used by Canadian fresh fruit and vegetable value chain members to validate the solvency of clients.
- Identify the methods used by Canadian fresh fruit and vegetable value chain members to recoup financial losses resulting from partial, delayed and non-payments.
- Quantify Canadian fresh fruit and vegetable value chain members' net financial losses as a result of partial, delayed and non payments to gross sales.

3.3 OUTLINE OF QUESTION OBJECTIVES

Socio-demographic characteristics	Types of horticulture value chain enterprise	
	Types of fresh fruits & vegetables marketed	
	Legal structure of the business	
Information on marketing of fresh produce	Type of market outlet	
	Trading area	
	Distribution of trade by commercial area	
	Membership in trade and industry associations	
Trading practices	Purchasing and selling methods and documentation	
	Terms of sale	Regular & new clients
	Frequency of measures to validate reliability and solvency of clients	Regular & new clients
	Other measures to reduce risk of payment difficulties	
Payment difficulties experienced in trading	Type of payment difficulties	Non payments
		Partial payments

		Delayed payments
	Frequency of payment difficulties	Non payments
		Partial payments
		Delayed payments
	Circumstances in which payment difficulties were experienced	Non payments
		Partial payments
		Delayed payments
	Source of payment difficulties	Non payments
		Partial payments
		Delayed payments
	Area of payment difficulties	Non payments
		Partial payments
		Delayed payments
Actions taken to recover losses		
	Took action to recoup losses	
	Type of actions taken	Non payments
		Partial payments
		Delayed payments
	Impact of actions taken	Non payments
		Partial payments
		Delayed payments
End results of payments difficulties	Financial losses	Due to non payments
		Due to partial payments
		Due to delayed payments

4 RESEARCH METHODS

4.1 QUALITATIVE SURVEY

The Working Group decided to conduct a quantitative survey to measure the experiences of buyers and sellers in the Canadian fresh produce market.

As a necessary developmental tool for the quantitative survey, the Market Research and Analysis Section (MRAS), AAFC and a consultant conducted a qualitative survey, or exploratory phase of members of the horticultural value chain at the CPMA convention in Montreal, May 9–11, 2007. The exploratory phase was organized and developed by MRAS and other officials from AAFC, in consultation with the FPA.

The objective of the exploratory phase was to gain a better understanding of the trading practices and the driving forces that lead to imprudent and unethical practices in the fresh produce industry in Canada.

The exploratory phase consisted of French and English focus groups and in-depth one-on-one interviews. A total of 25 participants participated in this exploratory phase. Of the total, 24 Canadian participants came from a broad cross section of the horticultural value chain, ranging from representatives of multinational companies, distributors, wholesalers, packers and large retail chains, to grower-shippers and importer/exporters of small local companies. MRAS also interviewed 1 American grower/shipper from a U.S. trade association. Many of the participants were active members of a producer or trade association and the majority of interviewees had worked in the horticultural sector for decades.

Results from the qualitative survey have made a valuable contribution to the Working Group's understanding of the fresh produce market, its players, modus operandi, and the problems encountered when trading fresh fruit and vegetables in the Canadian market.

The information gathered in the exploratory phase was crucial to the development of the questionnaire used in the following quantitative phase, the online survey, which was conducted in February–March 2008.

4.2 RESULTS OF THE QUALITATIVE SURVEY

4.2.1 Trading Practices

The qualitative exploratory research indicates that the majority of business in the Canadian fresh produce sector is conducted through verbal agreements. Since the prices of fresh produce fluctuate significantly, verbal agreements can be modified according to market demand and day-to-day market needs. Purchase orders and invoices are usually the only evidence of sale transactions. However, the use of electronic invoicing and email communications is a standard trading practice among some of the participants. The price of the commodity, the quantity and delivery date are the usual information written on these documents. Written contracts are more common in the processing sector of the fresh produce industry. Verbal agreements are also used in export or import transactions, although, because of the nature of this type of exchange, formal written documents are ultimately required by government authorities for cross-border movement.

Consequently, verbal agreements seemed to be part of a customary trading practice for a large majority of the participants. This is due to the nature of the industry itself (perishable goods).

4.2.2 Dealing with trading difficulties

The majority of participants pointed out that, over the years, they have develop long-standing business relationships with their buyers or sellers and that they will avoid dealing with unknown or new trading partners unless necessary. However, when doing business with new clients, they will take some precautions, such as consulting with the Fruit and Vegetable Dispute Resolution Corporation (DRC) or the Canadian Food Inspection Agency (CFIA), or with colleagues in the fresh produce industry. Some participants to the qualitative survey will only deal with members of the DRC or/and use the following resources in order to assess the honesty and legitimacy of potential trading partners. As well as referring to the Blue Book and Red Book, industry resources that publish credit ratings, some interviewees engage firms specializing in credit investigations, or rely on their own forms to conduct credit checks of potential clients by contacting banks and previous business partners.

4.2.3 Problems reported with trading practices

Some participants referred to the practice of companies buying product, closing and "disappearing" or going bankrupt before payment, reopening a new business under a new name and repeating the pattern. Sometimes these companies will practice legitimately for a period of time to instil confidence in the supplier before they "disappear" or go bankrupt.

In times of product surpluses, some growers have occasionally made quick deals without properly investigating unknown buyers, who "*come out of nowhere and later disappear*." The new unknown client takes possession of the product, does not pay the supplier, then sells the product at a low price, "*dumping*" the product on the market and destabilizing market prices.

Sometimes buyers will, upon payment, arbitrarily lower the payment by a small but not insignificant amount to less than initially agreed upon. Suppliers frequently do not pursue these

losses because they are not large and do not warrant the time and costs associated with attempting to recoup the losses.

Some participants report abuses of the destination inspection system, such as the practice of requesting what they consider unjustified inspections, deliberately causing delays that then become a bargaining tool for the buyer to negotiate lower prices. Suppliers have little choice but to accept the lower price to avoid delays and the deterioration of the product.

4.2.4 Impact on market reputation

Participants recognize that unethical and fraudulent behaviour occurs in every marketplace. They say that the reputation of the Canadian fresh produce market has suffered internationally as a result of repeated use of "unethical and fraudulent" business practices by some. Although the Montreal fresh produce market was frequently noted for its problematic practices, such practices were also said to occur in the Toronto and Vancouver markets. However, this is not exclusive to the Canadian market, as some participants agreed that "people *will avoid Hunt's Point (N.Y.) market the same way they will avoid some markets in Canada."*

4.2.5 Resolving problems and protection against non-payment

A number of participants reported referring trading problems to the DRC. Rarely did they bring matters to court. Some participants felt that in a situation of bankruptcy, since banks have priority of credit, the amounts they would recover through the courts would likely be insufficient to justify the time, which can be lengthy, and the costs associated with using this approach. The general opinion was that there was "no point throwing good money after bad."

When payment problems arise when dealing with the U.S. market, participants have used the trust provisions in the U.S. *PACA* to recover outstanding debts.

4.3 QUANTITATIVE SURVEY TOOL

4.3.1 Online survey

The Fed-Prov Working group decided to use an online survey method, as we had access to the email addresses of the fresh fruit and vegetables businesses listed in the database provided to the Working Group by the DRC, CPMA and other industry associations for the sole purpose of this survey. This innovative survey methodology enabled us to address the objectives of the research while ensuring that the population lists provided for the survey would remain confidential.

Conducting the survey within AAFC enabled MRAS to keep total quality control on each task during the survey process: from management of the population list to data validation and analysis.

To that end, MRAS tested the survey tools, services and costs of five different online service providers. Each of these online service providers offered a slightly different set of survey tools, services and different level of client support. Some of the online service providers offered survey tools that were tailored for brands/products studies, while others were broader in their target application. The needs of this survey were better addressed in the latter category. To that end, MRAS selected SurveyMonkey as its online service provider for the following reasons: user-friendly application, availability of an extensive instruction manual and minimal survey costs.

4.3.2 Questionnaire development

The survey questionnaire development was a joint effort between AAFC, CFIA, DRC, CPMA, and MAPAQ officials and a consultant in survey design.

Members of the FPT Working Group who participated in the questionnaire development design are listed below:

- FEDERAL

Agriculture and Agri-Food Canada:

Mark Ziegler, Co-Chair, Director, Horticulture and Special Crops Division (retired)

Keva McKennirey, Project Coordinator, Horticulture and Special Crops Division

Pierre Aubin, Team leader, MRAS, Economics and Industry Analysis Division

Claude Perreault, Analyst, MRAS, Economics and Industry Analysis Division

Canadian Food Inspection Agency:

Ronna Reddick, Fresh Produce Section, Program Standards Officer

Helen Zohar-Picciano, Chief, Fresh Produce Inspection, Fresh Produce Section

- PROVINCIAL

Hung-Minh Lam, Conseiller en politique agricole, Direction des politiques commerciales et intergouvernementales, Ministère de l'Agriculture, des Pêcheries et de l'Alimentation du Québec

- INDUSTRY CONTRIBUTORS

Stephen Whitney, President and CEO, Fruit and Vegetable Dispute Resolution Corporation

Dan Dempster, President, Canadian Produce Marketing Association

Ian MacKenzie, General Manager, Fresh Produce Alliance

- CONSULTANT

Philippe Ricard, President, Socio-graphic Studies Inc.,

All members of the Federal-Provincial Territorial Working Group on Fair and Ethical Trading Practices in the Horticultural Sector were invited to comment on drafts and the final version of the survey questionnaire.

4.3.3 Questionnaire pre-test

A pre-test of the online questionnaire was sent by MRAS to twenty-three members (19 Anglophones and 4 Francophones) of the Canadian fresh fruit and vegetables industry in early February 2008. The email addresses of these members were provided by the DRC. MRAS received 10 completed pre-test questionnaires and comments sheets. In the pre-test phase respondents were asked to provide their feedback on the draft questionnaire on a separate comments sheet, on which respondents were asked to:

- Identify any issues faced in the procedure to get to the questionnaire on the Website.
- Identify any question that presented any difficulty and to describe the difficulty.
- Identify any difficulties in entering responses on the online questionnaire.

The feedback we received enabled us to make the appropriate adjustments and corrections to the Internet questionnaire, which eventually became the final questionnaire for the Internet survey of members of the Canadian fresh fruit and vegetables value chain.

4.4 TARGET POPULATION

The Canadian fresh fruit and vegetable value industry is made up of the fresh fruit and vegetable producers and the fresh fruit and vegetable value chain. Initially, this survey was going to target both the fresh fruit and vegetable producers and the fresh fruit and vegetable value chain. However, as AAFC did not have access to any producers list, we had to limit the scope of the survey to the fresh fruit and vegetable value chain.

The target population for this online survey is a compilation of the members lists provided by the following organisations:

- Canadian members of the Dispute Resolution Council
- Members of the Canadian Produce Marketing Association
- British Columbia Produce Marketing Association
- Ontario Produce Marketing Association
- Quebec Produce Marketing Association

Supplemental names were provided by some provincial producer organizations.

The online survey was sent exclusively to potential respondents with an email address. The initial list included 895 members of the Canadian fresh fruit and vegetable value chain. As most members of the fresh fruit and vegetable value chain have an email address, we can assume that we reached the majority of that population with this online survey.

The Working Group was not able to conduct a parallel survey of growers in Canada who do not ship produce or play any other role in the fresh produce value chain. Federal and provincial data on this "growers-only" category is limited. Consequently, the Working Group approached the Canadian Horticultural Council to request that the CHC contact its constituent organizations and invite them to provide the coordinates of their grower membership for the purposes of the survey. While the CHC expressed support of the survey, it noted that many of its constituent associations may not be permitted to release their membership information.

4.5 OBSERVED POPULATION AND SAMPLE

4.5.1 Observed population

The listed population numbered 895 Canadian fresh fruit and vegetables businesses. Email invitations to participate in the online survey were sent to each of them. The data collection process, which lasted one month, included three recalls. There were 104 undelivered emails. The observed population included 791 businesses. The total response rate to the online survey was 27%.

	Email invitations sent	Undelivered email	Delivered email invitations	Delivered /Invitations	Total started survey	Response rate
English	672	68	604	90%	167	28%
French	223	36	187	84%	43	23%
Total	895	104	791	88%	210	27%

4.5.2 Sample precision

A total of 210 survey questionnaires were started. At the end of the validation process, 205 questionnaires were kept. This constitutes the final sample. Three questionnaires were discarded because they contained almost no responses, while two other questionnaires were discarded because losses were not congruent with declared revenues.

In 95% of all random samples drawn with this method, the confidence interval (margin of error) is ± 5.9% for a dichotomous question with a 50%-50% result.

4.5.3 Data analysis

In this descriptive analysis we present bivariate tables where a significant difference (P = 0.05 or less) is observed between groups.

The exact measure of association is presented at the bottom of the tables.

Tables with no significant difference ($P > 0.05$) between groups are generally not presented.

However, there are exceptions for tables presenting multiple response questions. We present the more contrasting ones so that readers can gain an idea of the trend behind the responses. Note that it is not possible to calculate the Chi square or a measure of association for tables containing a multiple response question.

5 CHARACTERISTICS OF FRESH FRUITS & VEGETABLES ENTERPRISES

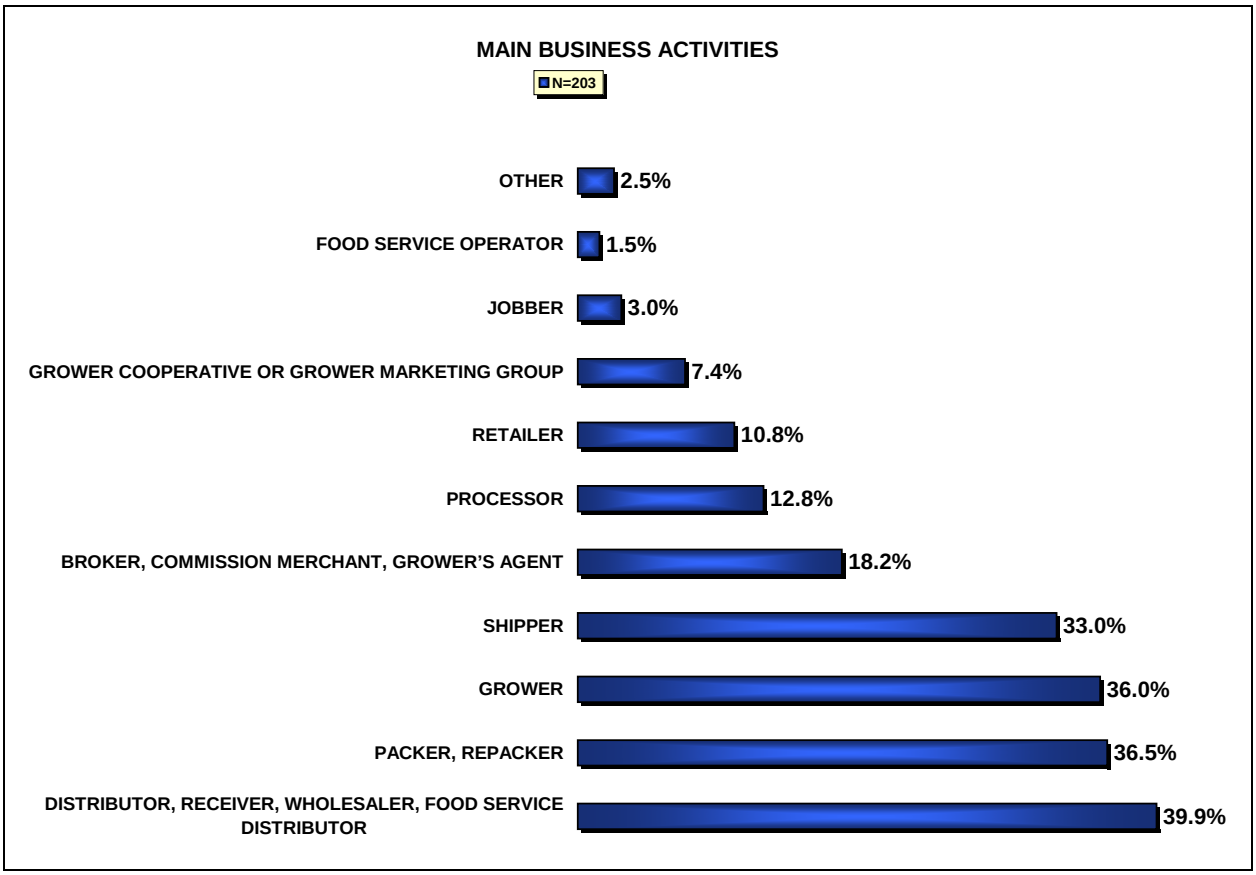
5.1 TYPE OF ENTERPRISE (Q.1)

Respondents were asked to identify all their main activities in the marketing of fresh fruit and vegetables in Canada. Diversification of the main business activity is quite prevalent in this industry. Results show that more than half of the respondents identified more than one main activity for their business. In fact, about 18% of the businesses have either two or three types of main activities, while another 10% of the businesses have four main activities. Finally, less than 5% of the businesses have five main activities or more.

Number of business activities reported

	Number of activities	
	N	%
0	2	1.0%
1	101	49.3%
2	37	18.0%
3	36	17.6%
4	20	9.8%
5	8	3.9%
6	1	.5%
Total	205	100.0%

The fresh fruit and vegetable value chain is made up of enterprises that provide different services to bring the fresh produce from the farm to the consumer. The 10 main activities that make up the fresh produce value chain of the survey respondents are listed in the following graphic: *Main Business Activities (*multiple responses*)*.



Out of the ten possible main business activities, the four most common types are the "Distributor, Receiver, Wholesaler, and Food Service Distributor" group, as almost 4 respondents out of 10 were in this group. This group was followed closely by the "Packer, Repacker" group and the "Grower" group, as about 36% of the respondents took part in those main activities. The fourth main type of activities is the "Shipper," as 1 out of 3 respondents identified it as one of their main business activities.

As previously mentioned, respondents could identify all their business main activities. On average, businesses have 2 main activities.

For analytical purposes, we decided to regroup the mix of 10 possible main activities into only 5 groups of main business activities, which are listed below.

Groups of main business activities:

- Grower and grower/ packer/ shipper plus
- Grower coop and marketing group
- Distributor and broker
- Processor and food service operator
- Retailer

Criteria for groups of main business activities:

We regrouped main business activities that are either complementary or similar as the fresh fruit and vegetables move up the supply value chain. As an example, we regrouped within the first group the activities of growers, packers and shippers as each of these activities are complementary to each other.

We also tried to regroup the main business activities in a chronological order, as the fresh fruit and vegetables move up the supply value chain, i.e. from the farm where they are produced to where the majority are sold, at the retail level.

For each of the groups illustrated, the population is made up of different main activities (except retailers), in decreasing order of importance for each activities within that group. For example, the "Grower or grower/ packer/ shipper plus" is made up firstly of growers, secondly of growers that are also packers, thirdly of growers that are also packers and shippers.

Group of main business activities

	Main business activities	
	N	%
Grower or grower/ packer/ shipper plus	67	33.0%
Grower coop or marketing group	14	6.9%
Distributor or broker	90	44.3%
Processor or food service operator	10	4.9%
Retailer	22	10.8%
Total	203	100.0%

5.2 LEGAL STRUCTURE (Q.46)

The legal structure for the majority of the Canadian fresh fruit and vegetable businesses is a corporation: this is the choice of 3 businesses out of 4. This is followed by sole proprietorship, distant second choice with only 1 business out of 10 being structured this way.

WHICH OF THE FOLLOWING BEST DESCRIBES THE LEGAL STRUCTURE OF THIS FRESH FRUIT & VEGETABLE BUSINESS?

	FRESH FRUIT AND VEGETABLE BUSINESS: LEGAL STRUCTURE	
	N	%
SOLE PROPRIETORSHIP	16	9.6%
PARTNERSHIP WITHOUT A WRITTEN AGREEMENT	6	3.6%
PARTNERSHIP WITH A WRITTEN AGREEMENT	10	6.0%
CORPORATION	127	76.0%
COOPERATIVE OR COMMUNAL OPERATIONS	6	3.6%
OTHER	2	1.2%
Total	167	100.0%

5.3 HEAD OFFICE LOCATION (Q.45)

As can be expected, the majority of fresh fruit and vegetable businesses (96.4%) surveyed had their head office in Canada, while a very small minority (3.6%) had their head office in the USA.

IN WHICH REGION IS THE HEAD OFFICE
OF THIS FRESH FRUIT AND VEGETABLE BUSINESS LOCATED?

	FRESH FRUIT AND VEGETABLE BUSINESS: LOCATION OF HEAD OFFICE	
	N	%
ATLANTIC PROVINCES	27	16.3%
QUEBEC	43	25.9%
ONTARIO	60	36.1%
PRAIRIE PROVINCES	10	6.0%
BRITISH COLOMBIA	20	12.0%
USA	6	3.6%
Total	166	100.0%

5.4 MAIN RESPONSIBILITIES OF RESPONDENTS IN THE BUSINESS (Q44)

Survey respondents were asked their main responsibilities in the fresh fruit and vegetables business where they work. The two most common responsibilities were owner or president, roles of 26% and 23% of the survey respondents respectively. In decreasing order of importance, the other types of main responsibilities were manager (11%), vice president (10.4%), general manager (8.5%), director (5.5%), accountant (5.5%) and chief executive or financial officer (5.5%).

WHAT ARE YOUR MAIN RESPONSIBILITIES
IN THIS FRESH FRUIT AND VEGETABLE BUSINESS?

	MAIN RESPONSIBILITIES IN FRESH FRUIT AND VEGETABLE BUSINESS	
	N	%
President	38	23.2%
Owner	42	25.6%
Vice President	17	10.4%
General manager	14	8.5%
Director	9	5.5%
Manager	18	11.0%
Accountant	9	5.5%
Chief Executive Officer	3	1.8%
Chief Financial Officer (CFO)	6	3.7%
Other	8	4.9%
Total	164	100.0%

As the respondents were high-ranking officials in these fresh fruit and vegetable businesses, they were quite knowledgeable about the trading practices and financial situation of their enterprises. These respondents were therefore well-positioned to complete this online survey.

6 INFORMATION ON THE MARKETING OF FRESH FRUITS & VEGETABLES

6.1 TYPE OF PRODUCE MARKETED (Q.2)

WHAT ARE THE TYPES OF FRESH FRUIT AND VEGETABLES THAT WERE MARKETED BY THIS BUSINESS IN 2007? (CHECK ALL THAT APPLY) (N = 201)

		N	%
TYPES OF FRESH FRUIT AND VEGETABLES	STORAGE VEGETABLES	121	60.2
	GREENHOUSE VEGETABLES	61	30.3
	OTHER VEGETABLES	96	47.8
	TREE FRUITS	84	41.8
	OTHER FRUITS INCLUDING BERRIES AND GRAPES	104	51.7

The two most commonly traded types of fresh fruit and vegetables are storage vegetables (ex: carrots, potatoes, onions) and other fruits, including berries and grapes (also includes bananas, papayas and other imported fruits), as 60% and 52% of the respondents market them respectively. This is closely followed by other vegetables (ex: fresh lettuce, fresh asparagus) and tree fruits (ex: apples, peaches, citrus), which are marketed by 48% and 42% of the respondents respectively. Greenhouse vegetables are the least traded type of fresh fruit and vegetables, as only 30% of the respondents market them.

6.2 NUMBER OF TRANSACTIONS (Q.7)

Respondents were asked: “In 2007, what was the approximate number of transactions made by this business in the trade of fresh fruit & vegetables?". For analysis purposes, we recoded the number of transactions in categories. Close to 3 respondents out of 10 made between 1 to 499 transactions in 2007. This is the largest category of transactions. Next are the 1,000 to 1,999 and the 2,000 to 3,999 categories, which represent about 14% of the transactions respectively. Globally about 80% of the fresh fruit and vegetables businesses did less than 8,000 transactions in 2007.

IN 2007, WHAT WAS THE APPROXIMATE NUMBER OF TRANSACTIONS MADE BY THIS BUSINESS IN THE TRADE OF FRESH FRUIT & VEGETABLES?

	Number of transactions in 2007	
	N	%
1 thru 499	48	28.9%
500 thru 999	19	11.4%
1000 thru 1999	23	13.9%
2000 thru 3999	23	13.9%
4000 thru 7999	20	12.0%
8000 thru 49999	16	9.6%
50000 thru 99999	8	4.8%
100000 thru high	9	5.4%
Total	166	100.0%

The formulation of the question did not clearly stipulate that we wanted to measure transactions within the value chain exclusively, excluding transactions at the retail level. Therefore, some answers probably included the number of transactions made at the retail level on top of the number of transactions between members of the fresh fruit and vegetables value chain.

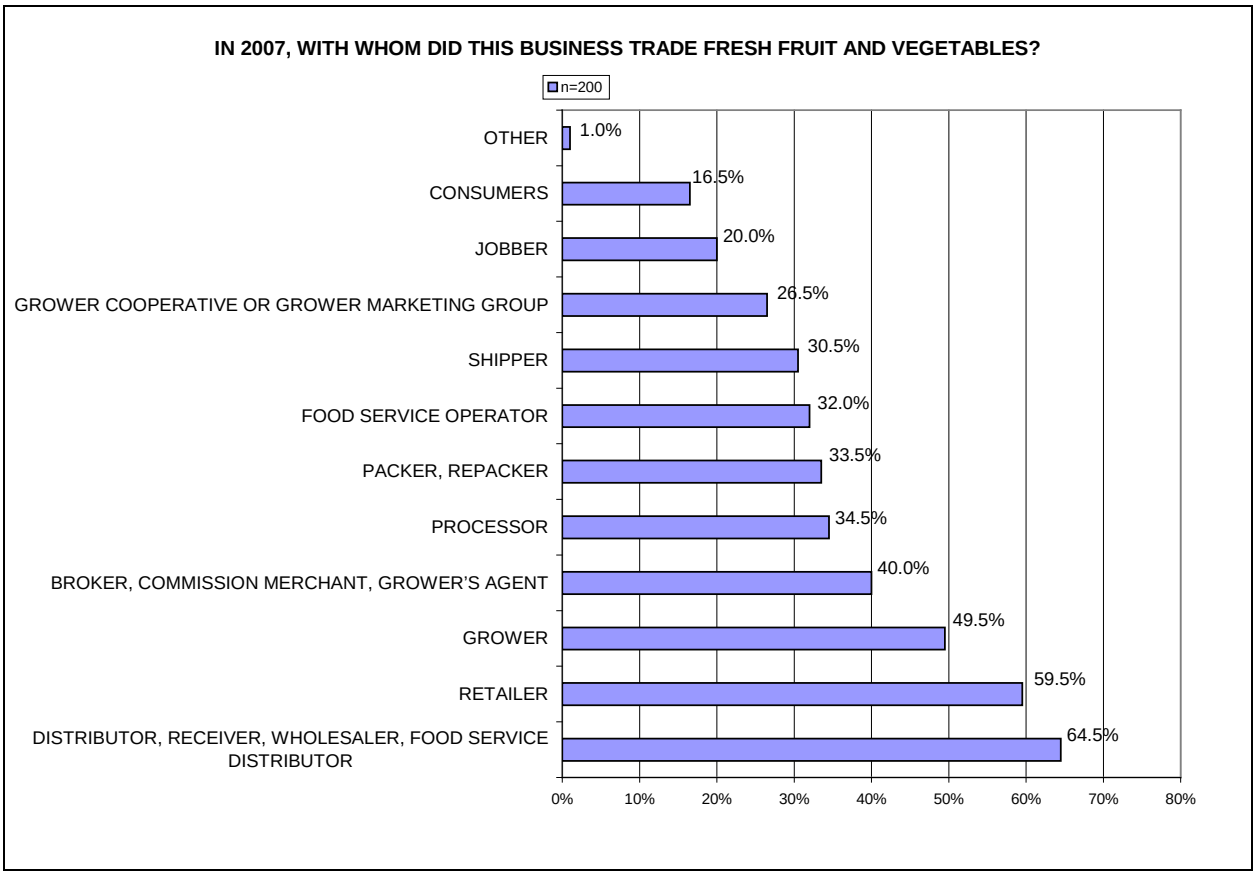
For 2007, respondents reported a median of 1,500 transactions in the trade of fresh fruit and vegetables, while the mean number of transactions reached 28,770.

Number of transactions in 2007

N	Valid	166
	Missing	39
Mean		28769.58
Median		1500.00
Mode		250
Std. Deviation		90638.714
Percentiles	10	250.00
	20	250.00
	30	750.00
	40	750.00
	50	1500.00
	60	3000.00
	70	5500.00
	80	14800.00
	90	75000.00

6.3 TYPES OF CLIENTS (Q.4)

As can be seen in the graph below, close to 2 out of 3 respondents traded with the distributor, receiver, wholesaler, food service distributor group and almost 6 out of 10 respondents also traded with retailers. The third main type of clients with whom respondents traded was growers, as about half of the respondents traded with them. A reflection of the composition of the fresh produce value chain, only 17% of the respondents reported consumers as clients.



6.4 FREQUENCY OF TRADING WITH DIFFERENT TYPES OF CLIENTS (Q5)

Fresh fruit and vegetables businesses definitely prefer to trade with regular clients as opposed to new clients: 65% of the businesses traded with regular client *all of the time,* while another 31% trade with them *most of the time*. This contrasts to the trading practices with new clients, as 60% of the fresh fruit and vegetables businesses trade with them only *sometimes*, while another 22% *rarely* trade with them.

IN 2007, WHEN THIS BUSINESS MARKETED FRESH FRUIT AND VEGETABLES, HOW FREQUENTLY DID IT TRADE WITH:

	All of the time		Most of the time		Sometimes		Rarely		Never		Total	
	N	%	N	%	N	%	N	%	N	%	N	%
REGULAR CLIENTS	128	65.0%	60	30.5%	4	2.0%	3	1.5%	2	1.0%	197	100.0%
NEW CLIENTS	4	2.1%	20	10.5%	115	60.2%	42	22.0%	10	5.2%	191	100.0%
DRC MEMBERS	19	10.3%	49	26.5%	38	20.5%	29	15.7%	50	27.0%	185	100.0%
CFIA PRODUCE LICENSEES	39	21.4%	30	16.5%	56	30.8%	22	12.1%	35	19.2%	182	100.0%
PACA MEMBERS	26	16.5%	26	16.5%	31	19.6%	12	7.6%	63	39.9%	158	100.0%

The frequency of trade by Canadian fresh fruit and vegetables businesses with either DRC members or with CFIA produce licensees is not as polarized as the pattern of trade observed between regular vs. new clients.

In terms of trading with DRC members, about 1 business out of 4 will trade with them *most of the time*, but the same proportion *never* deals with them. As a whole, the majority of respondents (57%) will at least *sometimes* trade with DRC members. However, 43% of the businesses will either *rarely* or *never* deal with DRC members.

Trading frequency with CFIA produce licensees is more frequent than the pattern observed for DRC members. While 21% of the business will *always* trade with CFIA produce licensees, another 31% will trade with them only *sometimes*. As a whole, about 7 out of 10 respondents (69%) at least *sometimes* trade with CFIA members, while 3 out of 10 respondents either *rarely* or *never* deal with CFIA members.

Trading with PACA members shows the lowest usage frequency. While 6 out of 10 respondents will at least *sometimes* trade with PACA members, another 40% will *never* deal with them. This is probably a reflection that not all Canadian fresh fruit and vegetable businesses deal directly with USA suppliers for their supply of USA fresh produce. If their suppliers handle the

importation of USA fresh fruit and vegetables, these businesses do not have to deal directly with PACA members.

6.5 TRADE REGIONS (Q.3)

Respondents were asked: "*In 2007, in which region(s) did this business trade fresh fruit and vegetables?*" Respectively 60% and 53% of the respondents reported doing business in Ontario and Quebec. This is a reflection of the high number of fresh fruit and vegetables businesses that have their headquarters in these two provinces. The third most important trade region reported was the USA, as 43% of the fresh fruit and vegetable businesses reported trading with that region. The latter figure is an indication of the importance of the USA as a key source of imported fresh fruit and vegetables for the Canadian market and also as a key market outlet for the export of fresh fruit and vegetables produced in Canada.

IN 2007, IN WHICH REGION(S) DID THIS BUSINESS TRADE FRESH FRUIT AND VEGETABLES? (CHECK ALL THAT APPLY) (N = 203)

		N	Column %
TRADE REGIONS	ATLANTIC PROVINCES	68	33.5
	QUEBEC	107	52.7
	ONTARIO	122	60.1
	PRAIRIE PROVINCES	46	22.7
	BRITISH COLOMBIA	49	24.1
	USA	86	42.4
	MEXICO	24	11.8
	OTHER COUNTRIES	42	20.7

Respondents were asked the region in which the head office of their fresh fruit and vegetable business was located (Q.45). From that information, we constructed the following table, which illustrates the distribution of the regions in which fresh fruit and vegetables business trade, in relation to the location of their business head office.

Every fresh fruit and vegetable business with headquarters in Canada will first deal with other businesses within their region before trading with other regions, be they within or outside Canada. For example, in 2007, 98% of the fresh fruit and vegetable businesses with headquarters in Ontario traded with other fresh fruit and vegetables businesses located in Ontario.

TRADE REGIONS BY HEAD OFFICE LOCATION

		FRESH FRUIT AND VEGETABLE BUSINESS: HEAD OFFICE LOCATION												Total	
		ATLANTIC PROVINCES		QUEBEC		ONTARIO		PRAIRIE PROVINCES		BRITISH COLOMBIA		USA		N	%
		N	%	N	%	N	%	N	%	N	%	N	%		
TRADE REGIONS	ATLANTIC PROVINCES	26	96.3	13	31.0	15	25.0	1	10.0	2	10.0	1	20.0	58	35.4
	QUEBEC	12	44.4	39	92.9	30	50.0	2	20.0	4	20.0	2	40.0	89	54.3
	ONTARIO	13	48.1	20	47.6	59	98.3	4	40.0	7	35.0	2	40.0	105	64.0
	PRAIRIE PROVINCES	3	11.1	5	11.9	9	15.0	8	80.0	10	50.0	3	60.0	38	23.2
	BRITISH COLOMBIA	4	14.8	6	14.3	7	11.7	3	30.0	19	95.0	3	60.0	42	25.6
	USA	15	55.6	16	38.1	27	45.0	4	40.0	7	35.0	4	80.0	73	44.5
	MEXICO	2	7.4	2	4.8	8	13.3	2	20.0	6	30.0	2	40.0	22	13.4
	OTHER COUNTRIES	8	29.6	6	14.3	11	18.3	1	10.0	6	30.0	1	20.0	33	20.1
Total		27	100.0	42	100.0	60	100.0	10	100.0	20	100.0	5	100.0	164	100.0

Note: Results are only indicative for some regions (Prairie provinces & USA). As the sample size is small (10 and 5 respectively) for those regions, results should be considered directional only. Therefore, caution should be used in interpretation.

The following is an example of how to read the above table. For the fresh fruit and vegetable businesses with headquarters in the Atlantic Provinces, almost all of them (96%) trade with businesses in the Atlantic Provinces, while 56% of them trade with fresh fruit and vegetable businesses in the USA. Fresh fruit and vegetable businesses with headquarters in the Atlantic Provinces also trade with fresh fruit and vegetable businesses located in Ontario and in Quebec (48% and 44%, respectively).

6.6 TOTAL GROSS REVENUE (Q.47)

The total gross revenue of fresh fruit and vegetable businesses that participated in the survey is wide-ranging. This is a reflection of the different types of businesses that make up the Canadian fresh fruit and vegetable value chain, along with the varied size usually associated with these different types of businesses. For example, a "local" grower/shipper's gross revenue will only be a small fraction of the gross revenue reported by a major retail chain with stores from coast to coast.

FRESH FRUIT AND VEGETABLE BUSINESS: TOTAL GROSS REVENUE

N	Valid	116
	Missing	89
Mean		$31,666,309.05
Median		$4,000,000.00
Mode		$5,000,000
Std. Deviation		$151,901,157.464
Sum		$3,673,291,850
Minimum		$10,000
Percentiles	10	$400,000.00
	20	$1,152,721.80
	30	$1,755,000.00
	40	$2,900,000.00
	50	$4,000,000.00
	60	$6,500,000.00
	70	$10,000,000.00
	80	$17,600,000.00
	90	$43,000,000.00
Maximum		$1,430,000,000

The median gross revenue of Canadian fresh fruit and vegetables businesses reported in 2007 was $4,000,000, while the average gross revenue was $31,666,309. The significant difference between the median and the average tells us that the dispersion of gross revenue does not follow a normal curve. While the lower 10% of the fresh fruit and vegetables businesses reported gross revenue of less than $400,000, the upper 10% reported gross revenue above $43,000,000.

Gross revenues are much dispersed. However, most respondents (87.9 %) declared gross revenues of less than $25,000,000, while a small fraction, the upper 10%, declared gross revenues ranging from $40,000,000 to a maximum of $1,430,000,000. So we have mostly small and medium businesses on one side, and very large businesses on the other.

7 PAYMENT TERMS EXTENDED TO CLIENTS

7.1 MOST FREQUENT PAYMENTS TERMS (Q.6)

The most frequent payment term extended by Canadian fresh fruit and vegetables businesses to their clients is between 30 to 34 days; about 29% of the respondents reported their preference for that term. This was followed closely by the 25 to 29 days period, preferred by about 24% of the respondents.

IN 2007, WHAT PAYMENT TERMS DID THIS BUSINESS MOST FREQUENTLY EXTEND TO IT'S CLIENTS?

	MOST FREQUENT PAYMENT TERMS EXTENDED TO CLIENTS	
	N	%
Less than 10 days	15	7.5%
10 to 19 days	26	13.1%
20 to 24 days	24	12.1%
25 to 29 days	47	23.6%
30 to 34 days	57	28.6%
35 to 39 days	15	7.5%
40 days or more	15	7.5%
Total	199	100.0%

7.2 PAYMENTS TERMS FOR NEW CLIENTS

7.2.1 Reducing the usual payment credit period (Q.13)

Reducing the usual payment credit period extended to new clients is not a frequent practice in the Canadian fresh fruit and vegetables business. Only 14% of the respondents will either do it *all the time* (5%) or *most of the time* (9%). In contrast, the majority of respondents (58%) will either *rarely* (26%) or *never* (31%) reduce the usual payment credit period extended to new clients.

IN 2007, HOW FREQUENTLY DID THIS BUSINESS REDUCE THE USUAL PAYMENT CREDIT PERIOD EXTENDED TO ITS "NEW CLIENTS"?

	REDUCING THE USUAL PAYMENT CREDIT PERIOD EXTENDED TO NEW CLIENTS	
	N	%
All of the time	9	5.1%
Most of the time	16	9.1%
Sometimes	49	28.0%
Rarely	46	26.3%
Never	55	31.4%
Total	175	100.0%

7.2.2 Securing pre-payments or payment on delivery (Q.14)

Securing pre-payment or payment on delivery instead of extending open credit to new clients is a practice that is used even less frequently than reducing the usual payment credit period extended to new clients. Only 1 out of 10 Canadian fresh fruit and vegetables businesses secure pre-payment or payment on delivery for their new clients either *all the time* (3%) or *most of the time* (7%). In contrast, more than 7 out of 10 Canadian fresh fruit and vegetables businesses either *rarely* (28%) or *never* (44%) secured pre-payment or payment on delivery rather than extending open credit to new clients.

IN 2007, HOW FREQUENTLY DID THIS BUSINESS SECURE PRE-PAYMENT (EX: LETTERS OF CREDIT) OR PAYMENT ON DELIVERY RATHER THAN EXTENDING OPEN CREDIT TO ITS "NEW CLIENTS"?

	SECURING PRE-PAYMENT OR PAYMENT ON DELIVERY RATHER THAN EXTENDING OPEN CREDIT TO NEW CLIENTS	
	N	%
All of the time	6	3.4%
Most of the time	12	6.8%
Sometimes	31	17.6%
Rarely	50	28.4%
Never	77	43.8%
Total	176	100.0%

7.3 PAYMENT TERMS FOR REGULAR CLIENTS

7.3.1 Reducing the usual payment credit period (Q.16)

As previously mentioned, reducing the usual payment credit period extended to new clients is not a frequent business practice used by Canadian fresh fruit and vegetables businesses.

Reducing the usual payment credit period extended to regular clients is an even less frequent business practice. In fact, about 8 out of 10 Canadian fresh fruit and vegetables businesses will either *rarely* (38%) or *never* (43%) use this practice. Only 15% of the respondents will *sometimes* reduce the usual payment credit period extended to regular clients.

IN 2007, HOW FREQUENTLY DID THIS BUSINESS REDUCE THE USUAL PAYMENT CREDIT PERIOD EXTENDED TO ITS "REGULAR CLIENTS"?

	REDUCING THE USUAL PAYMENT CREDIT PERIOD EXTENDED TO REGULAR CLIENTS	
	N	%
All of the time	2	1.2%
Most of the time	5	3.0%
Sometimes	26	15.4%
Rarely	64	37.9%
Never	72	42.6%
Total	169	100.0%

7.3.2 Securing pre-payment or payment on delivery (Q.17)

As previously mentioned, securing pre-payment or payment on delivery from new clients is not a common practice in the Canadian fresh fruit and vegetable business.

Securing pre-payment or payment on delivery rather than extending open credit to regular clients is even less frequent. Close to 6 out of 10 businesses *never* use this practice, while more than 3 out of 10 businesses *rarely* secure pre-payment or payment on delivery rather than extending open credit to their regular clients.

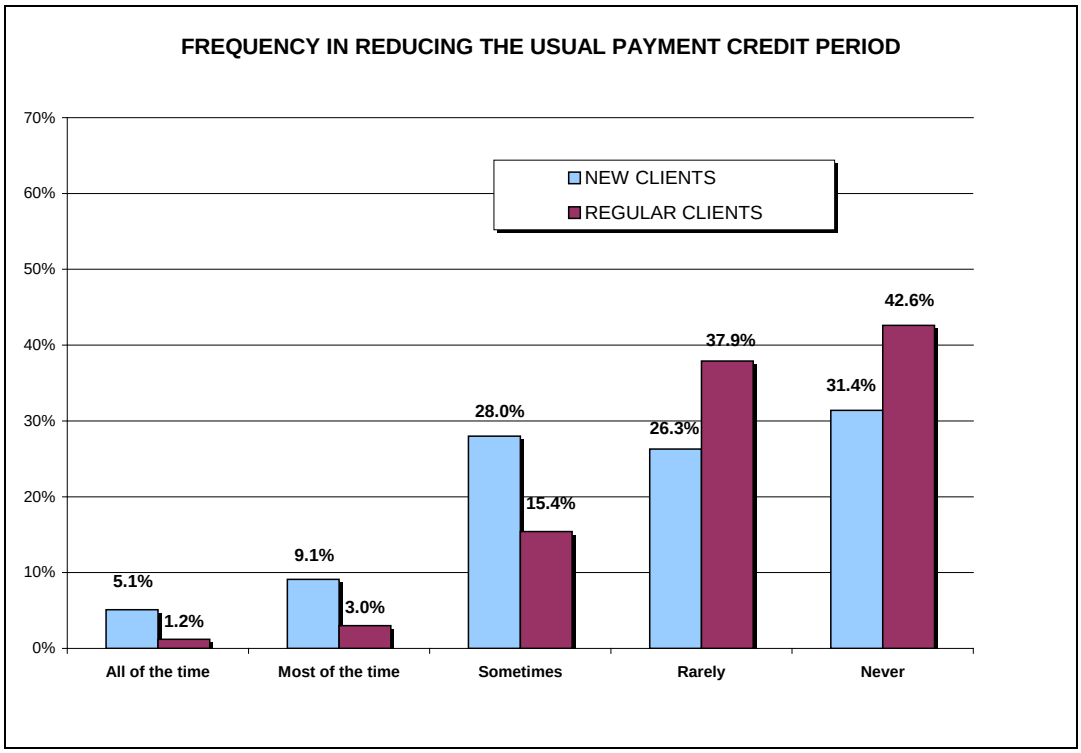
IN 2007, HOW FREQUENTLY DID THIS BUSINESS SECURE PRE-PAYMENT (EX: LETTERS OF CREDIT) OR PAYMENT ON DELIVERY RATHER THAN EXTENDING OPEN CREDIT TO ITS "REGULAR CLIENTS"?

	SECURING PRE-PAYMENT OR PAYMENT ON DELIVERY RATHER THAN EXTENDING OPEN CREDIT TO REGULAR CLIENTS	
	N	%
All of the time	2	1.2%
Most of the time	4	2.3%
Sometimes	14	8.1%
Rarely	54	31.4%
Never	98	57.0%
Total	172	100.0%

7.4 DIFFERENCES IN PAYMENT TERMS BETWEEN NEW AND REGULAR CLIENTS

As the graph below illustrates, the majority of respondents will *rarely* or *never* reduce the usual payment credit period extended to a client, be it a regular or a new client. This practice is used even less frequently with regular clients, compared to new clients.

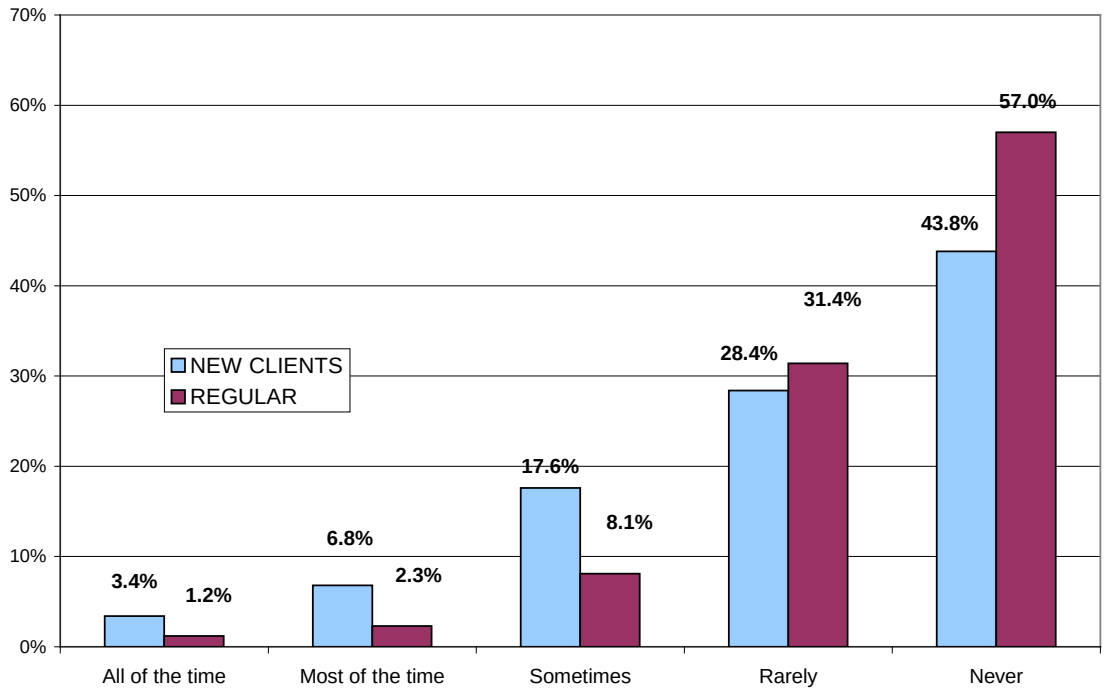
The graph also shows that while only a minority of respondents tends to reduce the usual payment credit period extended to a client, it is a practice that is used more frequently with new clients than with regular clients.



As the following graph illustrates, the majority of respondents will *rarely* or *never* secure pre-payment or payment on delivery rather than extend open credit to a client, be it for a regular or new client. This practice is used even less frequently with regular clients than with new clients.

The graph also shows that while only a minority of respondents tends to secure pre-payment or payment on delivery rather than extend open credit to a client, it is a practice that is used more frequently with new clients than with regular clients.

FREQUENCY IN SECURING PRE-PAYMENT OR PAYMENT ON DELIVERY RATHER THAN EXTENDING OPEN CREDIT



8 PRACTICES TO CONFIRM TRANSACTIONS (Q.11)

The usage frequencies of the different business practices that are used to confirm a transaction in the trade of fresh fruit and vegetables are listed in the table below.

Within the Canadian fresh fruit and vegetable industry, the usage of a bill of sales/invoice is by far the most common practice to confirm a transaction: 72% use it *all of the time*, while 13% use it *most of the time*.

IN 2007, WHEN TRADING FRESH FRUIT AND VEGETABLES WITH A CLIENT, HOW FREQUENTLY DID THIS BUSINESS USE THE FOLLOWING PRACTICES TO CONFIRM A TRANSACTION?

	All of the time		Most of the time		Sometimes		Rarely		Never		Total	
	N	%	N	%	N	%	N	%	N	%	N	%
VERBAL SALES AGREEMENTS	63	36.6%	51	29.7%	34	19.8%	12	7.0%	12	7.0%	172	100.0%
WRITTEN SALES AGREEMENT SIGNED BY BOTH PARTIES	12	7.5%	21	13.0%	37	23.0%	49	30.4%	42	26.1%	161	100.0%
E-MAILS THAT CONFIRMS THE TERMS OF THE SALE	13	8.0%	34	20.9%	61	37.4%	34	20.9%	21	12.9%	163	100.0%
BILL OF SALES/INVOICE	121	72.0%	21	12.5%	10	6.0%	8	4.8%	8	4.8%	168	100.0%
PURCHASE ORDERS	53	31.0%	60	35.1%	42	24.6%	9	5.3%	7	4.1%	171	100.0%
BROKER'S CONFIRMATION OF SALE/MEMORANDUM OF UNDERSTANDING	22	13.2%	21	12.6%	43	25.7%	34	20.4%	47	28.1%	167	100.0%
ELECTRONIC DATA INTERCHANGE	9	5.6%	32	19.8%	47	29.0%	20	12.3%	54	33.3%	162	100.0%
OTHER TYPES	1	4.3%			5	21.7%	2	8.7%	15	65.2%	23	100.0%

The second most frequent practice to confirm a transaction is the verbal sales agreements: 37% use them *all of the time*, while 30% use them *most of the time*.

The third most frequent practice to confirm a transaction is the usage of purchase orders: 31% use them *all of the time*, while 35% use those *most of the time*. Less than 10% either *rarely* or *never* use a purchase order to confirm a transaction.

For the majority of businesses in the fresh fruit and vegetable industry, having a written sales agreement signed by both parties to confirm a transaction is not a common practice: 26% *never* use a written agreement, while 30% *rarely* use one. Only 13% will use one *most of the time,*

while 23% will *sometimes* use a written agreement. In fact, of all the practices used to confirm a transaction, the written sales agreement is the least likely to be used.

The respondents were almost split in two in relation to the usage of a broker's confirmation of sale/memorandum of understanding to confirm a transaction: about half uses them, while the other half don't. While 52% of the respondents will at least *sometimes* uses a broker's confirmation of sale/memorandum of understanding, the other 48% will either *rarely* or *never* use one.

Globally, the respondents' distribution in terms of usage of electronic data interchange (EDI) to confirm a transaction is quite similar to the one observed for a broker's confirmation of sale/memorandum of understanding: a little bit more than half uses EDI extensively, while the rest of the respondents do not. While 29% and 20% of the respondents uses EDI *sometimes* and *most of the time* respectively, one third of the respondents *never* use it, and 12% *rarely* do.

The respondents were also split in relation to the usage of emails as a tool to confirm a transaction: 37% uses them *sometimes* and another 21% uses them *most of the time*. However, another 34%, either *rarely* (21%) or *never* (13%) use emails to confirm a transaction.

While the level of usage of electronic tools (email or electronic data interchange) to confirm a transaction is significant, the hard paper copy (bill of sales/invoice, purchase order) and the verbal sales agreement are still the preferred methods used within the Canadian fresh fruit and vegetable industry to confirm a transaction.

9 SOLVENCY VERIFICATION (Q.12, Q. 15)

9.1 PRACTICES USED WITH NEW CLIENTS (Q.12)

This section covers practices that are used within the Canadian fresh fruit and vegetables industry to validate the solvency of a potential new client.

Verifying the credit rating of a new client with a credit research agency and consulting other members of the industry to get background information on them are the two most prevalent practices used in the industry to validate the solvency of a potential new client.

IN 2007, WHEN TRADING FRESH FRUIT AND VEGETABLES WITH A "NEW CLIENT," HOW FREQUENTLY DID THIS BUSINESS USE THE FOLLOWING PRACTICES?

	All of the time		Most of the time		Sometimes		Rarely		Never		Total	
	N	%	N	%	N	%	N	%	N	%	N	%
VERIFY CREDIT RATING WITH CREDIT RESEARCH AGENCY	54	32.0%	37	21.9%	23	13.6%	21	12.4%	34	20.1%	169	100.0%
VERIFY OWNERSHIP OF CFIA LICENCE	17	10.4%	15	9.2%	22	13.5%	42	25.8%	67	41.1%	163	100.0%
VERIFY MEMBERSHIP IN DRC	24	14.5%	21	12.7%	20	12.1%	29	17.6%	71	43.0%	165	100.0%
CONSULT DRC FOR BACKGROUND INFORMATION	9	5.5%	3	1.8%	20	12.2%	45	27.4%	87	53.0%	164	100.0%
CONSULT MEMBERS OF INDUSTRY FOR BACKGROUND INFORMATION	32	19.2%	38	22.8%	45	26.9%	26	15.6%	26	15.6%	167	100.0%
VISIT THEIR FACILITIES	11	6.8%	24	14.8%	47	29.0%	38	23.5%	42	25.9%	162	100.0%
OTHER TYPES OF PRACTICES	3	20.0%			1	6.7%			11	73.3%	15	100.0%

When trading fresh fruit and vegetables with new clients, the majority of businesses will verify their credit rating with a credit research agency: 32% do it *all the time*, 22% *most of the time* and 14% *sometimes*. However, another 20% *never* verify the credit rating of new clients, and 12% *rarely* do it.

Verifying that a new client owns a CFIA license is not a very common practice within the Canadian fresh fruit and vegetables industry. In fact, the majority of respondents will not verify that a new client owns a CFIA license: 41% *never* do it, and 26% *rarely* do. Only 10% of respondents will verify *all the time* that a new client owns a CFIA license, while only 9% will do that verification *most of the time*.

Verifying that a new client is a member of the DRC is also not a very common practice within the industry. The majority of respondents will not verify that a new client is a member of DRC: 43% *never* do it, while 18% *rarely* do. Only 15% of respondents will verify *all the time* that a new client is a member of the DRC, while 13% will do that verification *most of the time*.

Consulting other members of the industry to obtain background information on a potential new client is a widely used practice: 19% do it *all of the time*, 23% *most of the time* and 27% *sometimes*. After verifying the credit rating, this is the second most frequent practice used to validate the solvency of a potential new client. Peer recognition of the solvency and reliability of a member of the fresh fruit and vegetable industry seems to carry more weight than membership in either an industry association or the ownership of a licence.

The respondents were split in relation to the visit of a new client facility when trading fresh fruit and vegetables: half of the respondents do it, while the other half do not. Respectively 26% and 24% will *rarely* or *never* visit a new client facility, while 29% will do it *sometimes*.

9.2 PRACTICES USED WITH REGULAR CLIENTS (Q.15)

This section covers practices used to validate the solvency of regular clients. For most of these practices, the frequency of usage with regular clients is at times significantly less frequent than that reported when dealing with new clients (see previous section). The only exception is with the practice of visiting client facilities, which showed a higher level of usage for regular clients than with new clients.

IN 2007, WHEN TRADING FRESH FRUIT AND VEGETABLES WITH A "REGULAR CLIENT," HOW FREQUENTLY DID THIS BUSINESS USE THE FOLLOWING PRACTICES?

	All of the time		Most of the time		Sometimes		Rarely		Never		Total	
	N	%	N	%	N	%	N	%	N	%	N	%
VERIFY CREDIT RATING WITH CREDIT RESEARCH AGENCY	12	7.1%	16	9.4%	40	23.5%	40	23.5%	62	36.5%	170	100.0%
VERIFY OWNERSHIP OF CFIA LICENCE	7	4.2%	10	6.0%	15	9.0%	34	20.4%	101	60.5%	167	100.0%
VERIFY MEMBERSHIP IN DRC	8	4.7%	12	7.1%	16	9.5%	33	19.5%	100	59.2%	169	100.0%
CONSULT DRC FOR BACKGROUND INFORMATION	2	1.2%	4	2.4%	12	7.2%	43	25.7%	106	63.5%	167	100.0%
CONSULT MEMBERS OF INDUSTRY FOR BACKGROUND INFORMATION	14	8.2%	27	15.9%	47	27.6%	32	18.8%	50	29.4%	170	100.0%
VISIT THEIR FACILITIES	17	10.7%	31	19.5%	63	39.6%	23	14.5%	25	15.7%	159	100.0%
OTHER TYPES OF PRACTICES	2	11.1%	1	5.6%	3	16.7%	1	5.6%	11	61.1%	18	100.0%

Once a fresh fruit and vegetable business has established a business relationship with another member of the industry, the practices that they would have initially used to validate their

reliability drops off. This does not mean that they do not use them any more; they just use them less frequently.

Verifying the credit rating of regular clients with a credit research agency and consulting other members of the industry to get background information on them are the two most prevalent practices used in the industry.

When trading fresh fruit and vegetables with a regular client, the majority of respondents will not verify credit rating with a credit research agency: 37% will *never* verify the credit rating of their regular clients, while 24% will *rarely* do it. Another 24% will *sometimes* verify their regular clients' credit rating.

Verifying that a regular client owns a CFIA license is not a common practice within the industry. In fact, the majority of respondents will not verify that a new client owns a CFIA license: 61% *never* do it, while 20% *rarely* do. Only 4% of respondents will verify *all the time* that a new client owns a CFIA license, while only 9% will do that verification *most of the time*.

Verifying that a regular client owns a DRC license is also not a very common practice within the industry. The majority of respondents will not verify that a regular client owns a DRC license: 59% *never* do it, while 20% *rarely* do. Only 5% of respondents will verify *all the time* that a regular client owns a DRC license, while 7% will do that verification *most of the time*.

Consulting other members of the industry to obtain background information on a regular client is the most widely used practice used to validate the solvency of a regular client, yet it is used a lot less frequently then when dealing with a new client: 28% will use that practice *sometimes*, 16% *some of the time* and only 8% *all of the time*. Almost half of the respondents will either *rarely* (19%) or *never* (29%) consult other members of the industry to obtain background information on a regular client.

Visits to a regular client's facility when trading fresh fruit and vegetables were a lot more frequent than visits to a new client's facility: 40%, 20% and 11% or respondents do it *sometimes*, *most of the time* and *all of the time*, respectively. Visiting a new client's can be a tactic used to validate that the potential new client does in fact have a brick and mortar facility. At the same time, one can visit a client facility to build and maintain a business relationship. This probably explains why the frequency of visits to the facilities of regular clients is more frequent than those to the facilities of new clients.

10 LICENSING AND MEMBERSHIPS (Q.8, Q.9)

The majority of respondents, 87%, are member of the Dispute Resolution Corporation (DRC) while 57% of the businesses are licensed under the licensing and arbitration regulations with the Canadian Food Inspection Agency (CFIA).

Respondents self-identified themselves as either members of the DRC or licensed with the CFIA, or both. From the response distribution, it seems that many respondents that are members of the DRC assumed that they were also licensed with the CFIA by default. This significantly increased the apparent prevalence of businesses that are licensed with the CFIA. According to CFIA officials, only about 15% of the fresh fruit and vegetable value chain is licensed with them.

	Yes		No		Total	
	N	%	N	%	N	%
IS THIS BUSINESS LICENSED UNDER THE LICENSING AND ARBITRATION REGULATIONS WITH THE CANADIAN FOOD INSPECTION AGENCY (CFIA) ("AGRICULTURE CANADA LICENSE")?	105	57.1%	79	42.9%	184	100.0%
IS THIS BUSINESS A MEMBER OF THE DISPUTE RESOLUTION CORPORATION (DRC)?	165	87.3%	24	12.7%	189	100.0%

The majority of respondents, 70%, are member of the Canadian Produce Marketing Association (CPMA), while 39% are member of another marketing association and 35% are member of a producer association. Only 7% are members of a grower-cooperative, while 6% are member of a marketing club.

PLEASE IDENTIFY THE ASSOCIATIONS
OF WHICH THIS BUSINESS IS A MEMBER (N = 158)

		N	%
ASSOCIATION MEMBERSHIP	CANADIAN PRODUCE MARKETING ASSOCIATION (CPMA)	110	69.6
	A PRODUCER ASSOCIATION	55	34.8
	A GROWER CO-OPERATIVE	11	7.0
	A MARKETING CLUB	10	6.3
	OTHER MARKETING ASSOCIATION	62	39.2

11 PAYMENT DIFFICULTIES EXPERIENCED IN TRADING

This section covers non payments, partial payments and delayed payments experienced in the trade of fresh fruit and vegetables. The following definitions were included in the online survey questionnaire.

- Non payment: a non payment occurs when a client does not pay any amount due to this business.
- Partial payment: a partial payment occurs when a client does not pay the full amount due to this business. This is often referred to as "invoice clipping" in the fresh fruit & vegetables industry.
- Delayed payment: Delayed payments are payments that are received significantly beyond the terms that are the most frequently extended to the clients of this business.

This section does not include non payments, partial payments and delayed payments experienced in the trade of seed potatoes and onion sets.

11.1 NON PAYMENTS (Q.18 TO Q.26)

11.1.1 Non payments experienced by the business (Q18)

In 2007, about half of the Canadian fresh fruit and vegetables business experienced at least one instance of non payment in the trade of fresh fruit and vegetables[4].

	2007: NON-PAYMENT EXPERIENCED IN THE TRADE OF FRESH FRUIT AND VEGETABLES	
	N	%
Yes	86	50.6%
No	84	49.4%
Total	170	100.0%

[4] Note: Results are based on the number of respondents who gave an answer to the question. In the table, out of an initial sample of 205, 170 respondents provided a yes or no answer to the question. There are 35 respondents who did not provide an answer.

11.1.2 Circumstance of non payments (Q.19)

The circumstances under which respondents experienced non payment in the trade of fresh fruit and vegetables were varied. The two most frequent circumstances of non payment were that the "*client provided a non sufficient funds (NSF) cheque*" (39% of the respondents reporting non payments), or the client "*ceased operations without fulfilling financial obligations*" (38%). In decreasing order, the other circumstances of non payment were that the *"client filed for bankruptcy or was petitioned into bankruptcy"* at 33%, or the "*client disappeared without fulfilling financial obligations"* at 28%.

CIRCUMSTANCES OF NON PAYMENTS (N = 85)	N	%
CLIENT CEASED OPERATIONS WITHOUT FULFILLING FINANCIAL OBLIGATIONS	32	37.6
CLIENT DISAPPEARED WITHOUT FULFILLING FINANCIAL OBLIGATIONS	24	28.2
CLIENT FILED FOR BANKRUPTCY OR WAS PETITIONED INTO BANKRUPTCY	28	32.9
CLIENT PROVIDED A NON SUFFICIENT FUNDS (NSF) CHEQUE	33	38.8
CLIENT CANCELLED PAYMENT(S) (EX: CANCELLED CHEQUE)	6	7.1
OTHER	25	29.4

It is important to note that many respondents could have been referring to the same source of a series of non payments. That same source could have affected many businesses. For example, 28 respondents replied that the circumstance of the non payment was that the *"client filed for bankruptcy or was petitioned into bankruptcy."* Many of those respondents could have been referring to the same source for a series of non payment. To illustrate, 10 different respondents could all be referring to the bankruptcy of a single business, *XYZ & Sons Inc*. In such a case, 10 out of the 28 responses are referring to one instance of bankruptcy, not 10 different instances of bankruptcy.

Readers should also note that this is a multiple response question. Therefore, in reference to one instance of a non payment, a respondent could have reported that the "*client disappeared without fulfilling financial obligations,"* while for another instance of non-payment, the response could be that the "*client filed for bankruptcy or was petitioned into bankruptcy."*

11.1.3 Number of transactions with non payments (Q.20)

In 2007, 61% of the businesses that reported a non payment from the trade of fresh fruit and vegetable, these non payments occurred on somewhere between 1 to 5 transactions, while for another 16%, non payment occurred on somewhere between 6 to 10 transactions.

	NON PAYMENT: NUMBER OF TRANSACTIONS	
	N	%
Between 1 to 5 transactions	53	60.9%
Between 6 to 10 transactions	14	16.1%
Between 11 to 15 transactions	4	4.6%
Between 16 to 20 transactions	6	6.9%
Between 21 to 25 transactions	0	0.0%
Between 26 to 30 transactions	0	0.0%
Between 31 to 35 transactions	1	1.1%
Between 36 to 40 transactions	1	1.1%
Between 46 to 50 transactions	2	2.3%
Above 50 transactions	6	6.9%
Total	87	100.0%

Therefore, for the majority of the affected respondents (77%), the number of transactions on which they experienced a non payment in the trade of fresh fruit and vegetable in 2007 was less than 10 transactions.

About 16% of the respondents experienced a non payment on between 11 to 40 transactions, while less than 7% experienced a non payment on more than 50 transactions.

There was no relationship between the number of transactions with non payment when trading fresh fruit and vegetables in 2007 and the total number of transactions for the year.

11.1.4 Types of clients who did not pay (Q.21)

The two types of clients for whom respondents reported non payments most frequently were the retailers, followed by the distributor, receiver, wholesaler, food service distributor group: 40% of the respondents reported non payment from the former and 35% from the latter. This was followed by the food service operator, the jobbers and the broker, commission merchant, grower's agent group: 17%, 15% and 12% of the respondents reported non payment from them, respectively.

IN 2007, WITH WHAT TYPES OF CLIENT(S) DID THIS BUSINESS EXPERIENCE NON-PAYMENT(S)

TYPES OF CLIENTS WHO DID NOT PAY (N = 86)	N	%
GROWER	5	5.8
GROWER COOPERATIVE OR GROWER MARKETING GROUP	0	0.0
PACKER, REPACKER	3	3.5
SHIPPER	5	5.8
JOBBER	13	15.1
BROKER, COMMISSION MERCHANT, GROWER'S AGENT	10	11.6
DISTRIBUTOR, RECEIVER, WHOLESALER, FOOD SERVICE DISTRIBUTOR	30	34.9
PROCESSOR	3	3.5
FOOD SERVICE OPERATOR	15	17.4
RETAILER	34	39.5
OTHER	9	10.5

As seen in the following table, depending on the main business activities, the types of clients from whom fresh fruit and vegetable business are more likely to have experienced a non payment in 2007 is quite varied:

- The "*Grower or grower/packer/shipper plus group"* reported non payment mainly from distributor, receiver, wholesaler, and food service distributor.
- The "*Grower coop or marketing group"* reported non payment mainly from broker, commission merchant, grower's agent.
- The "*Distributor or broker group"* reported non payment mainly from retailers.
- The "*Processor or food service operator group*" reported non payment mainly from distributor, receiver, wholesaler, and food service distributor.
- The "Retailers" reported non payment mainly from other retailers.

		Main business activities										Total	
		Grower or grower/ packer/ shipper plus		Grower coop or marketing group		Distributor or broker		Processor or food service operator		Retailer		N	%
		N	%	N	%	N	%	N	%	N	%		
TYPES OF CLIENTS WITH NON PAYMENTS	GROWER	2	10.0	2	25.0	1	2.1					5	6.0
	PACKER, REPACKER	2	10.0			1	2.1					3	3.6
	SHIPPER	2	10.0	1	12.5	2	4.3					5	6.0
	JOBBER	7	35.0			6	12.8					13	15.5
	BROKER, COMMISSION MERCHANT, GROWER'S AGENT	4	20.0	4	50.0	1	2.1	1	25.0			10	11.9
	DISTRIBUTOR, RECEIVER, WHOLESALER, FOOD SERVICE DISTRIBUTOR	8	40.0	1	12.5	16	34.0	2	50.0	2	40.0	29	34.5
	PROCESSOR	1	5.0			1	2.1	1	25.0			3	3.6
	FOOD SERVICE OPERATOR	3	15.0	1	12.5	9	19.1			2	40.0	15	17.9
	RETAILER	6	30.0	1	12.5	20	42.6	1	25.0	4	80.0	32	38.1
	OTHER	1	5.0			8	17.0					9	10.7
Total		20	100.0	8	100.0	47	100.0	4	100.0	5	100.0	84	100.0

Note: Results are only indicative for some activities. As the sample size is small (10 or less) for some main business activities, results should then be considered directional only. Therefore, caution should be used in interpretation.

11.1.5 Regions of non payments (Q.22)

The two main regions from which respondents reported non payments were Ontario and Quebec: 43% and 33% of the respondents reported non payments from these two regions respectively.

REGIONS OF NON PAYMENT (N = 82)	N	%
ATLANTIC PROVINCES	8	9.8
QUEBEC	27	32.9
ONTARIO	35	42.7
PRAIRIE PROVINCES	6	7.3
BRITISH COLOMBIA	11	13.4
USA	11	13.4
MEXICO	0	0.0
OTHER COUNTRIES	6	7.3

However, it is important to note that the distribution of non payments by regions is almost in line with the distribution of the number of fresh fruit and vegetable business head offices by region (see table 6.1), with the exception of the USA and the Atlantic provinces. Therefore, non payments are not more likely to happen in one region of Canada than another region. More respondents reported non payments from Ontario and Quebec, but this is in line with the higher number of fresh fruit and vegetable business head offices and, ultimately, transactions from these two regions.

As seen in the following table, the majority of fresh fruit and vegetable businesses experience non payment “close to home.” For example, 90% of businesses with head offices in British Colombia reported non payment from other business located in British Colombia, while 10% reported non payment from businesses located in Ontario, and another 10% reported non payment from businesses located in other countries. Note that this is a multiple response question.

		FRESH FRUIT AND VEGETABLE BUSINESS: LOCATION OF HEAD OFFICE												Total	
		ATLANTIC PROVINCES		QUEBEC		ONTARIO		PRAIRIE PROVINCES		BRITISH COLOMBIA		USA		N	%
		N	%	N	%	N	%	N	%	N	%	N	%		
REGION OF NON PAYMENT	ATLANTIC PROVINCES	6	66.7	1	6.7	1	2.8							8	10.1
	QUEBEC	2	22.2	13	86.7	10	27.8	1	20.0					26	32.9
	ONTARIO	1	11.1	2	13.3	30	83.3			1	10.0	1	25.0	35	44.3
	PRAIRIE PROVINCES	1	11.1					4	80.0			1	25.0	6	7.6
	BRITISH COLOMBIA	1	11.1							9	90.0			10	12.7
	USA			1	6.7	6	16.7	2	40.0			1	25.0	10	12.7
	OTHER COUNTRIES	2	22.2	1	6.7					1	10.0	1	25.0	5	6.3
Total		9	100.0	15	100.0	36	100.0	5	100.0	10	100.0	4	100.0	79	100.0

Note: Results are only indicative for some regions (Prairie provinces & USA). As the sample size is small (5 and 4 respectively) for those regions, results should be considered directional only. Therefore, caution should be used in interpretation.

As shown in the table below, for some of the different types of main business activities, the regions where they were more likely to report non payments were quite different:

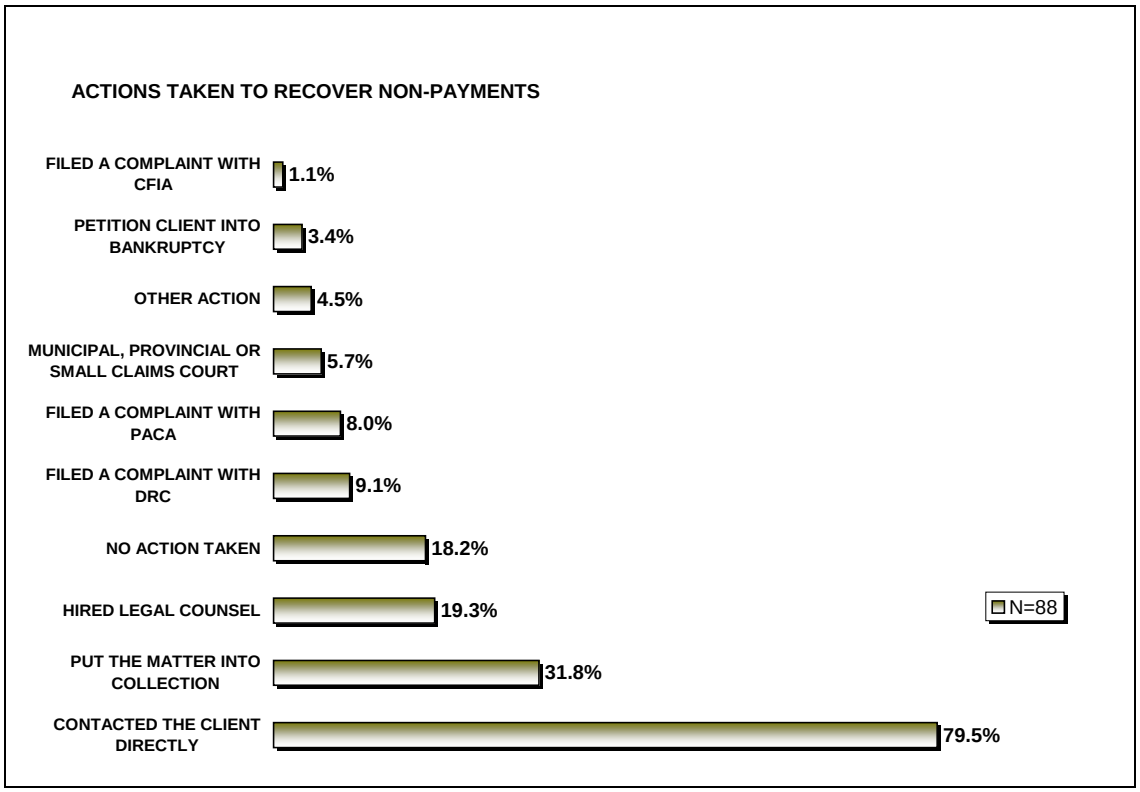
- The "*Grower or grower/packer/shipper plus group"* reported non payment mainly in Ontario and in Quebec.
- The "*Distributor or broker group"* also reported non payment mainly in Ontario and in Quebec.
- For the other main business activities types, no clear pattern existed between their main business activities and the region where they reported non payment.

		Group of main business activities who reported non-payment										Total	
		Grower or grower/ packer/ shipper plus		Grower coop or marketing group		Distributor or broker		Processor or food service operator		Retailer		N	%
		N	%	N	%	N	%	N	%	N	%		
REGION OF NON PAYMENT	ATLANTIC PROVINCES	1	5.0	1	12.5	3	6.8			2	50.0	7	8.8
	QUEBEC	8	40.0	2	25.0	14	31.8			2	50.0	26	32.5
	ONTARIO	11	55.0	2	25.0	18	40.9	1	25.0	2	50.0	34	42.5
	PRAIRIE PROVINCES			1	12.5	3	6.8			2	50.0	6	7.5
	BRITISH COLOMBIA	2	10.0	1	12.5	6	13.6	1	25.0	1	25.0	11	13.8
	USA	5	25.0	2	25.0	3	6.8	1	25.0			11	13.8
	OTHER COUNTRIES	1	5.0	1	12.5	3	6.8	1	25.0			6	7.5
Total		20	100.0	8	100.0	44	100.0	4	100.0	4	100.0	80	100.0

Note: Results are only indicative for some activities. As the sample size is small (10 or less), results should be considered directional only. Therefore, caution should be used in interpretation.

11.1.6 Actions taken to recover non payments (Q.23)

By far the most frequent action taken to recover non payments was to contact the client directly: 80% of those who experienced non payment did contact their client. The second most widely used method to recover non payment was to put the matter into collection, a method used by 32% of the respondents. Another 19% of the respondents hired legal counsel. Only 9% of the respondents filed a complaint with the DRC as a result of a non payment, while 8% filed a complaint with PACA. Note that 18% of the respondents did not take any action to recover non payments. This leads us to believe that when a client disappears without fulfilling his financial obligations, there are occasions where no action can be taken to recover the non payment.



Readers should note that this was a multiple responses question. Therefore, a respondent could have replied that it contacted a client, and if the issue could not be resolved, it could then have decided to send the matter to collection. Also, a respondent could have taken one or more actions to resolve one instance of non payment and have taken a different set of actions in another instance of non payment.

11.1.7 Level of success in recovering non payments (Q.24)

Respondents were asked to estimate the level of success they had in 2007 in recovering the non payments they reported from the trade of fresh fruit and vegetables.

Only 14% considered the actions they took to recover non payments to have been successful for all non payments. Close to half of the respondents (49%) said they had some success in recovering non payments. However, 38% said that they did not have any success in recovering non payments.

	SUCCESS OF ACTIONS TAKEN IN RECOVERING NON PAYMENT	
	N	%
Yes, for all	12	13.6%
Yes, for some	43	48.9%
No, not at all	33	37.5%
Total	88	100.0%

Being successful (*Yes, for all*) in recovering non payments does not necessarily imply that there were zero financial losses. Some respondents who recovered most of the money they were owned considered their action to be successful *("yes for all"*), even if they still lost some money. This was demonstrated in the declared financial losses of the businesses that replied *"yes, for all"* that were significantly lower than the average financial losses declared by the businesses that replied *"yes, for some".* The respondents who replied *"yes, for all"* had a mean net financial loss of $1,325. This contrasts with the mean net financial loss of $41,333 for the respondents who replied *"no, not at all."*

As seen in the table below, there is a strong correlation between the respondents' evaluations of the success of the actions they took to recover non payment and their declared net financial losses.

TOTAL NET FINANCIAL LOSSES DUE TO NON PAYMENT

SUCCESS OF ACTIONS TAKEN IN RECOVERING NON PAYMENT	Mean	Grouped Median	N
Yes, for all	$1,325.00	$1,050.00	4
Yes, for some	$23,824.50	$17,133.33	30
No, not at all	$41,333.20	$14,550.00	20
Total	$28,642.57	$14,437.50	54

(R = 0.244)

11.1.8 Capacity to evaluate net financial loss due to non payments (Q.25)

While 62% of the respondents stated that they had the capacity to estimate total net financial losses due to non payments, another 38% said they could not estimate them.

	CAPACITY TO ESTIMATE TOTAL NET FINANCIAL LOSSES DUE TO NON PAYMENT	
	N	%
Yes	58	61.7%
No	36	38.3%
Total	94	100.0%

Readers should note that some instances of non payment from 2007 could have been outstanding at the time of the survey, which was conducted in early 2008.

11.1.9 Total net financial losses due to non payments (Q.26)

For the respondents who declared losses in 2007 in the trade of fresh fruit and vegetables due to non payment, the median net loss was $14,250, while the mean net loss was $27,811. For 30% of the respondents, the net loss was under $3,500, while for 10% of the respondents, net losses from non payment were above $71,000.

TOTAL NET FINANCIAL LOSSES DUE TO NON PAYMENT

N		57
Mean		$27,810.51
Median		$14,250.00
Mode		$30,000
Percentiles	10	$800.00
	20	$2,000.00
	30	$3,500.00
	40	$6,400.00
	50	$14,250.00
	60	$20,000.00
	70	$30,000.00
	80	$44,000.00
	90	$71,000.00

11.2 PARTIAL PAYMENTS (Q.27 TO Q.35)

11.2.1 Partial payments experienced by the business (Q.27)

In 2007, about 67% of the respondents experienced at least one instance of partial payment in the trade of fresh fruit and vegetables[5].

2007: PARTIAL PAYMENT EXPERIENCED IN THE TRADE OF FRESH FRUIT AND VEGETABLES

	N	%
Yes	112	67.5%
No	54	32.5%
Total	166	100.0%

11.2.2 Circumstance of partial payments (Q.28)

The circumstances under which respondents experienced partial payments were varied. The two most frequent circumstances of partial payments were that the "*client made deductions on payment based on the amount of documented condition problems with the product without an inspection by a recognised inspection service*" at 65% and that the "*client did not pay the full amount due to invoice clipping not related to any documented condition problems with the products*" at 48%. The least frequent circumstance of partial payment was when a "*client made deductions on payment based on the amount of documented condition problems with the product following an inspection by a recognised inspection service,"* which explains 34% of the occurrences. Readers should note that this was a multiple response question.

CIRCUMSTANCES OF PARTIAL PAYMENTS (N = 109)	N	%
CLIENT DID NOT PAY THE FULL AMOUNT DUE TO INVOICE CLIPPING, NOT RELATED TO ANY DOCUMENTED CONDITION PROBLEMS WITH THE PRODUCTS (EX: MARKET DECLINE CITED AS REASON FOR PARTIAL PAYMENT(S)	52	47.7
CLIENT MADE DEDUCTIONS ON PAYMENT(S) BASED ON THE AMOUNT OF DOCUMENTED CONDITION PROBLEMS WITH THE PRODUCT FOLLOWING AN INSPECTION BY A RECOGNISED INSPECTION SERVICE (EX: CFIA, USDA OR BY AN AGREED TO THIRD PARTY)	37	33.9
CLIENT MADE DEDUCTIONS ON PAYMENT(S) BASED ON THE AMOUNT OF DOCUMENTED CONDITION PROBLEMS WITH THE PRODUCT WITHOUT AN INSPECTION BY A RECOGNISED INSPECTION SERVICE (EX: CLIENT IN HOUSE QUALITY CONTROL OR INSPECTION BY NON AGREED TO THIRD PARTY)	71	65.1
OTHER	9	8.3

[5] Note: Results are based on the number of respondents who gave an answer to the question. In the table, out of an initial sample of 205, 166 respondents provided a yes or no answer to the question. There are 39 respondents who did not provide an answer.

11.2.3 Number of transactions with partial payments (Q.29)

In 2007, for 31% of the businesses that reported partial payments, these occurred on between 1 to 5 of their transactions, while for 17% of the respondents, instances of partial payments occurred on somewhere between 6 to 10 transactions. Therefore, for close to half of the respondents, the number of transactions on which they experienced a partial payment in the trade of fresh fruit and vegetable was on less than 10 transactions. For three quarter of the respondents, partial payments occurred on less than 30 transactions. Only 17% of the respondents reported partial payments on more than 50 transactions.

PARTIAL PAYMENT : NUMBER OF TRANSACTIONS		
	N	%
Between 1 to 5 transactions	32	30.8%
Between 6 to 10 transactions	18	17.3%
Between 11 to 15 transactions	7	6.7%
Between 16 to 20 transactions	13	12.5%
Between 21 to 25 transactions	4	3.8%
Between 26 to 30 transactions	4	3.8%
Between 36 to 40 transactions	2	1.9%
Between 41 to 45 transactions	1	1.0%
Between 46 to 50 transactions	5	4.8%
Above 50 transactions	18	17.3%
Total	104	100.0%

As seen in the following table, there is a strong correlation between the total number of transactions in 2007 and the number of those transactions for which partial payments were received. Globally, as the number of transactions in the trade of fresh fruit and vegetable increased, so did the probability that a business would receive partial payments.

From a low of a little more than a mean of 11 transactions with partial payments for businesses with between 1-499 transactions in 2007, the number of partial payments increased with the rising number of transactions and peaked at about 41 transactions with partial payment for businesses with 100,000 transactions or more.

However, as the number of transactions increased, the proportion of transactions that resulted in partial payment decreased. On average, businesses with between 1-449 transactions had 4.5% of those transactions result in partial payments. However, as the number of transactions

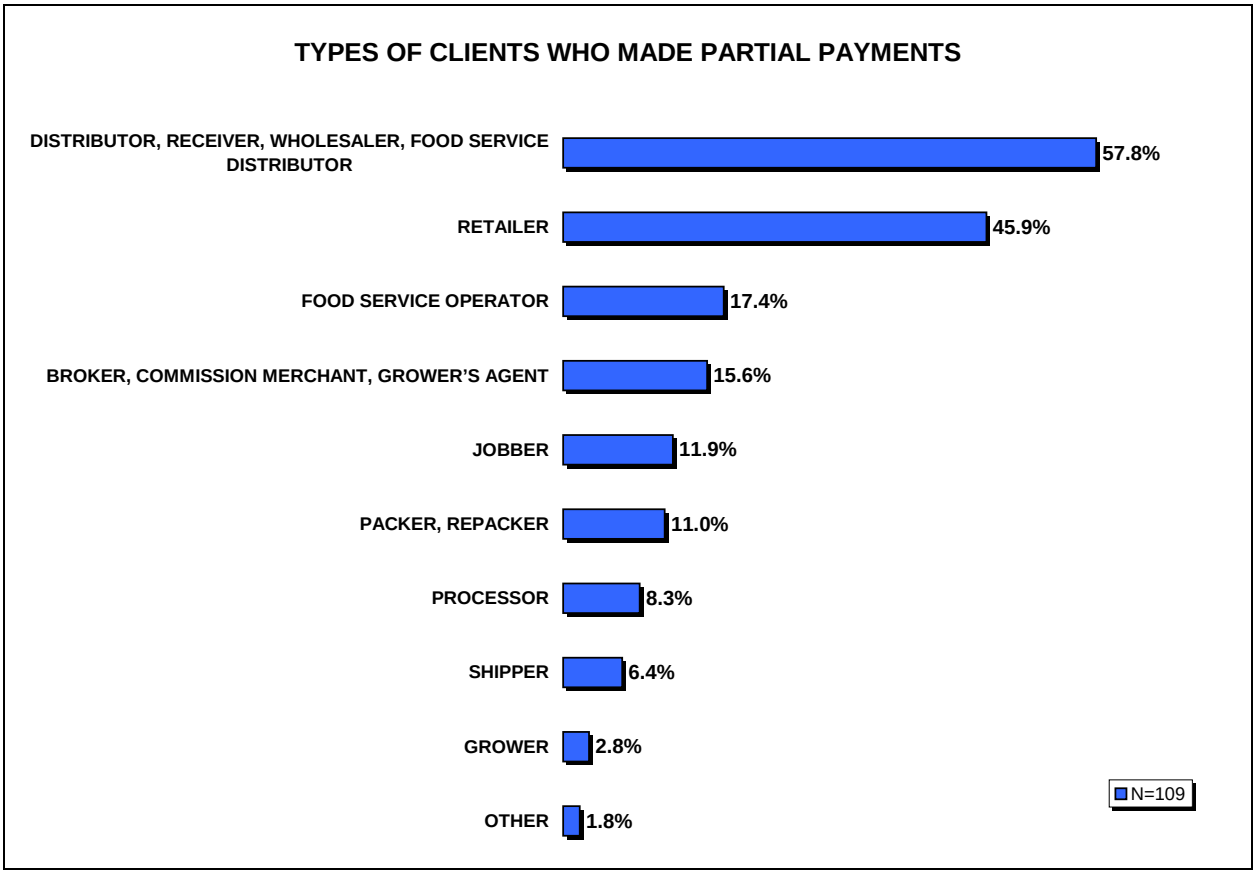
made in 2007 increased, the importance of partial payment steadily decreased and bottomed out at less than 0.01% of the transactions for the group with 100,000 transactions or more.

Number of transactions in 2007	Mean		Grouped Median		N
	PARTIAL PAYMENT: NUMBER OF TRANSACTIONS	Percentage of total transactions in partial payment transactions	PARTIAL PAYMENT: NUMBER OF TRANSACTIONS	Percentage of total transactions in partial payment transactions	
1 thru 499	11.17	4.4667	5.83	2.3333	18
500 thru 999	16.39	2.1852	11.50	1.5333	9
1000 thru 1999	12.58	.8385	5.83	.3889	13
2000 thru 3999	15.09	.5030	7.50	.2500	11
4000 thru 7999	33.44	.6080	22.50	.4091	17
8000 thru 49999	22.23	.1058	16.50	.0786	11
50000 thru 99999	33.50	.0447	27.50	.0367	5
100000 thru high	41.21	.0103	40.50	.0101	7
Total	21.40	1.4098	12.41	.3220	91

	R
PARTIAL PAYMENT : NUMBER OF TRANSACTIONS * Number of transactions in 2007	.291
Percentage of total transactions in partial payment transactions * Number of transactions in 2007	-.169

11.2.4 Types of clients who made partial payments (Q.30)

The two types of clients for whom respondents reported partial payments most frequently were the distributor, receiver, wholesaler, food service distributor group and the retailers: 58% of the respondents reported partial payments from the former, and 46% from the latter. This was followed by the food service operator and the broker, commission merchant, grower's agent group: 17% and 16% of the respondents reported partial payments from them, respectively.



As seen in the following table, depending on the main business type of activities, the types of clients from whom they are more likely to have experienced partial payments in 2007 are quite varied:

- The "*Grower or grower/packer/shipper plus group"* and the "*Distributor or broker group"* reported non payment mainly from the Distributor, receiver, wholesaler, food service distributor group and secondly from the Retailers.

	Main business activities										Total	
	Grower and grower/ packer/ shipper plus		Grower coop and marketing group		Distributor and broker		Processor and food service operator		Retailer		N	%
Main business activities of clients who made partial payment	N	%	N	%	N	%	N	%	N	%		
GROWER	2	5.7			1	2.0					3	2.8
PACKER, REPACKER	7	20.0	2	18.2	3	5.9					12	11.2
SHIPPER	6	17.1			1	2.0					7	6.5
JOBBER	8	22.9			5	9.8					13	12.1
BROKER, COMMISSION MERCHANT, GROWER'S AGENT	10	28.6	4	36.4	2	3.9	1	16.7			17	15.9
DISTRIBUTOR, RECEIVER, WHOLESALER, FOOD SERVICE DISTRIBUTOR	17	48.6	7	63.6	32	62.7	5	83.3	1	25.0	62	57.9
PROCESSOR	2	5.7			6	11.8	1	16.7			9	8.4
FOOD SERVICE OPERATOR	4	11.4	1	9.1	12	23.5	1	16.7	1	25.0	19	17.8
RETAILER	16	45.7	3	27.3	24	47.1	2	33.3	3	75.0	48	44.9
OTHER					2	3.9					2	1.9
Total	35	100.0	11	100.0	51	100.0	6	100.0	4	100.0	107	100.0

Note: Results are only indicative for some activities. As the sample size is small (10 or less), results should be considered directional only. Therefore, caution should be used in interpretation.

11.2.5 Regions of partial payments (Q.31)

The two regions most frequently reported by respondents as the origin of partial payments in the trade of fresh fruit and vegetables were Ontario and Quebec: 52% and 47% of the respondents reported having received partial payments from business in those regions respectively. The USA was the third region most frequently reported as the origin of partial payments: 32% of the respondents reported having received partial payments from business in that region.

IN 2007, IN WHICH REGION(S) DID THIS BUSINESS EXPERIENCE PARTIAL PAYMENT(S) WHEN TRADING FRESH FRUIT AND VEGETABLES? (N = 108)

		N	%
REGION OF PARTIAL PAYMENT	ATLANTIC PROVINCES	15	13.9
	QUEBEC	51	47.2
	ONTARIO	56	51.9
	PRAIRIE PROVINCES	17	15.7
	BRITISH COLOMBIA	18	16.7
	USA	34	31.5
	MEXICO	1	.9
	OTHER COUNTRIES	4	3.7

It is important to note that the distribution of partial payments by region is almost in line with the distribution of the number of fresh fruit and vegetable business head offices by region (see table 6.1), with the exception of the USA and the Atlantic provinces. Therefore, partial payments are not more likely to happen in one region in Canada than in another region. More respondents reported partial payments from Ontario and Quebec, but this is in line with the higher number of fresh fruit and vegetable business head offices and, ultimately, transactions from these two regions.

As seen in the following table, the majority of fresh fruit and vegetable businesses reported partial payments firstly with businesses that are “close to home.” For example, of the business with head offices in Ontario that reported receiving partial payments, 89% reported them from businesses in Ontario, while 46% reported them from businesses in Quebec.

	FRESH FRUIT AND VEGETABLE BUSINESS: LOCATION OF HEAD OFFICE												Total	
	ATLANTIC PROVINCES		QUEBEC		ONTARIO		PRAIRIE PROVINCES		BRITISH COLOMBIA		USA		N	%
REGION OF ORIGIN OF PARTIAL PAYMENT	N	%	N	%	N	%	N	%	N	%	N	%		
ATLANTIC PROVINCES	8	57.1	3	15.0	1	2.2			2	14.3	1	16.7	15	14.0
QUEBEC	5	35.7	18	90.0	21	45.7	1	14.3	3	21.4	2	33.3	50	46.7
ONTARIO	1	7.1	5	25.0	41	89.1	1	14.3	4	28.6	3	50.0	55	51.4
PRAIRIE PROVINCES			1	5.0	1	2.2	6	85.7	6	42.9	3	50.0	17	15.9
BRITISH COLOMBIA					2	4.3	3	42.9	10	71.4	3	50.0	18	16.8
USA	5	35.7	9	45.0	11	23.9	1	14.3	3	21.4	4	66.7	33	30.8
MEXICO											1	16.7	1	.9
OTHER COUNTRIES	1	7.1			1	2.2			1	7.1	1	16.7	4	3.7
Total	14	100.0	20	100.0	46	100.0	7	100.0	14	100.0	6	100.0	107	100.0

Note: Results are only indicative for some locations. When the sample size is small (10 or less), results should be considered directional only. Therefore, caution should be used in interpretation.

11.2.6 Actions taken to recover partial payments (Q.32)

By far the most frequent action taken to recover partial payments was to contact the clients directly: 78% of those who reported receiving partial payments contacted their clients. In fact, calling clients who made partial payments seems to be the only action deemed to be potentially successful in recovering payments. The cost associated with the other types of actions to recover due payments could be a deterrent to their usage.

WHAT ACTIONS WERE TAKEN BY THIS BUSINESS
TO RECOVER DUE PAYMENTS
AS A RESULT OF RECEIVING PARTIAL PAYMENTS? (N = 111)

		N	%
ACTIONS TAKEN TO RECOVER PARTIAL PAYMENT	CONTACTED THE CLIENT DIRECTLY	87	78.4
	FILED A COMPLAINT WITH DRC	6	5.4
	FILED A COMPLAINT WITH PACA	6	5.4
	HIRED LEGAL COUNSEL	5	4.5
	PUT THE MATTER INTO COLLECTION	5	4.5
	FILED PROCEEDINGS IN MUNICIPAL, PROVINCIAL OR SMALL CLAIMS C	2	1.8
	OTHER ACTION	4	3.6
	NO ACTION TAKEN	32	28.8

It is interesting to note that 29% of the respondents did not take any action to recover partial payments.

11.2.7 Level of success in recovering partial payments (Q.33)

Respondents were asked to estimate the level of success they had in 2007 in recovering the partial payments that they reported in the trade of fresh fruit and vegetables.

	SUCCESS OF ACTIONS TAKEN IN RECOVERING PARTIAL PAYMENT	
	N	%
Yes, for all	13	12.3%
Yes, for some	58	54.7%
No, not at all	35	33.0%
Total	106	100.0%

Only 12% considered that the actions they took to recover payments were successful for all partial payments (*yes, for all*). More than half (55%) said they had some success (*yes, for some*) in recovering partial payments. However, 33% said that they did not have any success (*no, not at all*) in recovering partial payments. Globally, respondents had slightly more success in recovering partial payments than non payments.

Being successful (yes, for all) in recovering partial payments does not necessarily imply that there were zero financial losses.

11.2.8 Capacity to evaluate net financial loss due to partial payments (Q.34)

	CAPACITY TO ESTIMATE TOTAL NET FINANCIAL LOSSES DUE TO PARTIAL PAYMENT	
	N	%
Yes	51	46.4%
No	59	53.6%
Total	110	100.0%

The majority of respondents (54%) stated that they could not evaluate net financial loss due to partial payments. In fact, a lower proportion of the respondents (46%) said they could evaluate net losses due to partial payments compared to non payments, where the majority (62%) said that they could evaluate them.

11.2.9 Total net financial losses due to partial payments (Q.35)

For the respondents who did declare losses due to partial payments in 2007 in the trade of fresh fruit and vegetables, the median net loss was $16,600, while the mean net loss was $44,832. For 30% of the respondents, the net loss was under $6,000, while for 10% of the respondents, net losses from partial payments were above $150,000.

TOTAL NET FINANCIAL LOSSES DUE TO PARTIAL PAYMENT

N		48
Mean		$44,832.17
Median		$16,600.00
Mode		$10,000
Percentiles	10	$1,200.00
	20	$3,640.00
	30	$6,000.00
	40	$10,000.00
	50	$16,600.00
	60	$20,000.00
	70	$35,900.00
	80	$56,000.00
	90	$150,000.00

11.3 DELAYED PAYMENTS (Q.36 TO Q.43)

11.3.1 Delayed payments experienced by the business (Q36)

Delayed payments are quite common in the Canadian fresh fruit and vegetable industry: more than 3 out of 4 businesses reported experiencing at least one instance of delayed payment in 2007[6].

2007: DELAYED PAYMENT EXPERIENCED IN THE TRADE OF FRESH FRUIT AND VEGETABLES

	N	%
Yes	125	77.2%
No	37	22.8%
Total	162	100.0%

[6] Note: Results are based on the number of respondents who gave an answer to the question. In the table, out of an initial sample of 205, 162 respondents provided a yes or no answer to the question. There are 43 respondents who did not provide an answer.

11.3.2 Number of transactions with delayed payments (Q.37)

Delayed payments affect a higher number of transactions, compared to both instances of non payments and partial payments. For example, 84% of the businesses that reported delayed payments in the trade of fresh fruit and vegetables were affected on 6 or more transactions. This contrasts with partial payments and non payments, where 31% and 61% of the affected businesses reported them on between 1 to 5 transactions, respectively.

DELAYED PAYMENT : NUMBER OF TRANSACTIONS	N	%
Between 1 to 5 transactions	19	16.1%
Between 6 to 10 transactions	16	13.6%
Between 11 to 15 transactions	13	11.0%
Between 16 to 20 transactions	9	7.6%
Between 21 to 25 transactions	10	8.5%
Between 26 to 30 transactions	10	8.5%
Between 31 to 35 transactions	2	1.7%
Between 36 to 40 transactions	5	4.2%
Between 41 to 45 transactions	0	0.0%
Between 46 to 50 transactions	15	12.7%
Above 50 transactions	19	16.1%
Total	118	100.0%

As seen in the following table, there is a very strong correlation between the number of transactions in 2007 and the number of those transactions for which delayed payments were received. Globally, as the number of transactions increased, so did the probability that a business will report delayed payments. From an average low of about 22 transactions with delayed payments for businesses with between 1-499 transactions in 2007, the number of delayed payments increased with the rising number of transactions. It peaked at an average of about 44 transactions for businesses with 100,000 transactions or more.

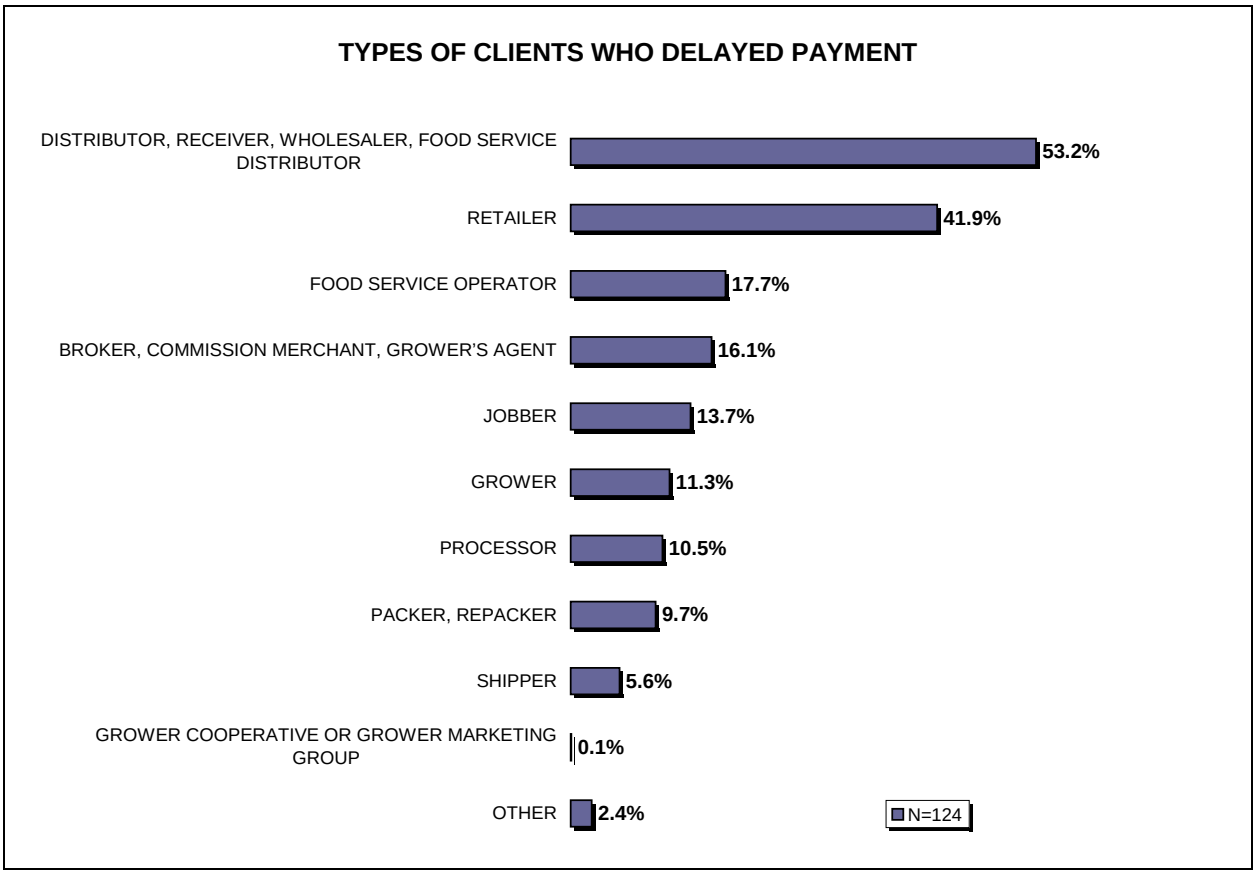
Number of transactions in 2007	Mean		Grouped Median		N
	DELAYED PAYMENT: NUMBER OF TRANSACTIONS	Percentage of total transactions in delayed payment transactions	DELAYED PAYMENT: NUMBER OF TRANSACTIONS	Percentage of total transactions in delayed payment transactions	DELAYED PAYMENT: NUMBER OF TRANSACTIONS
1 thru 499	21.88	8.7500	19.17	7.6667	20
500 thru 999	23.36	3.1152	14.83	1.9778	11
1000 thru 1999	23.71	1.5804	19.17	1.2778	17
2000 thru 3999	15.41	.5137	12.50	.4167	17
4000 thru 7999	40.79	.7417	45.50	.8273	17
8000 thru 49999	34.04	.1621	32.50	.1548	12
50000 thru 99999	38.08	.0508	39.38	.0525	6
100000 thru high	44.20	.0110	43.75	.0109	5
Total	27.72	2.4741	23.09	.8688	105

	Eta
DELAYED PAYMENT : NUMBER OF TRANSACTIONS * Number of transactions in 2007	.452
Percentage of total transactions in delayed payment transactions * Number of transactions in 2007	.670

We also found a very strong correlation between the total number of transactions made in 2007 and the percentage of those transactions for which payments were received significantly beyond the terms most frequently extended to clients. As the number of transactions increased, the proportion of those transactions for which payments where received beyond usual terms decreased. On average, businesses with between 1-449 transactions got paid beyond terms on 8.8% of those transactions. However, as the number of transactions made in 2007 increased, the importance of delayed payments steadily decreased and bottomed out at 0.01% of the transactions for the group with 100,000 transactions or more.

11.3.3 Types of clients who delayed payment (Q.38)

The two types of clients from whom respondents reported delayed payments most frequently were the distributor, the receiver, the wholesaler, the food service distributor group, followed by the retailer: 53% of the respondents reported delayed payments from the former, and 42% from the latter. This was followed by the food service operator and the broker, commission merchant, grower's agent group: 18% and 16% of the respondents reported delayed payments from them, respectively.



11.3.4 Regions of delayed payments (Q.39)

The two regions from which respondents reported partial payments more frequently were Ontario and Quebec: 51% and 42% of the respondents reported receiving delayed payments from these two regions, respectively.

REGIONS WITH DELAYED PAYMENT (N = 123)	N	%
ATLANTIC PROVINCES	26	21.1
QUEBEC	52	42.3
ONTARIO	63	51.2
PRAIRIE PROVINCES	14	11.4
BRITISH COLOMBIA	16	13.0
USA	24	19.5
MEXICO	3	2.4
OTHER COUNTRIES	6	4.9

As seen in the table below, the majority of fresh fruit and vegetable businesses experience delayed payments firstly from businesses that are "close to home." For example, of the businesses with head offices in Quebec that reported receiving delayed payments, 85% reported them from businesses in Quebec, while 33% reported them from businesses in Ontario, and another 24% reported them from businesses located in the USA.

	FRESH FRUIT AND VEGETABLE BUSINESS: LOCATION OF HEAD OFFICE												Total	
	ATLANTIC PROVINCES		QUEBEC		ONTARIO		PRAIRIE PROVINCES		BRITISH COLOMBIA		USA		N	%
REGIONS WITH DELAYED PAYMENT	N	%	N	%	N	%	N	%	N	%	N	%		
ATLANTIC PROVINCES	15	93.8	5	15.2	2	4.4	1	12.5	2	13.3	1	20.0	26	21.3
QUEBEC	3	18.8	28	84.8	15	33.3	1	12.5	3	20.0	2	40.0	52	42.6
ONTARIO	3	18.8	11	33.3	40	88.9	1	12.5	5	33.3	3	60.0	63	51.6
PRAIRIE PROVINCES			1	3.0	2	4.4	7	87.5	2	13.3	1	20.0	13	10.7
BRITISH COLOMBIA					3	6.7			11	73.3	2	40.0	16	13.1
USA	4	25.0	8	24.2	7	15.6	1	12.5	2	13.3	2	40.0	24	19.7
MEXICO									1	6.7	2	40.0	3	2.5
OTHER COUNTRIES	1	6.3	2	6.1	1	2.2			1	6.7	1	20.0	6	4.9
Total	16	100.0	33	100.0	45	100.0	8	100.0	15	100.0	5	100.0	122	100.0

Note: Results are only indicative for some location. As the sample size is small (10 or less), results should be considered directional only. Therefore, caution should be used in interpretation.

It is important to note that the distribution of delayed payments by region is almost in line with the distribution of the number of fresh fruit and vegetable business head offices by region (see section 5.3), with the exception of the USA. Therefore, delayed payments are not more likely to happen in one region in Canada than in another region. More respondents reported delayed payments originating from Ontario and Quebec, but this is in line with the higher number of fresh fruit and vegetable business head offices and, ultimately, transactions from these two regions.

11.3.5 Actions taken to recover delayed payments (Q.40)

The pattern of actions taken to recover delayed payments is quite similar to the pattern of actions used to recover partial payment.

By far the most frequent action taken to recover delayed payments is to contact the clients directly: 90% of those who reported delayed payments contacted their clients. In fact, contacting clients directly seems to be the only action deemed to be potentially successful in recovering delayed payments.

ACTIONS TAKEN TO RECOVER DELAYED PAYMENT (N = 124)	N	%
CONTACTED THE CLIENT DIRECTLY	111	89.5
FILED A COMPLAINT WITH DRC	1	.8
FILED A COMPLAINT WITH PACA	2	1.6
HIRED LEGAL COUNSEL	4	3.2
PUT THE MATTER INTO COLLECTION	7	5.6
OTHER ACTION	2	1.6
NO ACTION TAKEN	16	12.9

Since payments are coming, even tough they are late very few respondents used other types of actions apart from contacting the “late payer” directly.

Note that 13% of the respondents did not take any action to recover delayed payments.

11.3.6 Level of success in recovering delayed payments (Q.41)

Respondents were asked to estimate the level of success they had in 2007 in recovering the delayed payments that they experienced in the trade of fresh fruit and vegetables.

	SUCCESS OF ACTIONS TAKEN IN RECOVERING DELAYED PAYMENT	
	N	%
Yes, for all	64	52.0%
Yes, for some	42	34.1%
No, not at all	17	13.8%
Total	123	100.0%

Success in recovering delayed payments was significantly higher than the success in recovering either non payments or partial payments.

The majority of respondents (52%) said that the actions they took to recover delayed payments were successful for all of them (*yes, for all*). In contrast, only 12% and 14% said that the actions they took to recover non payments and partial payments, respectively, were successful for all of them (*yes, for all*).

A third of respondents (34%) said they had some success (*yes, for some*) in recovering delayed payments, while 14% said that they did not have any success (*no, not at all*). This implies that some respondents could not recoup the losses they suffered because they were paid significantly later than the usual credit period extended to clients. An example of the potential financial lost as a result of a delayed payment is provided further down in the report.

11.3.7 Capacity to evaluate net financial loss due to delayed payments (Q.42)

The majority of respondents (70%) stated that they could not evaluate net financial loss due to delayed payments.

	CAPACITY TO ESTIMATE TOTAL NET FINANCIAL LOSSES DUE TO DELAYED PAYMENTS	
	N	%
Yes	31	29.5%
No	74	70.5%
Total	105	100.0%

11.3.8 Total net financial losses due to delayed payments (Q.43)

For the respondents who did declare losses due to delayed payments in 2007 from the trade of fresh fruit and vegetables, the median net loss was $6,250 while the mean net loss was $24,709. For 30% of the respondents, the net loss was under $2,950, while for 10% of the respondents, net losses from delayed payment were above $135,000.

TOTAL NET FINANCIAL LOSSES DUE TO DELAYED PAYMENT

N	Valid	22
Mean		$24,709.14
Median		$6,250.00
Mode		$10,000
Percentiles	10	$370.00
	20	$1,900.00
	30	$2,950.00
	40	$4,200.00
	50	$6,250.00
	60	$9,600.00
	70	$10,500.00
	80	$27,000.00
	90	$135,000.00

To put the above reported figures into perspective, let us consider for example a typical fresh fruit and vegetable business with gross sales of $31,666,309 (respondents mean gross sales) and whose most frequent payment term is 30 days. Let us assume that this business had outstanding accounts receivables of $10,000,000 throughout the year that were paid only after 90 days. Therefore, that business loss potential interests on $10,000,000 for at least 60 days. With interest rate at 10%, this business would have lost $166,666 due to delayed payments.

12 END RESULTS OF PAYMENTS DIFFICULTIES

12.1 TOTAL FINANCIAL LOSSES

The table below presents the 2007 total net financial losses as a result of non payments, partial payments and delayed payments, and the cumulative losses due to these three types of payment difficulties in the trade of fresh fruit and vegetables in Canada.

For businesses that reported at least one type of payment difficulty, the median net total losses for all three types of payment difficulties in 2007 was $20,800, while the average net total losses was $55,594.

For 30% of respondents, the total net loss from the three types of payment difficulties was under $7,700, while for 10% of respondents total net losses was above $150,000.

		TOTAL NET FINANCIAL LOSSES DUE TO NON PAYMENT	TOTAL NET FINANCIAL LOSSES DUE TO PARTIAL PAYMENT	TOTAL NET FINANCIAL LOSSES DUE TO DELAYED PAYMENT	TOTAL LOSSES
N	Valid	57	48	22	77
	Missing	148	157	183	128
Mean		$27,810.51	$44,832.17	$24,709.14	$55,594.08
Median		$14,250.00	$16,600.00	$6,250.00	$20,800.00
Mode		$30,000	$10,000	$10,000	$25,000
Sum		$1,585,199	$2,151,944	$543,601	$4,280,744
Percentiles	10	$800.00	$1,200.00	$370.00	$1,660.00
	20	$2,000.00	$3,640.00	$1,900.00	$3,680.00
	30	$3,500.00	$6,000.00	$2,950.00	$7,700.00
	40	$6,400.00	$10,000.00	$4,200.00	$14,130.00
	50	$14,250.00	$16,600.00	$6,250.00	$20,800.00
	60	$20,000.00	$20,000.00	$9,600.00	$34,000.00
	70	$30,000.00	$35,900.00	$10,500.00	$54,674.00
	80	$44,000.00	$56,000.00	$27,000.00	$94,000.00
	90	$71,000.00	$150,000.00	$135,000.00	$150,000.00

12.2 FINANCIAL LOSSES COMPARED TO GROSS REVENUE

The table below presents the distribution of financial losses as a result of non payments, partial payments and delayed payments, and total losses in comparison to the reported gross revenue in the trade of fresh fruit and vegetables. In 2007, the total median net loss from the three types of payment difficulties was 0.4% of reported gross revenue, while the average net loss was 1.53%.

Note that for 30% of respondents, the total net loss was 0.12% or less of their reported gross revenues, while for 10% of respondents, the total net losses were 3.1% or more of their reported gross revenues.

		Proportion of gross revenue in losses due to non-payments	Proportion of gross revenue in losses due to partial payments	Proportion of gross revenue in losses due to delayed payments	Proportion of gross revenue in total losses
N	Valid	49	40	18	63
	Missing	156	165	187	142
Mean		.0080868	.0124630	.0039242	.0153240
Median		.0017425	.0035417	.0019169	.0040000
Mode		.00050	.00286	.01000	.03000
Percentiles	10	.0000684	.0003699	.0000247	.0002652
	20	.0004101	.0007446	.0001049	.0007398
	30	.0006477	.0019276	.0007000	.0011833
	40	.0011667	.0028908	.0012760	.0024927
	50	.0017425	.0035417	.0019169	.0040000
	60	.0023316	.0044303	.0023235	.0056667
	70	.0047733	.0070000	.0057059	.0101708
	80	.0078866	.0121671	.0100000	.0152759
	90	.0107143	.0226765	.0111429	.0309706

13 CONCLUSION

This report presents the results of an internet survey designed to measure the frequency and impact of losses, in 2007, to members of the Canadian fresh fruit and vegetable value chain as a result of delayed, adjusted and non-payment.

Survey results are statistically representative of members of the Canadian fresh fruit and vegetables value chain, except “growers-only”.

The total response rate to the online survey is 27% and the margin of error is ± 5.9%, 19 times out of 20.

An objective of the survey was to identify methods used by respondents to validate the reliability of a trading partner. The key findings are:

- When trading fresh fruit and vegetables with new clients, the majority of respondents (54%) reported that they verified the credit rating of new clients with a credit research agency, *all* or *most of the time*. However, 32% *rarely* or *never* verified their new client’s credit rating with a credit research agency.
- The second most frequent practice used to validate the reliability of a potential new client is to consult other members of the industry to obtain background information on a potential new client. Results show that 42% of respondents use this practice *all* or *most of the time*.
- However, once a business has traded with a client regularly, the practices that they would have used to validate their reliability drops off.
- Peer recognition of the reliability of a member of the fresh fruit and vegetable chain seems to carry more weight than membership in either an industry association or the possession of a licence. Only 20% of the value chain members will verify *all* or *most of the time* that a new client has a Canadian Food Inspection Agency license. About a quarter (27%) will verify *all* or *most of the time* that a new client is a member of the Dispute Resolution Council.
- Canadian fresh fruit and vegetables businesses definitely prefer to trade with regular clients: 65% of the businesses reported trading with regular clients *all of the time*. This contrasts to trading with new clients, as 60% of the respondents reported trading with them only *sometimes.*

Another objective of the survey was to identify the payment terms extended to clients and the practices used to confirm transactions. The key findings are:

- The majority of respondents will *rarely* or *never* reduce the usual payment credit period extended to a regular or a new client.
- The majority, or 58%, of respondents will *rarely* (26%) or *never* (31%) reduce the usual payment credit period extended to new clients.

- Reducing the usual payment credit period extended to regular clients is an even less frequent business practice. In fact, about 8 out of 10 Canadian fresh fruit and vegetables businesses will either *rarely* (38%) or *never* (43%) use this practice.
- Securing pre-payment or payment on delivery, rather than extending open credit to clients, is a practice that is used even less frequently than reducing the usual payment credit period extended to clients, whether they are regular or new clients. More than 7 out of 10 Canadian fresh fruit and vegetables businesses either *rarely* (28%) or *never* (44%) secured pre-payment or payment on delivery rather than extending open credit to new clients.
- Securing pre-payment or payment on delivery rather than extending open credit to regular clients is even less frequent. Close to 6 out of 10 businesses *never* use this practice, while more than 3 out of 10 businesses *rarely* secure pre-payment or payment on delivery rather than extending open credit to their regular clients.
- The usage of a bill of sales/invoice is by far the most common practice to confirm a transaction within the Canadian fresh fruit and vegetables industry.

Another objective of the survey was to quantify the frequency of non-payments, partial payments, delayed payments, and to determine mechanisms used to recoup financial losses. The key findings are:

- Roughly 50% of respondents reported at least one instance of non-payment in the trade of fresh fruit and vegetables in 2007. Of those that reported non-payment, about 6 respondents in 10 said that these non-payments occurred on 1 to 5 transactions.
- The average number of transactions done in 2007 by the fresh fruit and vegetables value chain members in Canada was 28,770.
- The two types of clients from whom respondents reported non payments most frequently were the retailers, followed by the distributors, receivers, wholesalers, and food service distributor groups. The majority of fresh fruit and vegetable businesses experienced non payments “close to home.”
- By far the most frequent action taken to recover non payments was to contact the client directly, a method used by 8 out of 10 respondents, followed by sending the matter to collection, a method used by 3 out of 10 respondents.
- About two-thirds of respondents who answered the question reported at least one instance of partial payment in the trade of fresh fruit and vegetables. Of those that reported partial payment, about half of the respondents said that partial payment occurred on less than 10 transactions.
- The two types of clients from whom respondents reported partial payments most frequently were the distributors, receivers, wholesalers, food service distributor groups and the retailers: close to 6 out of 10 respondents reported partial payments from the former, and about 1 in 2 respondents from the latter. The majority of fresh fruit and

vegetable businesses reported partial payments from businesses that were "close to home."

- Almost half of those that experiencing partial payment reported that the client did not pay the full amount due to invoice clipping, not related to any documented condition problems with the products. For example market decline is cited as one of the reasons for partial payment.
- The most frequent action taken to recover partial payments was to contact the client directly: 8 out of 10 respondents who reported partial payments contacted their client.
- Delayed payments are quite common in the Canadian fresh fruit and vegetable industry. More than 75% of businesses who answered the question reported at least one instance of delayed payment in the trade of fresh fruit and vegetables. Delayed payments affect a higher number of transactions compared to instances of both non-payments and partial payments. For example, 84% of the businesses that reported delayed payments were affected on 6 or more transactions. This contrasts with partial payments and non-payments, where respectively, 31% and 61% of the affected businesses reported them on 1 to 5 transactions.
- The two types of clients from whom respondents reported delayed payments most frequently were the distributors, receivers, wholesalers, food service distributor groups, followed by the retailers: 53% of the respondents reported delayed payments from the former, and 42% from the latter.
- By far the most frequent action taken to recover delayed payments is to contact the client directly: 90% of those who reported delayed payments contacted their client. The success in recovering delayed payments was significantly higher than the success in recovering either non payments or partial payments.

A final objective of the survey was to estimate the financial losses incurred by the Canadian fresh fruit and vegetable value chain market due to non-payment, partial payment or delayed payment.

- In 2007, the total average net loss from non-payments, partial payments or delayed payments in the trade of fresh fruit and vegetable in Canada represented 1.53% of value chain member's reported gross revenue.

To summarise, a majority of businesses in the Canadian fresh fruit and vegetable value chain take actions to validate the credit worthiness of their clients but a significant proportion do not.

The majority of the businesses that experienced non-payment, partial or delayed payment were affected on a small number of transactions and their net financial losses were also relatively small.

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Risk Experience in Canada and Risk Mitigation in the United States:

Perspectives from the Canadian Produce Community

By

L. Patrick Hanemann

Farm2Market Agribusiness Consulting Inc

Based on a survey conducted on behalf of the Dispute Resolution Corporation

2 December 2008

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D R C

I. Executive Summary

Over the past few years the Fruit & Vegetable Dispute Resolution Corporation has worked with the Canadian Horticultural Council and the Canadian Produce Marketing Association, under the banner of the Fresh Produce Alliance, to foster the establishment of a PACA-like trust in Canada. To this end, the DRC assisted the Canadian government in February of 2008 in executing a national survey of commercial practices within the Canadian produce sector. Since 75% of all fresh produce consumed in Canada originates from the United States, the DRC also undertook its own complementary survey of US shippers to discern their attitudes toward transactional risks on sales to Canada, and toward the role played by the PACA in risk mitigation on sales to US buyers. The results of this latter survey, which was published in July of 2008, appear as Appendix 2 of this report.

The release of the original Canadian government survey has fallen victim to a series of delays, such that the results of the survey are still not available today, nine months after the survey was closed. Given the continuing high level of interest on the part of CHC/CPMA/DRC Canadian membership, and in particular on the part of Canadian growers and shippers, the Fresh Produce Alliance decided to respond to the non-release of the government survey by asking the DRC to conduct its own independent survey of attitudes within the Canadian produce industry regarding commercial practices.

The DRC initiated its 20-question survey on 6 October, and closed off responses on 24 October. In addition to the DRC's own Canadian membership, the survey was also distributed through several provincial and national produce organizations within Canada. In all, 990 Canadian companies were invited to participate in the survey. By the time the survey was closed, 295 companies had responded, constituting a 30% response rate. Highlights from the survey data include the following:

A. Canadian Transactions

- 88% of respondents had sold fresh produce to Canadian customers within the past five years
- 78% of respondents derived more than 50% of their gross revenues over the past five years from sales to Canadian customers
- 52% of respondents had experienced problems with claims on their sales to Canadian buyers
- Most claims (76%) were settled with discounts off the original invoice value of 10% or less
- 51% of respondents had experienced payments problems on their sales to Canadian buyers
- 80% of those respondents with collections problems on transactions with Canadian buyers were able to hold their losses on such transactions to 10% or less of the original invoice value

B. Interactions with the PACA Branch

- 48% of respondents had sold fresh fruits or vegetables to customers in the United States over the previous five years

- Of those respondents who had sold to US buyers, 26% had contacted the USDA's PACA Branch for assistance with claims or payments problems

- 50% of this latter group had taken advantage of the provisions of the PACA Trust when their US buyers filed for bankruptcy. Most positive respondents had availed themselves of these provisions on more than one occasion over the past five years.

- Almost the same number of respondents had utilized the provisions of the PACA Trust to obtain temporary restraining orders against US customers who had not declared bankruptcy, but who had simply refused to pay in a timely manner

- 45% of PACA Trust users felt that its provisions had helped them to recover $10,000 or less since 2004; 45% felt the Trust had helped them to recover between $10,000 and $100,000; and 10% indicated the Trust provisions had enabled them to recover amounts in excess of $100,000

The most common annual revenue category among respondent companies was the "$1 million -$10 million" range (42%), followed by "$10-$50 million" (26%), "Less than $1 million" (12%), "More than $100 million" (11%) and "$50-$100 million" (9%).

Special thanks got to the DRC members, as well as the members of the Quebec Produce Marketing Association, the British Columbia Produce Marketing Association, and the Ontario Produce Marketing Association, who participated in this survey.

II. Introduction

The Dispute Resolution Corporation, acting in conjunction with the Canadian Horticultural Council and the Canadian Produce Marketing Association, under the banner of the Fresh Produce Alliance, has been actively pursuing the possibility of establishing a PACA-like trust in Canada. Earlier this year, a working group composed of officials from federal and provincial departments of agriculture, as well as a number of other federal agencies, conducted a survey of produce industry members in Canada to better understand the payments difficulties these members had encountered in their fresh fruit and vegetable transactions. Since imports make up 75% of all fresh produce being sold in Canada, the DRC felt it would be helpful to supplement the government survey of Canadian produce companies with its own survey of U.S. produce companies. The purpose of the DRC survey of US shippers was two-fold:

1. To supplement the government data regarding produce trading experience in Canada with a perspective from the US industry, and

2. To alert Canadian produce companies and government agencies as to the extent to which US produce companies rely on the USDA's PACA Branch in the event of payments problems with other PACA members.

The DRC initiated its 18-question survey on 27 May, and closed off responses on 13 June. In addition to its own U.S. membership, the survey was distributed through several regional and national produce associations within the United States. In all, 1,016 companies were invited to participate in the survey. The results of this survey can be found in the document titled "Risk Experience in Canada and Risk Mitigation in the United States: Perspectives from the U. S. Produce Shipper Community", which is included in its entirety as Appendix II to this report.

This survey of the US shipper community was originally intended as a companion piece to the Canadian government's survey of the Canadian produce industry, which had been completed several months earlier. Although the US survey results were formally released in July of this year, it became apparent over the months that followed that the release and dissemination of the government's survey results would be delayed for an indefinite period of time. Indeed, up until today, there is no release date in sight for the government's study. Given the continuing high level of interest expressed across all segments of the Canadian produce industry (and particularly on the part of Canadian growers and shippers) in the potential value of a PACA-like trust instrument in Canada, and the momentum which the US shipper survey had created within the Canadian produce industry, the Fresh Produce Alliance determined that it should take responsibility for filling the information void attributable to the non-release of the government survey by sponsoring its own study of attitudes within the Canadian produce industry with respect to risk experience and risk mitigation. Chapter III of this report provides greater details on the methodology of data collection, while Chapter IV consists of a detailed question-by-question analysis of the survey results.

III. Methodology

The questionnaire --attached as Appendices 1(English) & 2 (French) -- was developed over a two-week period in late September and early October of 2008, using the SurveyMonkey software package which the DRC had used successfully in several previous membership surveys. The survey instrument was then sent via email on 6 October to 791 Canadian members of the DRC (673 in English, 118 in French) On the same day the survey was also sent electronically to 199 Canadian produce companies that are not DRC members, but which had been included in Federal/Provincial commercial practices survey conducted earlier in the year. In total, 990 Canadian companies received invitations to log onto the SurveyMonkey website and participate. .Following the initial distribution of the survey, several follow-up messages were sent by CPMA, QPMA, OPMA, BCPMA, CHC and DRC to all companies involved, urging those that had not participated to log on and fill out the questionnaire. Since the survey instrument prevents multiple responses from the same computer, it is believed that each response represents a separate company.

When the survey was closed to responses on 25 October, 295 companies had responded, for a gross response rate of 30%. This figure compares favorably with the 23% response rate captured in the US shipper survey. Responses by language, by date, were as follows:

Exhibit 1: Survey Distribution & Response Statistics

	ENGLISH	FRENCH	TOTAL	% of Total Responses By Day
START DATE	6-Oct	6-Oct		
6-Oct	28	5	33	11%
7-Oct	17	5	22	7%
8-Oct	39	13	52	18%
9-Oct	18	11	29	10%
10-Oct	8	2	10	3%
11-Oct	0	0	0	0%
12-Oct	1	0	1	0%
13-Oct	2	1	3	1%
14-Oct	48	6	54	18%
15-Oct	12	2	14	5%
16-Oct	10	1	11	4%
17-Oct	1	0	1	0%
18-Oct	0	0	0	0%
19-Oct	0	0	0	0%
20-Oct	2	0	2	1%
21-Oct	22	15	37	13%
22-Oct	13	7	20	7%
23-Oct	2	0	2	1%
24-Oct	2	2	4	1%
TOTAL RESPONSES	225	70	295	100%
TOTAL RECIPIENTS	780	210	990	
% RESPONDING	29%	33%	30%	

Of the 295 respondents, 9 were identified, through their response to Question # 2, as being headquartered in the United States. In order to maintain the exclusively Canadian nature of the survey, all answers from these 9 respondents were deleted. The data described throughout this report, then, was derived solely from the 286 Canadian companies that responded to the survey instrument. Of the 286 gross responses, 233 respondents (81% of total respondents) completed the survey in full. This compares well with the 73% completion rate for the US study. A breakdown of survey initiations and completions are shown in Exhibit 2:

Exhibit 2: Initiation/Completion Statistics by Collector

	Aggregate	English	French
# Initiated	**286**	**216**	**70**
# Completed	**233**	**176**	**57**
Attrition	**53**	**40**	**13**
% Completed	**81%**	**81%**	**81%**

Of the 20 questions posed during the survey, seven (#3, #5, #8, #12, #14, #15 and #17) contained a skip function, where a negative response would skip the respondent over one or more follow-up questions, and re-direct the respondent to the next area of interest in the survey document. The attrition rate on the initial skip function questions was somewhat higher than would have been predicted on the basis of the initial question. For example, Question # 3 asked if the respondent's company had sold any fresh fruits in Canada over the past five years. The 247 respondents who answered in the affirmative were led to Question # 4, while the 33 respondents who answered in the negative were directed to Question # 12. Instead of 247 responses to Question # 4, however, only 231 (16 fewer than were shown this question) chose to respond. Exhibit 3 shows the attrition rate experienced following each of the skip function questions, by comparing the respondents who were invited to answer the next question, with the number of respondents who actually answered:

Exhibit 3: Actual vs. Expected Response Rates Following Skip-Function Questions

Question Following #	Expected Responses	Actual Responses	Attrition
3	247	231	**16**
5	121	111	**10**
8	110	112	**-2**
12	118	120	**-2**
14	31	32	**-1**
15	16	16	**0**
17	14	14	**0**
TOTAL			**21**

This 21-respondent decline following skip-function questions represents 40% of the total attrition of 53 respondents seen in Exhibit 2. While there is inevitably a certain amount of "survey fatigue" which sets in during the course of a multi-question instrument such as

this one, the 19% decline from initiation through to completion would appear to indicate that survey participants remained engaged throughout the course of the survey. In the case of the US survey conducted earlier this year, for example, the overall attrition rate for a survey which was two questions shorter was 27%.

The excellent participation rate – 30% of all invited respondents initiated the survey, and 24% completed it – is probably attributable to a number of different considerations, including

- the importance and immediacy of the survey's subject matter to the respondent pool,
- the coordinated "get-out-the-vote" effort by industry associations, and the attention which the respondent pool paid to these association initiatives, and
- the belief on the part of the respondent pool that the results of the survey could ultimately lead to the establishment of a PACA-like trust system, and a recognition of the positive effect which such a system could exert on their businesses.

IV. Analysis of Responses

1. Please indicate your principal type of business

	Aggregate		English		French	
	%	#	%	#	%	#
Broker	7.04%	20	8.40%	18	2.90%	2
Exporter	0.70%	2	0.90%	2	0.00%	0
Foodservice Distributor/Operator	3.87%	11	3.30%	7	5.70%	4
Grower/Shipper	**33.45%**	95	**30.80%**	66	**41.40%**	29
Importer	14.08%	40	13.60%	29	15.70%	11
Processor	5.28%	15	5.10%	11	5.70%	4
Retailer	5.63%	16	6.50%	14	2.90%	2
Wholesaler	16.90%	48	19.60%	42	8.60%	6
Other	13.03%	37	11.70%	25	17.10%	12
ANSWERED		**284**		**214**		**70**
SKIPPED		**2**		**2**		**0**

At 33% of total responses, grower/shippers were the dominant business type among Canadian respondents. This weight approximates the role which grower/shippers play within the DRC's Canadian membership, where they represent 28% of the total. Wholesalers, which make up 30% of Canadian DRC membership, appear at first glimpse to be under-represented in the survey, until we note that wholesalers frequently identify themselves as importers as well, given that 75% of the produce volumes they handle involve imported product. If we combine responses from importers and wholesalers, we arrive at a good fit between DRC membership and survey participation. Participation by brokers, foodservice entities, processors and retailers also coincides rather closely with their relative roles within the DRC. This would seem to indicate that all target segments within the Canadian produce industry were proportionally represented in the overall survey participation.

DRC Canadian Membership by Business Type

Broker	Canada	45	5%
Carrier	Canada	4	0%
Commission Merchant	Canada	7	1%
Distributor	Canada	30	3%
Foodservice Distributor	Canada	54	6%
Foodservice Operator	Canada	3	0%
Fresh Processor	Canada	58	7%
Grower	Canada	15	2%
Grower/Shipper	Canada	168	19%
Other	Canada	96	11%
Retailer	Canada	65	7%
Shipper	Canada	64	7%
Transportation Broker	Canada	7	1%
Wholesaler	Canada	260	30%

FVDRC Website, 21 November 2008

2. In which province is your headquarters office located?

	Aggregate		English		French	
	%	#	%	#	%	#
Alberta	5.36%	15	7.10%	15	0.00%	0
British Columbia	11.79%	33	15.70%	33	0.00%	0
Manitoba	1.43%	4	1.90%	4	0.00%	0
New Brunswick	2.14%	6	2.90%	6	0.00%	0
Newfoundland and Labrador	1.07%	3	1.40%	3	0.00%	0
Nova Scotia	3.93%	11	4.80%	10	1.40%	1
Prince Edward Island	2.86%	8	3.80%	8	0.00%	0
Quebec	32.50%	91	10.50%	22	**98.60%**	69
Saskatchewan	2.86%	8	3.80%	8	0.00%	0
Other	0.71%	2	1.00%	2	0.00%	0
ANSWERED	**280**		**210**		**70**	
SKIPPED	**6**		**6**		**0**	

The three leading provinces in terms of survey responses – Ontario at 35%, Quebec at 32%, and British Columbia at 12% -- are also the three provinces which account for the largest number of DRC memberships, at 44%, 20% and 16%, respectively.. Together these three provinces account for 80% of Canadian DRC membership, and 79% of the survey's respondent population. The higher-than-expected participation by Quebec, and the lower-than expected participation by Ontario and BC, may be due to a combination of aggressive follow-up by the QPMA throughout the survey, and the heightened sensitivity of the Quebec produce sector toward issues of quality and payments problems.

DRC Canadian Membership by Province

AB	Canada	56	6%
BC	Canada	138	16%
MB	Canada	16	2%
NB	Canada	27	3%
NF	Canada	7	1%
NS	Canada	26	3%
ON	Canada	344	39%
PE	Canada	55	6%
QC	Canada	198	23%
SK	Canada	9	1%

FVDRC Website, 21 November 2008

3. Did your company sell fresh fruits or vegetables to customers in Canada at anytime over the past five years?

	Aggregate		English		French	
	%	#	%	#	%	#
Yes	**88.21%**	247	**89.50%**	188	**84.30%**	59
No	11.79 %	33	10.50%	22	15.70%	11
ANSWERED		**280**		**210**		**70**
SKIPPED		**6**		**6**		**0**

Both respondent groups were highly engaged in sales to the Canadian produce market. This 88% positive response was, not surprisingly, even higher than the 84% rate evidenced in the US shipper survey.

4. What percent of your company's total revenues over the past five years were generated on sales to Canadian customers?

	Aggregate		English		French	
	%	#	%	#	%	#
< 5%	1.73%	4	2.30%	4	0.00%	0
5-10 %	3.90%	9	3.40%	6	5.60%	3
10-20 %	3.46%	8	4.00%	7	1.90%	1
20-30 %	4.33%	10	4.50%	8	3.70%	2
30-40 %	2.60%	6	2.30%	4	3.70%	2
40-50%	6.49%	15	7.90%	14	1.90%	1
> 50 %	**77.49%**	179	**75.70%**	134	**83.30%**	45
ANSERED		**231**		**177**		**54**
SKIPPED		**55**		**39**		**16**

In the previous question, we noted that the respondents to this survey were somewhat more engaged in the Canadian produce market. With this question, the differences become much more accentuated. In the US shipper survey, 65% of respondents relied on the Canadian market for less than 10% of their total revenues. In this survey, however, respondent dependence on the Canadian market is considerably higher. Less than 6% of Canadian respondents indicated that they derived 10% or less of their annual revenues from sales to Canadian buyers. At the opposite end of the spectrum, more than 77% of Canadian respondents relied on Canadian customers for at least 50% of their sales. Clearly, the companies represented in this survey are fundamentally reliant on the Canadian market, complete with its full range of commercial practices, for their livelihoods.

5. On its sales to Canadian customers, did your company experience any problems over the past five years related to claims?

	Aggregate %	Responses	English %	Responses	French %	Responses
Yes	**52.16%**	121	**52.50%**	93	**50.90%**	28
No	47.84%	111	47.50%	84	49.10%	27
ANSWERED		**232**		**177**		**55**
SKIPPED		**54**		**39**		**15**

Only those respondents who indicated they sold product were invited to respond to this question. Based on this response, over 50% of all companies active in the market have experienced claims on their Canadian sales. It appears that it is difficult to operate in the Canadian produce sector without encountering claims, irrespective of the region in which one's company operates.

By way of reference, 72% of US shippers admitted to having claims problems in Canada over the past five years.

6. What reduction in the original sales value have Canadian claims caused for your company?

	Aggregate %	Responses	English %	Responses	French %	Responses
< 5%	**50.45%**	56	**53.90%**	48	**36.40%**	8
5-10 %	25.23%	28	24.70%	22	27.30%	6
10-20 %	10.81%	12	10.10%	9	13.60%	3
20-30 %	4.50%	5	2.20%	2	13.60%	3
30-40 %	0.00%	0	0.00%	0	0.00%	0
40-50%	4.50%	5	3.40%	3	9.10%	2
> 50 %	4.50%	5	5.60%	5	0.00%	0
ANSWERED		**111**		**89**		**22**
SKIPPED		**175**		**127**		**48**

There are two observations of note to be made under this heading. First, for 75% of respondents, claims events led to reductions in original FOB values of 10% or less. 16% of respondents lost 10-30% of the original invoice value due to claims, while losses for the remaining 9% exceeded 40% of the original invoice values. Second, this question marks the first significant divergence between Francophone and Anglophone respondents. The percentage of Francophones reporting losses of 10% or less was 64% (15 percentage points below their Anglophone counterparts), while 36% reported losses in excess of 10%, against only 21% from Anglophone respondents.

Corresponding loss percentages reported by US shippers in the earlier survey amounted to 54% below 10%, and 46% greater than 10% of original invoice values.

7. How does this compare with your company's claims experience on sales to buyers outside of Canada?

	Aggregate		English		French	
	%	#	%	#	%	#
Much Higher	14.41%	16	14.60%	13	13.60%	3
Somewhat Higher	11.71%	13	12.40%	11	9.10%	2
About the Same	**29.73%**	33	**27.00%**	24	**40.90%**	9
Much Lower	7.21%	8	7.90%	7	4.50%	1
Somewhat Lower	4.50%	5	4.50%	4	4.50%	1
Not applicable	32.43%	36	**33.70%**	30	27.30%	6
ANSWERED		**111**		**89**		**22**
SKIPPED		**175**		**127**		**48**

The principal response here – Not Applicable – relates to the fact that 32% of respondents do not sell to markets outside of Canada, and therefore have no basis against which to compare their Canadian claims loss experience. Of the remaining respondents, in both linguistic regions, the primary response (30%) is that losses on claims in Canada are somewhat less than responding companies have experienced elsewhere. Next in frequency comes Much Higher (14%), followed by Somewhat Higher (12%). US shipper responses to this question peaked on Much Higher (44%), followed by Somewhat Higher (19%) and About the Same (16%).

8. On its sales to Canadian buyers, did your company experience any problems with payments over the past five years?

	Aggregate		English		French	
	%	#	%	#	%	#
Yes	50.93%	110	**53.30%**	89	42.90%	21
No	49.07%	106	46.70%	78	**57.10%**	28
ANSWERED		**216**		**167**		**49**
SKIPPED		**70**		**49**		**21**

As was seen earlier on the question regarding claims problems, there appears to be a fifty-fifty chance among respondents of encountering difficulties with collecting payments due to them on their sales to Canadian customers. Additionally, this problem would appear to be more acute within the Anglophone segment of respondents.
This response pattern is much closer to the US shipper experience (positive response from 54% of respondents) than on several of the preceding questions.

9. What reduction in its final collections have payments problems on sales to Canadian buyers created for your company?

	Aggregate		English		French	
	%	#	%	#	%	#
< 5%	53.57%	60	**50.50%**	46	**66.70%**	14
5-10 %	26.79%	30	29.70%	27	14.30%	3
10-20 %	8.04%	9	7.70%	7	9.50%	2
20-30 %	2.68%	3	2.20%	2	4.80%	1
30-40 %	0.00%	0	0.00%	0	0.00%	0
40-50%	0.89%	1	0.00%	0	4.80%	1
> 50 %	8.04%	9	9.90%	9	0.00%	0
ANSWERED		**112**		**91**		**21**
SKIPPED		**174**		**125**		**49**

80% of both linguistic components of the respondent pool reported a loss of less than 10% in terms of the ultimate financial impact of payments problems on sales to Canadian buyers, which approximates the range reported by 75% of US shippers. At the other end of the scale, 10% of Anglophones reported losses in excess of 50% of invoice values, while Francophone respondents had nothing to report in this category.

10. How does this compare with your company's bad debts experience on sales to buyers outside of Canada?

	Aggregate		English		French	
	%	#	%	#	%	#
Much Higher	12.61%	14	13.30%	12	9.50%	2
Somewhat Higher	21.62%	24	17.80%	16	**38.10%**	**8**
About the Same	21.62%	24	23.30%	21	14.30%	3
Somewhat Lower	4.50%	5	3.30%	3	9.50%	2
Much Lower	2.70%	3	2.20%	2	4.80%	1
Not applicable	**36.94%**	41	**40.00%**	36	23.80%	5
ANSWERED		**111**		**90**		**21**
SKIPPED		**175**		**126**		**49**

As in the earlier version of this same question dealing with claims, the principal response was Not Applicable (37%), meaning that only 60% of the respondents to this question experienced any sales activity outside of Canada. Of the remaining 60% of respondents, Somewhat Higher (22%) and About the Same (22% each garnered a third of responses. It is noteworthy that 48% of Francophone respondents believed their losses on Canadian collection problems were Much or Somewhat Higher than for sales to non-Canadian customers, while Anglophone respondents assigned only 37% of their votes to these two categories.

11. What percentage of your company's bad debts over the past five years have come as a result of payments problems with Canadian customers?

	Aggregate		English		French	
	%	#	%	#	%	#
< 5%	42.86%	48	**44.00%**	40	38.10%	8
5-10 %	8.93%	10	9.90%	9	4.80%	1
10-20 %	5.36%	6	4.40%	4	9.50%	2
20-30 %	1.79%	2	2.20%	2	0.00%	0
30-40 %	2.68%	3	3.30%	3	0.00%	0
40-50%	0.89%	1	1.10%	1	0.00%	0
> 50 %	37.50%	42	35.20%	32	**47.60%**	10
ANSWERED		**112**		**91**		**21**
SKIPPED		**174**		**125**		**49**

It is difficult to reconcile the results of this question with those that came before, particularly with respect to the Canadian share of total revenues (Question # 4). In that question, 78% of respondents reported that 50% or more of their sales went to Canadian buyers. Yet in this question, only 38% of respondents report that a comparable percentage of their bad debts were generated on Canadian transactions. We are therefore required to assume either that non-Canadian sales were disproportionately high contributors to the bad debt problems of these Canadian companies, or that the wording of the question was insufficiently clear to generate a valid response. Given that only 7% of respondents classified Canadian payments problems (Question # 10) as either Somewhat or Much Lower than their non-Canadian transactions, we are inclined to conclude that this question was interpreted to inquire into the impact of bad Canadian debts on the company's total income statement, rather than to gauge the relative significance of Canadian versus non-Canadian bad debt.

12. Did your company sell fresh fruits or vegetables to customers in the United States at anytime over the past five years?

	Aggregate		English		French	
	%	#	%	#	%	#
Yes	47.58%	118	47.90%	90	46.70%	28
No	52.42%	130	**52.10%**	98	**53.30%**	32
ANSWERED		**248**		**188**		**60**
SKIPPED		**38**		**28**		**10**

Almost 50% of respondents had engaged in sales to US-based buyers at some point over the past five years. Participation by French and English respondents was quite similar.

13. What percent of your company's total revenues over the past five years were generated on sales to US customers?

	Aggregate		English		French	
	%	#	%	#	%	#
< 5%	24.17%	29	**23.70%**	22	**25.90%**	7
5-10 %	15.83%	19	12.90%	12	**25.90%**	7
10-20 %	17.50%	21	17.20%	16	18.50%	5
20-30 %	8.33%	10	8.60%	8	7.40%	2
30-40 %	7.50%	9	7.50%	7	7.40%	2
40-50%	9.17%	11	10.80%	10	3.70%	1
> 50 %	17.50%	21	19.40%	18	11.10%	3
ANSWERED		**120**		**93**		**27**
SKIPPED		**166**		**123**		**43**

In Question # 4, 179 respondents indicated that they relied on Canada for more than 50% of their total revenues. Here, another 21 respondents indicate that they rely on buyers in the United States for more than 50% of their total sales. The remaining 86 respondents not captured by these two questions are assumed to be a combination of exporters dealing in non-US markets, marketers with broad geographical distribution networks, and those respondents who had succumbed to survey fatigue at an earlier point in the survey.

14. Has your company contacted the USDA's PACA Branch over the past five years for assistance in claims or payments problems with US buyers?

	Aggregate		English		French	
	%	#	%	#	%	#
Yes	26.27%	31	27.50%	25	22.20%	6
No	73.73%	87	**72.50%**	66	**77.80%**	21
ANSWERED		**118**		**91**		**27**
SKIPPED		**168**		**125**		**43**

Only 31 survey respondents (11% of the total number that initiated the survey, and 26% of those that do business in the United States) reported contact with the USDA's PACA Branch over the past five years. Given that 41% of all respondents indicated that they had sold product to US buyers over the past five years, we are left with two non-exclusive explanations for this low level of contact: either quality and claims experiences were of a lower frequency on US sales than on Canadian sales (as were reported by 52% of total respondents in Question # 5); or Canadian shippers are not fully aware of their rights under the rules of the PACA regulations. Intuitively, the latter explanation seems more compelling, and suggests the potential need for outreach programs to assist Canadian sellers to understand their dispute resolution options under the PACA rules on sales to US companies.

15. Has your company used the PACA Trust over the past five years to assist with collections from US customers who have filed for bankruptcy?

	Aggregate		English		French	
	%	#	%	#	%	#
Yes	**50.00%**	16	**50.00%**	12	**50.00%**	4
No	**50.00%**	16	**50.00%**	12	**50.00%**	4
ANSWERED		**32**		**24**		**8**
SKIPPED		**254**		**193**		**62**

Of the few respondents who had contacted the PACA Branch for assistance over the past five years, 50% had made use of the Branch's Trust provisions to aid them in collections from US customers which had filed for bankruptcy. This figure amounts to 14% of all Canadian companies who reported sales activity to the US over the past five years. While this figure is well below the 49% level derived from the US shipper survey, it remains impressively high for "non-native" users. All US buyers and sellers of produce companies are required to hold PACA licenses, and that PACA has been an integral part of dispute resolution across the US produce sector since 1930. If these 78 years of reliance and involvement combine to create a utilization of 49% among US shippers, a 14% utilization rate by companies that are not PACA license-holders, and who do not possess the same long association with its regulations, seems noteworthy.

16. If so, how many times has your company used the PACA Trust over the past five years to assist with collections from US customers who have filed for bankruptcy?

	Aggregate		English		French	
	%	#	%	#	%	#
1	**37.50%**	6	**41.70%**	5	**25.00%**	1
2	**25.00%**	4	25.00%	3	**25.00%**	1
3	**18.75%**	3	16.70%	2	**25.00%**	1
4	**12.50%**	2	8.30%	1	**25.00%**	1
5	**0.00%**	0	0.00%	0	0.00%	0
More than 5	**6.25%**	1	8.30%	1	0.00%	0
ANSWERED		**16**		**12**		**4**
SKIPPED		**270**		**204**		**66**

Of the sixteen Canadian companies that have sought PACA protection in the case of the bankruptcy of a US client, more than half had recourse to PACA assistance on multiple occasions. 10 of the 16 positive respondents (62%) have utilized the PACA Trust 2 times or more over the past five years. While most multiple-use respondents had availed themselves of PACA Trust protections 2, 3 or 4 times, one respondent indicated it had called on the Trust's provisions more than five times during this five-year time frame. Set against this figure of 62% multiple use in Canada, the corresponding figure for US shippers in the FPA's earlier survey indicated that 95 out of 120 positive respondents (79%) had made multiple use of the PACA's Trust provisions in cases of collections from US customers who had filed for bankruptcy.

17. Has your company used the PACA Trust provisions in the US Federal Courts over the past five years to secure a judgment or temporary restraining order against customers who have not filed bankruptcy, but simply refuse to pay or have not paid in a timely manner?

	Aggregate		English		French	
	%	#	%	#	%	#
Yes	43.75%	14	33.30%	8	**75.00%**	6
No	56.25%	18	**66.70%**	16	25.00%	2
ANSWERED		**32**		**24**		**8**
SKIPPED		**254**		**192**		**62**

This use of PACA Trust provisions is more complicated than the process of filing for protection under bankruptcy, and generally involves retaining US counsel to initiate or join the request for a judgment or TRO. In our US shipper survey, for example, 68% of respondents had used the bankruptcy assistance, while only 42% had used the TRO provisions. This same pattern was evidenced by the Anglophone respondents to this Canadian survey, where there were 12 positive responses to the bankruptcy question, but only 6 positive responses to the TRO question. This makes the Francophone response all the more surprising – 4 companies had availed themselves of the bankruptcy protection provisions, but 6 companies had utilized the TRO provisions. At first glance, this may be due to more aggressive promotional efforts by the produce attorney community in Quebec than elsewhere in Canada; greater experience (and less patience) with poor payments practices on the part of produce creditors in Quebec; or other, less obvious explanations. It would be interesting to explore this issue with Francophone respondents in a follow-up exercise.

18. If so, how many times has your company used the PACA Trust provisions in the Federal Courts over the past five years to secure a judgment or temporary restraining order against a delinquent customer before that customer has filed for bankruptcy protection?

	Aggregate		English		French	
	%	#	%	#	%	#
1	**57.14%**	8	**62.50%**	5	**50.00%**	3
2	28.57%	4	25.00%	2	33.30%	2
3	0.00%	0	0.00%	0	0.00%	0
4	0.00%	0	0.00%	0	0.00%	0
5	0.00%	0	0.00%	0	0.00%	0
More than 5	14.29%	2	12.50%	1	16.70%	1
ANSWERED		**14**		**8**		**6**
SKIPPED		**272**		**208**		**64**

In contrast to the “frequency of use” question on PACA assistance on bankruptcy-related payments problems, where more than 50% of positive responses showed themselves to be multiple users of the system, here the majority of positive respondents used the TRO

provisions of the PACA regulations only once. This result is similar to that obtained in the US shipper survey, where 60 of respondents reported that they had had recourse to the TRO provisions only once or twice over the past five years.

19. How much has the PACA Trust helped your company to recover over the past five years?

	Aggregate		English		French	
	%	#	%	#	%	#
Less than $10,000	44.83%	13	**40.90%**	9	**57.10%**	4
$10,000-$25,000	17.24%	5	13.60%	3	28.60%	2
$25,000-$50,000	20.69%	6	22.70%	5	14.30%	1
$50,000-$100,000	6.90%	2	9.10%	2	0.00%	0
More than $100,000	10.34%	3	13.60%	3	0.00%	0
ANSWERED		**29**		**22**		**7**
SKIPPED		**257**		**194**		**63**

Based on the responses here, the assistance received by Canadian shippers who availed themselves of the PACA's protection schemes was substantial. If we take the most conservative possible calculation of actual benefits, whereby the bottom point of each recovery range is multiplied by that range's percentage of participants (e.g.: $ 0 for 45%, $10,000 for 17%, and so on), we arrive at an average recovery rate per positive respondent of $20,450 per respondent. US shipper respondents reported only an average of $30,950 over the corresponding 5-year period, despite the fact that the revenues derived from their sales to US customers was unquestionably greater than 50% higher than their Canadian counterparts reporting under this survey. Indeed, as will be seen below, average respondent revenue appears to be $18.5 million, only 55% of the $33.9 million reported by US shippers in the earlier survey.

20. Which of the ranges best describes your company's annual sales revenues?

	Aggregate		English		French	
	%	#	%	#	%	#
Less than $1 million	12.02%	28	9.10%	16	21.10%	12
$1-$10 million	42.06%	98	**42.60%**	75	**40.40%**	23
$10-$50 million	26.18%	61	25.60%	45	28.10%	16
$50-$100 million	9.01%	21	10.80%	19	3.50%	2
More than $100 million	10.73%	25	11.90%	21	7.00%	4
ANSWERED		**233**		**176**		**57**
SKIPPED		**53**		**40**		**13**

There are several interesting dimensions to this set of responses. First and foremost, 233 respondents chose to persevere through to the final question of the survey. Second, almost 82% of respondents chose to share with the survey instrument a highly sensitive and personal data point – a clear indication of the importance they gave to the issues covered, and of their trust in the associations which were responsible for its initiation.

Finally, it reveals an average operating size which is significantly smaller than that of their produce counterparts in the United States. Using the same technique as in the preceding question -- $0 for the 12% reporting in the “Less than $1 million” category, $1 million for the 42% reporting in the “$1-$10 million” category, and so on – we derive an average annual revenue value of $18,500,000 per respondent. While this methodology certainly understates average annual revenues, since respondents within each revenue category can safely be assumed to be spread across the range rather than all concentrated at the bottom end, it provides a useful vehicle for cross border comparisons, provided we utilize the same calculation assumptions for the US respondents to our earlier survey as well. Under this approach, we derive an average annual revenue of $33,900,000 per year for the US shippers captured in our earlier survey, a level almost 83% higher than that of our Canadian respondents. Viewed over the past 12 months, the US and Canadian currencies have traded essentially at parity. Viewed over the past 60 months, which was the time frame for many of the survey’s questions, the US dollar traded at a premium of 16.3% above parity, which, of course would accentuate this revenue disparity even more. Since smaller companies are typically less well equipped to absorb the shocks precipitated by inequitable claims resolutions or problems with accounts receivable, it would appear that Canadian actors in the produce sector would benefit even more from the kinds of protections which the PACA Trust system currently delivers to the US produce industry.

APPENDIX I

CANADIAN COMMERCIAL PRACTICES SURVEY INSTRUMENT
(English Language)

1. Please indicate your principal type of business			
		Response Percent	Response Count
Broker		7.04%	20
Exporter		0.70%	2
Foodservice Distributor/Operator		3.87%	11
Grower/Shipper		33.45%	95
Importer		14.08%	40
Processor		5.28%	15
Retailer		5.63%	16
Wholesaler		16.90%	48
Other (please specify)		13.03%	37
	answered question		**284**
	skipped question		**2**

2. In which province is your headquarters office located?			
		Response Percent	Response Count
Alberta		5.36%	15
British Columbia		11.79%	33
Manitoba		1.43%	4
New Brunswick		2.14%	6
Newfoundland and Labrador		1.07%	3
Nova Scotia		3.93%	11
Ontario		35.36%	99
Prince Edward Island		2.86%	8
Quebec		32.50%	91
Saskatchewan		2.86%	8
Other (please specify)		0.71%	2
	answered question		**280**
	skipped question		**6**

3. Did your company sell fresh fruits or vegetables to customers in Canada at anytime over the past five years?			
		Response Percent	Response Count
Yes		90.00%	247
No		10.00%	33
	answered question		**280**
	skipped question		**6**

4. What percent of your company's total revenues over the past five years were generated on sales to Canadian customers?			
		Response Percent	Response Count
Less than 5%		1.73%	4
5-10%		3.90%	9
10-20%		3.46%	8
20-30%		4.33%	10
30-40%		2.60%	6
40-50%		6.49%	15
More than 50%		77.49%	179
	answered question		**231**
	skipped question		**55**

5. On its sales to Canadian customers, did your company experience any problems over the past five years related to claims?			
		Response Percent	Response Count
Yes		52.16%	121
No		47.84%	111
	answered question		**232**
	skipped question		**54**

6. What reduction in the original sales value have Canadian claims caused for your company?			
		Response Percent	Response Count
Less than 5%		50.45%	56
5-10%		25.23%	28
10-20%		10.81%	12
20-30%		4.50%	5
30-40%		0.00%	0
40-50%		4.50%	5
More than 50%		4.50%	5
	answered question		**111**
	skipped question		175

7. How does this compare with your company's claims experience on sales to buyers outside of Canada?			
		Response Percent	Response Count
Much Higher		14.41%	16
Somewhat Higher		11.71%	13
About the Same		29.73%	33
Somewhat Lower		7.21%	8
Much Lower		4.50%	5
Not applicable		32.43%	36
	answered question		**111**
	skipped question		175

8. On its sales to Canadian buyers, did your company experience any problems with payments over the past five years?			
		Response Percent	Response Count
Yes		50.93%	110
No		49.07%	106
	answered question		**216**
	skipped question		70

9. What reduction in its final collections have payments problems on sales to Canadian buyers created for your company?			
		Response Percent	Response Count
0-5%		53.57%	60
5-10%		26.79%	30
10-20%		8.04%	9
20-30%		2.68%	3
30-40%		0.00%	0
40-50%		0.89%	1
More than 50%		8.04%	9
	answered question		**112**
	skipped question		174

10. How does this compare with your company's bad debts experience on sales to buyers outside of Canada?			
		Response Percent	Response Count
Much Higher		12.61%	14
Somewhat Higher		21.62%	24
About the Same		21.62%	24
Somewhat Lower		4.50%	5
Much Lower		2.70%	3
Not applicable		36.94%	41
	answered question		**111**
	skipped question		175

11. What percentage of your company's total bad debts over the past five years has come as a result of payments problems with Canadian customers?			
		Response Percent	**Response Count**
Less than 5%		42.86%	48
5-10%		8.93%	10
10-20%		5.36%	6
20-30%		1.79%	2
30-40%		2.68%	3
40-50%		0.89%	1
More than 50%		37.50%	42
	answered question		**112**
	skipped question		174

12. Did your company sell fresh fruits or vegetables to customers in the United States at anytime over the past five years?			
		Response Percent	**Response Count**
Yes		47.58%	118
No		52.42%	130
	answered question		**248**
	skipped question		38

13. What percent of your company's total revenues over the past five years were generated on sales to US customers?			
		Response Percent	Response Count
Less than 5%		24.17%	29
5-10%		15.83%	19
10-20%		17.50%	21
20-30%		8.33%	10
30-40%		7.50%	9
40-50%		9.17%	11
More than 50%		17.50%	21
	answered question		**120**
	skipped question		166

14. Has your company contacted the USDA's PACA Branch over the past five years for assistance in claims or payments problems with US buyers?			
		Response Percent	Response Count
Yes		26.27%	31
No		73.73%	87
	answered question		**118**
	skipped question		168

15. Has your company used the PACA Trust over the past five years to assist with collections from US customers who have filed for bankruptcy?			
		Response Percent	Response Count
Yes		**50.00%**	16
No		**50.00%**	16
	answered question		**32**
	skipped question		254

16. If so, how many times has your company used the PACA Trust over the past five years to assist with collections from US customers who have filed for bankruptcy?			
		Response Percent	**Response Count**
1		**37.50%**	6
2		**25.00%**	4
3		**18.75%**	3
4		**12.50%**	2
5		**0.00%**	0
More than 5		**6.25%**	1
	answered question		**16**
	skipped question		270

17. Has your company used the PACA Trust provisions in the US Federal Courts over the past five years to secure a judgment or temporary restraining order against customers who have not filed bankruptcy, but simply refuse to pay or have not paid in a timely manner?			
		Response Percent	**Response Count**
Yes		43.75%	14
No		56.25%	18
	answered question		**32**
	skipped question		254

18. If so, how many times has your company used the PACA Trust provisions in the Federal Courts over the past five years to secure a judgment or temporary restraining order against a delinquent customer before that customer has filed for bankruptcy protection?			
		Response Percent	Response Count
1		57.14%	8
2		28.57%	4
3		0.00%	0
4		0.00%	0
5		0.00%	0
More than 5		14.29%	2
	answered question		**14**
	skipped question		272

19. How much has the PACA Trust helped your company to recover over the past five years?			
		Response Percent	Response Count
Less than $10,000		44.83%	13
$10,000-$25,000		17.24%	5
$25,000-$50,000		20.69%	6
$50,000-$100,000		6.90%	2
More than $100,000		10.34%	3
	answered question		**29**
	skipped question		257

20. Which of the ranges below best describes your company's annual sales revenues?			
		Response Percent	Response Count
Less than $1 million		12.02%	28
$1-$10 million		42.06%	98
$10-$50 million		26.18%	61
$50-$100 million		9.01%	21
More than $100 million		10.73%	25
	answered question		**233**
	skipped question		53

APPENDIX II

CANADIAN COMMERCIAL PRACTICES SURVEY INSTRUMENT

(French Language)

1. Veuillez indiquer votre principal type d'entreprise			
		answered question	**70**
		skipped question	**0**
		Response Percent	**Response Count**
Courtier		2.90%	2
Exportateur		0.00%	0
Distributeur/Exploitant de service alimentaire		5.70%	4
Producteur/Expéditeur		**41.40%**	**29**
Importateur		15.70%	11
Transformateur		5.70%	4
Détaillant		2.90%	2
Grossiste		8.60%	6
Autre (veuillez préciser)		17.10%	12

2. Dans quelle province votre siège social est-il situé?			
		answered question	**70**
		skipped question	**0**
		Response Percent	**Response Count**
Alberta		0.00%	0
Colombie-Britannique		0.00%	0
Manitoba		0.00%	0
Nouveau-Brunswick		0.00%	0
Terre-Neuve-et-Labrador		0.00%	0
Nouvelle-Écosse		1.40%	1
Ontario		0.00%	0
Île-du-Prince-Édouard		0.00%	0
Québec		**98.60%**	**69**
Saskatchewan		0.00%	0
Autre (veuillez préciser)		0.00%	0

3. Au cours des cinq dernières années, votre entreprise a-t-elle vendu des fruits et légumes frais à des clients au Canada?			
		answered question	70
		skipped question	0
		Response Percent	Response Count
Oui		**84.30%**	**59**
Non		15.70%	11

4. Quelle proportion des recettes totales de votre entreprise des cinq dernières années a-t-elle été générée par les ventes à des clients canadiens?			
		answered question	54
		skipped question	16
		Response Percent	Response Count
Moins de 5%		0.00%	0
5 à 10%		5.60%	3
10 à 20%		1.90%	1
20 à 30%		3.70%	2
30 à 40%		3.70%	2
40 à 50%		1.90%	1
Plus de 50%		**83.30%**	**45**

5. Dans ses ventes à des clients canadiens au cours des cinq dernières années, votre entreprise a-t-elle connu des problèmes liés à des réclamations?			
		answered question	55
		skipped question	15
		Response Percent	Response Count
Oui		**50.90%**	**28**
Non		49.10%	27

6. Quelle réduction du prix de vente original vos réclamations avec des clients canadiens ont-elles occasionnée à votre entreprise?

		answered question	22
		skipped question	48
		Response Percent	**Response Count**
Moins de 5%		**36.40%**	**8**
5 à 10%		27.30%	6
10 à 20%		13.60%	3
20 à 30%		13.60%	3
30 à 40%		0.00%	0
40 à 50%		9.10%	2
Plus de 50%		0.00%	0

7. Comment cela se compare-t-il avec les réclamations que vous avez eues avec des acheteurs de l'extérieur du Canada?

		answered question	22
		skipped question	48
		Response Percent	**Response Count**
Beaucoup plus élevé		13.60%	3
Un peu plus élevé		9.10%	2
À peu près la même chose		**40.90%**	**9**
Un peu moins élevé		4.50%	1
Beaucoup moins élevé		4.50%	1
Sans objet		27.30%	6

8. Dans ses ventes à des clients canadiens, votre entreprise a-t-elle connu des problèmes liés aux paiements au cours des cinq dernières années?

		answered question	49
		skipped question	21
		Response Percent	**Response Count**
Oui		42.90%	21
Non		**57.10%**	**28**

9. Dans ses ventes à des clients canadiens, quelle réduction le recouvrement final des paiements problématiques a-t-il entraînée pour votre entreprise?			
		answered question	21
		skipped question	49
		Response Percent	Response Count
0 à 5%		**66.70%**	**14**
5 à 10%		14.30%	3
10 à 20%		9.50%	2
20 à 30%		4.80%	1
30 à 40%		0.00%	0
40 à 50%		4.80%	1
Plus de 50%		0.00%	0

10. Comment cela se compare-t-il avec les problèmes de paiement que vous avez eus avec des acheteurs de l'extérieur du Canada?			
		answered question	21
		skipped question	49
		Response Percent	Response Count
Beaucoup plus élevé		9.50%	2
Un peu plus élevé		**38.10%**	**8**
À peu près la même chose		14.30%	3
Un peu moins élevé		9.50%	2
Beaucoup moins élevé		4.80%	1
Sans objet		23.80%	5

11. Au cours des cinq dernières années, quelle proportion de l'ensemble des mauvaises créances de votre entreprise provient-elle de paiements problématiques de clients canadiens?			
		answered question	21
		skipped question	49
		Response Percent	Response Count
Moins de 5%		38.10%	8
5 à 10%		4.80%	1
10 à 20%		9.50%	2
20 à 30%		0.00%	0
30 à 40%		0.00%	0
40 à 50%		0.00%	0
Plus de 50%		**47.60%**	**10**

12. Au cours des cinq dernières années, votre entreprise a-t-elle vendu des fruits et légumes frais à des clients aux États-Unis?			
		answered question	60
		skipped question	10
		Response Percent	Response Count
Oui		46.70%	28
Non		**53.30%**	**32**

13. Quelle proportion des recettes totales de votre entreprise des cinq dernières années a-t-elle été générée par les ventes à des clients des États-Unis?			
		answered question	27
		skipped question	43
		Response Percent	Response Count
Moins de 5%		**25.90%**	**7**
5 à 10%		**25.90%**	**7**
10 à 20%		18.50%	5
20 à 30%		7.40%	2
30 à 40%		7.40%	2
40 à 50%		3.70%	1
Plus de 50%		11.10%	3

14. Au cours des cinq dernières années, votre entreprise a-t-elle communiqué avec la direction du PACA de l'USDA pour obtenir de l'aide avec des réclamations ou des problèmes de paiement avec des acheteurs des États-Unis?			
		answered question	27
		skipped question	43
		Response Percent	Response Count
Oui		22.20%	6
Non		**77.80%**	**21**

15. Votre entreprise s'est-elle prévalue des dispositions fiduciaires du PACA au cours des cinq dernières années pour aider au recouvrement de sommes dues par des clients des États-Unis qui ont déclaré faillite?

		answered question	8
		skipped question	62
		Response Percent	Response Count
Oui		**50.00%**	**4**
Non		**50.00%**	**4**

16. Le cas échéant, combien de fois au cours des cinq dernières années votre entreprise a-t-elle recouru aux dispositions fiduciaires du PACA pour aider au recouvrement de sommes dues par des clients des États-Unis qui ont déclaré faillite?

		answered question	4
		skipped question	66
		Response Percent	Response Count
1		**25.00%**	**1**
2		**25.00%**	**1**
3		**25.00%**	**1**
4		**25.00%**	**1**
5		0.00%	0
Plus de 5		0.00%	0

17. Votre entreprise a-t-elle recouru aux dispositions fiduciaires du PACA en Cour fédérale des États-Unis au cours des cinq dernières années pour obtenir un jugement ou une injonction temporaire contre des clients qui n'ont pas déclaré faillite mais refusaient simplement de payer ou ne voulaient pas payer dans les délais appropriés?

		answered question	8
		skipped question	62
		Response Percent	Response Count
Oui		**75.00%**	**6**
Non		25.00%	2

18. Le cas échéant, combien de fois au cours des cinq dernières années votre entreprise a-t-elle recouru aux dispositions fiduciaires du PACA en Cour fédérale des États-Unis pour obtenir un jugement ou une injonction temporaire contre un client mauvais payeur avant que celui-ci ne se place sous la protection des lois sur la faillite?

		answered question	6
		skipped question	64
		Response Percent	Response Count
1		**50.00%**	**3**
2		33.30%	2
3		0.00%	0
4		0.00%	0
5		0.00%	0
Plus de 5		16.70%	1

19. Quel montant les dispositions fiduciaires du PACA ont-elles aidé votre entreprise à recouvrer au cours des cinq dernières années?

		answered question	7
		skipped question	63
		Response Percent	Response Count
Moins de 10 000 $		**57.10%**	**4**
10 000 à 25 000 $		28.60%	2
25 000 à 50 000 $		14.30%	1
50 000 à 100 000 $		0.00%	0
Plus de 100 000 $		0.00%	0

20. Quelle fourchette de revenus représente le mieux les recettes annuelles de votre entreprise?

		answered question	57
		skipped question	13
		Response Percent	Response Count
Moins de 1 million $		21.10%	12
1 à 10 millions $		**40.40%**	**23**
10 à 50 millions $		28.10%	16
50 à 100 millions $		3.50%	2
Plus de 100 millions $		7.00%	4

APPENDIX III

Risk Experience in Canada and Risk Mitigation in the United States:

Perspectives from the U. S. Produce Shipper Community

By

L. Patrick Hanemann

Farm2Market Agribusiness Consulting Inc

Based on a survey conducted on behalf of the Dispute Resolution Corporation

31 July 2008

I. Executive Summary

The Dispute Resolution Corporation, acting in conjunction with the Canadian Horticultural Council and the Canadian Produce Marketing Association, under the banner of the Fresh Produce Alliance, has been actively pursuing the possibility of establishing a PACA-like trust in Canada. Earlier this year, a working group composed of officials from federal and provincial departments of agriculture, as well as a number of other federal agencies, conducted a survey of produce industry members in Canada to better understand the payments difficulties these members had encountered in their fresh fruit and vegetable transactions. Since imports make up 75% of all fresh produce being sold in Canada, the DRC felt it would be helpful to supplement the government survey of Canadian produce companies with its own survey of U.S. produce companies. The purpose of the DRC survey was two-fold:

1. To supplement the government data regarding produce trading experience in Canada with a perspective from the US industry, and

2. To alert Canadian produce companies and government agencies as to the extent to which US produce companies rely on the USDA's PACA Branch in the event of payments problems with other PACA members.

The DRC initiated its 18-question survey on 27 May, and closed off responses on 13 June. In addition to its own U.S. membership, the survey was distributed through several regional and national produce associations within the United States. In all, 1,016 companies were invited to participate in the survey. By the time the survey was closed, 234 companies had responded, constituting a 23% response rate. Highlights from the survey data included the following:

a. Canadian Transactions:

- 84% of respondents indicated they had sold fresh produce into the Canadian market within the past five years.

- 72% of respondents indicated they had experienced problems with claims on their sales into Canada

- Most claims (67%) were settled with discounts off the original invoice value of 20% or less

- 72% of respondents believed that their claims frequency on Canadian sales was higher than on sales to US customers

- 54% of respondents experienced payment problems on their sales to Canada

- 61% or respondents felt that the incidence of payment problems in Canada was higher in Canada than in the United States

b. Interactions with the PACA Branch:

- 70% of respondents contacted a PACA field office with questions regarding quality complaints or payment issues at least once a year; 12% contacted a PACA office at least once a month

- 68% of respondents had used PACA Trust provisions because of a customer bankruptcy at some point over the past five years. Of those who had used the trust to deal with a bankruptcy event, 79% had used the Trust more than once, and 17% had had recourse to the Trust more than 5 times over the past 5 years

- A lesser number of companies (42%) had made use of the PACA Trust provisions to secure a judgment or temporary restraining order in response to cases of delinquency in payment where there was no declaration of bankruptcy

- 40% of respondents believed that the PACA trust had helped them to recover $10,000 or less since 2004; 40% felt the Trust had helped them recover between $10,000 and $100,000; while 20% indicated the Trust had enabled them to recover amounts in excess of $100,000.

- Over 60% of respondents indicated that the protection provided by the PACA Trust had exerted little if any effect on the ability of their companies to secure credit.

- The most common annual revenue category among respondent companies was the “$10-$50 million” range (37%), followed by “Greater than $100 million” (22%), “$1-$10 million” (21%), and “$50-$100 million” (16%). Less than 5% of respondents indicated annual revenues of less than $1 million.

Special thanks go to the DRC members, as well as the members of the United Fresh Produce Association, the Florida Fruit and Vegetable Association, the Texas Produce Association and Western Growers, who participated in this survey.

II. Methodology

The questionnaire (attached as Appendix 1, with responses) was developed over a two-week period in early May of 2008, using the SurveyMonkey software package which the DRC had used successfully in several previous membership surveys. The survey instrument was then sent via email to 310 U.S. members of the DRC on 27 May. On the same day the survey was also sent electronically to 31 Texas Produce Association members. On 30 May the United Fresh Produce Association sent the survey to 350 of its members. Finally, on 2 June, the Florida Fruit and Vegetable Association distributed the survey to 325 of its members. In total, 1,106 U.S companies received invitations to log onto the SurveyMonkey website and participate. When the survey was closed to responses on 13 June, 234 companies had responded, for a gross response rate of 23%. Responses by organization, by date, were as follows:

Exhibit 1: Survey Distribution & Response Statistics by Collector

START DATE	DRC 27-May	FFVA 2-Jun	TPA 27-May	UFPA 30-May	TOTAL	% of Total Responses By Day
27-May	44	[redacted]	1	[redacted]	**45**	19%
28-May	15		4		**19**	8%
29-May	3		2		**5**	2%
30-May	27		0	16	**43**	18%
2-Jun	5	21	0	8	**34**	15%
3-Jun	19	25	0	0	**44**	19%
4-Jun	7	3	0	13	**23**	10%
5-Jun	3	2	0	3	**8**	3%
6-Jun	0	2	0	0	**2**	1%
9-Jun	2	5	0	2	**9**	4%
10-Jun	1	0	0	0	**1**	0%
11-Jun	0	0	0	0	**0**	0%
12-Jun	0	0	0	0	**0**	0%
13-Jun	0	0	0	1	**1**	0%
CLOSE	[redacted]					
TOTAL RESPONSES	**126**	**58**	**7**	**43**	**234**	100%
TOTAL RECIPIENTS	**310**	**325**	**31**	**350**	**1016**	
% RESPONDING	**41%**	**18%**	**23%**	**12%**	**23%**	

Of the 234 gross responses, 170 respondents (73% of total respondents) completed the survey in full. A breakdown of survey initiations and completions by collecting organization are shown in Exhibit 2:

Exhibit 2: Initiation/Completion Statistics by Collector

	AGGREGATE	DRC	FFVA	UFPA	TPA
# Initiated	**234**	**126**	**58**	**43**	**7**
# Completed	**170**	**100**	**33**	**30**	**7**
Attrition	**64**	**26**	**25**	**13**	**0**
% Completed	**73%**	**79%**	**57%**	**70%**	**100%**

There appears to be a positive correlation between the percentage of survey completion and the percentage of transactional involvement in Canada. In Florida, for example, where the percentage of companies involved in sales to Canada was lowest, the percentage of companies completing the survey was likewise lowest. The reverse was true in the case of Texas.

Of the 18 questions posed during the survey, five questions (#1, #3, #6, #12 and #14) contained a skip function, where a negative response would skip the respondent over one or more follow-up questions, and re-direct the respondent to the next area of interest in the survey document. It would appear that the attrition rate at each skip function was greater than would have been predicted on the basis of the initial response. For example, Question # 1 asked if the respondent's company had sold any fruits or vegetables into Canada over the past five years. The 196 respondents who answered in the affirmative were led to Question # 2, while the 36 respondents who answered in the negative were directed to Question # 10. Instead of 196 responses to Question # 2, however, only 179 (17 fewer than were shown this question) chose to respond. Exhibit 3 shows the attrition rate experienced following each of the skip function questions, by comparing the respondents who were invited to answer the next question, with the number of respondents who actually answered:

Exhibit 3: Actual vs. Expected Response Rates Following Skip-Function Questions

Question Following #	Expected Responses	Actual Responses	Attrition
1	196	179	**17**
3	127	122	**5**
6	91	92	**<1>**
12	124	120	**4**
14	75	72	**3**
TOTAL			**28**

This 28-respondent decline following skip-function questions represents 44% of the total attrition of 64 respondents seen in Exhibit 2. While there is inevitably a certain amount of "survey fatigue" which sets in during the course of a multi-question instrument such as this one, the 27% decline from initiation through to completion appears to be attributable to other factors as well, including

1. The high percentage (48%) of Florida respondents who do not trade into Canada, and presumably felt they had little to contribute to the survey;
2. The frequency (5 out of 18 questions) of skip-function questions, which can have a disorienting effect on the party being questioned

In future surveys, it may be advisable to consider minimizing the number of skip-function questions. Needless to say, any abbreviation to the overall length of any survey will be likely to reduce attrition rates between those who begin, and those who complete, the survey.

In terms of survey methodology, another important lesson was learned as well. In addition to the collectors enumerated above, Western Growers was also involved in the initial stages of the survey as a data collector. Unlike the other collectors, all of whom sent out the SurveyMonkey link via email, Western Growers embedded its link into one of its weekly newsletters. Responses during the first week following this effort were nil. A subsequent telephone/email solicitation by WG to certain of its members who are also DRC members led to some 32 responses, which were then incorporated into the DRC total of 126 respondents. For future surveys, the effectiveness of direct email, especially as compared to invitations embedded in other association communiqués, should be remembered.

Despite these observations, the overall response rates to this survey remain no less gratifying. 234 of the 1,016 companies who were directly invited to participate in the survey accepted their invitation. Of the 234 respondents who responded to the survey's initial question, 170 completed the survey. These response rates – 23% gross, 17% net – provide us with a robust response profile, and one in which there is reason to have considerable confidence.

III. Analysis of Responses

1. Did your company sell fresh fruits or vegetables to customers in Canada at anytime over the past five years?

	AGGREGATE	DRC	FFVA	UFPA	TPA
YES	84%	95%	52%	95%	100%
NO	16%	5%	48%	5%	0

With the exception of the FFVA respondents, the remaining collector groups were all highly engaged in the Canadian produce market.

2. What percent of your company's total revenues over the past five years were generated on sales to Canadian customers?

	AGGREGATE	DRC	FFVA	UFPA	TPA
< 5%	32%	26%	41%	43%	43%
5-10 %	33%	31%	30%	34%	57%
10-20 %	18%	19%	26%	11%	0
20-30 %	10%	14%	3%	6%	0
30-40 %	4%	5%	0	6%	0
40-50%	2%	3%	0	0	0
> 50 %	1%	2%	0	0	0

Only those respondents who indicated they sold product to Canada were invited to respond to this question. 65% of respondents stated that they derived less than 10% of their revenues from sales to Canada. With parity between the two currencies, higher average transportation costs to Canadian destinations, and 10% of the aggregate population of the two countries (USA = 303 million, Canada = 33 million), this level of Canada-based revenues is actually somewhat less than might have been expected. Not surprisingly, involvement in Canada is greater among U.S. DRC members than across the survey population as a whole.

3. On its sales to Canada, did your company experience any problems over the past five years related to claims?

	AGGREGATE	DRC	FFVA	UFPA	TPA
YES	72%	76%	63%	71%	43%
NO	28%	24%	37%	29%	57%

As with the previous question, only those respondents who indicated they sold product to Canada were invited to respond to this question. Based on this response, it would appear that it is difficult to be active on the Canadian market without encountering claims problems. Both Florida and Texas reported a lesser frequency with claims issues than either of the two national groups.

4. What reduction in the original sales value have Canadian claims caused for your company?

	AGGREGATE	DRC	FFVA	UFPA	TPA
< 5%	**28%**	**27%**	**12%**	**48%**	**0**
5-10 %	**26%**	**24%**	**41%**	**22%**	**0**
10-20 %	**13%**	**19%**	**0**	**4%**	**0**
20-30 %	**11%**	**8%**	**12%**	**18%**	**33%**
30-40 %	**8%**	**8%**	**12%**	**4%**	**33%**
40-50%	**4%**	**5%**	**0**	**4%**	**0**
> 50 %	**10%**	**9%**	**23%**	**0**	**34%**

Respondents here were limited to those that had confirmed they had experienced claims in Canada over the past five years. In 54% of the cases, claims events generated reductions in sales proceeds of less that 10% of the original value, although 10% of those reporting indicated impacts in excess of 50%. While Florida and Texas both reported a lower incidence of claims, they appear to suffer greater damage per incident than the national average.

5. How does this compare with your company's claims experience on US sales?

	AGGREGATE	DRC	FFVA	UFPA	TPA
MUCH HIGHER	**44%**	**39%**	**41%**	**59%**	**67%**
SOMEWHAT HIGHER	**28%**	**28%**	**41%**	**18%**	**33%**
SOMEWHAT LOWER	**3%**	**4%**	**6%**	**0**	**0**
MUCH LOWER	**8%**	**12%**	**0**	**5%**	**0**
ABOUT THE SAME	**16%**	**17%**	**12%**	**18%**	**0**

As with the preceding question, respondents here were limited to those that had confirmed they had experienced claims in Canada over the past five years.63% of all respondents indicate that their claims experience on sales into Canada was worse than what they had experienced on comparable sales into the US market. This opinion was offered by 100% of respondents from Texas, by 82% of respondents from Florida, by 77% of the UFPA respondents, but only 67% of the DRC respondents. This suggests that US DRC members may suffer less in the event of claims in Canada than their non-member compatriots.

6. On its sales to Canada, did your company experience any problems over the past five years related to payments?

	AGGREGATE	DRC	FFVA	UFPA	TPA
YES	**54%**	**60%**	**36%**	**53%**	**29%**
NO	**46%**	**40%**	**64%**	**47%**	**71%**

Based on this response, it would appear that payments have constituted considerably less of a problem than claims over the past five years. Against a 72% affirmative

response on claims problems, payment problems were reported by only 54% of our respondents. This decline was mirrored by all four collector groups within the survey.

7. What percent of your company's bad debt over the past five years has come as a result of sales to Canada?

	AGGREGATE	DRC	FFVA	UFPA	TPA
< 5%	**63%**	**61%**	**56%**	**69%**	**100%**
5-10 %	**11%**	**9%**	**11%**	**19%**	**0**
10-20 %	**10%**	**13%**	**11%**	**0**	**0**
20-30 %	**3%**	**3%**	**11%**	**0**	**0**
30-40 %	**5%**	**5%**	**0**	**12%**	**0**
40-50%	**2%**	**3%**	**0**	**0**	**0**
> 50 %	**6%**	**6%**	**11%**	**0**	**0**

According to the responses in Question # 2, sales to Canada represented 20% or less of annual revenues in 83% of the responses. 84% of the respondents to this question concerning bad debt reported that Canada represented 20% or less of their companies' bad debts over the same period.

8. What reduction in its final collections have payments problems on Canadian sales created for your company?

	AGGREGATE	DRC	FFVA	UFPA	TPA
< 5%	**55%**	**55%**	**56%**	**64%**	**0**
5-10 %	**20%**	**19%**	**11%**	**22%**	**50%**
10-20 %	**14%**	**16%**	**11%**	**7%**	**0**
20-30 %	**3%**	**2%**	**11%**	**7%**	**0**
30-40 %	**2%**	**2%**	**11%**	**0**	**0**
40-50%	**1%**	**0**	**0**	**0**	**50%**
> 50 %	**5%**	**6%**	**0**	**0**	**0**

Respondents here were limited to those that had confirmed they had experienced payments problems in Canada over the past five years. In 75% of the cases, payments events generated reductions in sales proceeds of less that 10% of the original value, as compared to only 54% in the case of claims. On the opposite end of the scale, only 5% claimed losses in excess of 50% of the invoice value, against a reported 10% in the case of claims.

9. How does this compare with your company's bad debt experiences on sales within the US?

	AGGREGATE	DRC	FFVA	UFPA	TPA
MUCH HIGHER	**39%**	**36%**	**11%**	**60%**	**100%**
SOMEWHAT HIGHER	**22%**	**21%**	**45%**	**13%**	**0**
SOMEWHAT LOWER	**9%**	**10%**	**0**	**13%**	**0**
MUCH LOWER	**8%**	**10%**	**11%**	**0**	**0**
ABOUT THE SAME	**22%**	**23%**	**33%**	**14%**	**0**

Despite the symmetry between bad debts and total revenues seemingly indicated in the preceding question, the majority (61%) of US respondents reported that their bad debt experiences in Canada were either “much higher” or “somewhat higher” than in the United States.

10. Does your company incorporate PACA Trust language on its invoices?

	AGGREGATE	DRC	FFVA	UFPA	TPA
ALWAYS	**88%**	**92%**	**66%**	**100%**	**86%**
USUALLY	**1%**	**1%**	**5%**	**0**	**0**
SOMETIMES	**3%**	**2%**	**8%**	**0**	**0**
NEVER	**8%**	**5%**	**21%**	**0**	**14%**

While 88% would generally be deemed to be a high rate of compliance, it remains somewhat surprising that only 88% of this group of US PACA licensees, as we assume all of these respondents to be, would include PACA Trust language on their invoices. Inclusion costs nothing, yet is essential to securing a priority status among creditors in the event of a bankruptcy. While both UFPA and the DRC are above the survey average, it is noteworthy that Texas would be below, and that Florida would be well below, this average figure.

11. How often does your company contact a PACA field office with a question regarding quality or payment?

	AGGREGATE	DRC	FFVA	UFPA	TPA
WEEKLY	**3%**	**6%**	**0**	**0**	**0**
MONTHLY	**9%**	**11%**	**0**	**13%**	**0**
A FEW TIMES A YEAR	**49%**	**53%**	**35%**	**53%**	**57%**
ONCE A YEAR	**9%**	**8%**	**8%**	**6%**	**29%**
LESS THAN ONCE A YEAR	**20%**	**17%**	**30%**	**22%**	**14%**
NEVER	**10%**	**5%**	**27%**	**6%**	**0**

This response provides evidence of the importance of the role which the PACA system plays in facilitating dispute resolution within the US produce industry. Over 60% of respondents contacted someone within the PACA structure for assistance with a quality

or payment question more often than once a year. This frequency held true for all collector groups except for Florida.

12. Has your company used the PACA Trust over the past five years to assist with collections from US customers who have filed for bankruptcy?

	AGGREGATE	DRC	FFVA	UFPA	TPA
YES	68%	76%	40%	71%	71%
NO	32%	24%	60%	29%	29%

The PACA Trust provides produce creditors with "first-in-line" access to assets available from a post-bankruptcy distribution, provided the creditors have complied with the requirements regarding the protection of their positions. As with Question # 11, this response underlines the importance of the PACA system in reducing the risks of the produce trade in the United States. 68% of respondents (70+% for the DRC, UFPA and TPA, only 40% for Florida) had recourse to the provisions of the PACA Trust to protect their exposure resulting from a customer bankruptcy at some time over the past 5 years

13. If so, how many times has your company used the PACA Trust over the past five years to assist with collections from US customers who have filed for bankruptcy?

	AGGREGATE	DRC	FFVA	UFPA	TPA
1	21%	24%	13%	5%	60%
2	28%	24%	33%	40%	40%
3	23%	22%	33%	25%	0
4	7%	8%	7%	5%	0
5	4%	6%	0	0	0
> 5	17%	16%	14%	25%	0

Expanding on Question # 12, this response set indicates that 79% of those who responded affirmatively to that question actually had recourse to the PACA Trust on multiple occasions over the past five years, with 21% reporting 5 or more incidents when the PACA Trust assisted them in cases of bankruptcy over the past five years.

14. Has your company used the PACA Trust provisions in the Federal Courts over the past five years to secure a judgment or temporary restraining order against customers who have not filed bankruptcy, but simply refuse to pay or have not paid in a timely manner?

	AGGREGATE	DRC	FFVA	UFPA	TPA
YES	42%	47%	29%	48%	14%
NO	58%	53%	71%	52%	86%

In addition to assuring compliant produce creditors with priority access to the assets of a liquidated company, PACA Trust regulations also provide produce creditors with recourse to injunctive relief in cases where there is reason to believe that the debtor

company may be disposing of its assets, in order to shield these assets from exposure in case of an eventual bankruptcy declaration. This question was designed to capture the extent to which this provision is used by the U.S. produce community. While 42% of respondents indicated that they had had recourse to this pre-bankruptcy injunctive relief over the past five years, its invocation is clearly less prevalent than the Trust's priority access provision which was explored in Question # 12.

15. If so, how many times has your company used the PACA Trust provisions in the Federal Courts over the past five years to secure a judgment or temporary restraining order against a delinquent customer before that customer has filed for bankruptcy protection?

	AGGREGATE	DRC	FFVA	UFPA	TPA
1	**31%**	**31%**	**50%**	**22%**	**0**
2	**31%**	**24%**	**38%**	**43%**	**100%**
3	**19%**	**27%**	**0**	**7%**	**0**
4	**4%**	**4%**	**0**	**7%**	**0**
5	**4%**	**2%**	**12%**	**7%**	**0**
> 5	**11%**	**12%**	**0**	**14%**	**0**

The responses to Question # 14 indicated that the number of companies using the Trust's injunctive relief provisions is less than the number of companies that use its bankruptcy protection provisions. The same appears to be true as regards the frequency of use by companies that do avail themselves of these provisions. Whereas only 51% of respondents to Question # 13 reported they had used the Trust's assistance in cases of bankruptcy more than twice over the past five years, only 38% indicated they had used the injunctive relief provisions more than twice over the past five years.

16. How much has the PACA Trust helped your company to recover over the past five years?

	AGGREGATE	DRC	FFVA	UFPA	TPA
< $10,000	**40%**	**35%**	**61%**	**21%**	**86%**
$10,000-$25,000	**12%**	**11%**	**13%**	**14%**	**14%**
$25,000-$50,000	**17%**	**19%**	**13%**	**18%**	**0**
$50,000-$100,000	**11%**	**12%**	**6%**	**14%**	**0**
> $100,000	**20%**	**23%**	**7%**	**32%**	**0**

This question reveals, perhaps better than any other, the reason for the U.S. produce industry's attachment to the provisions of the PACA Trust. 60% of respondents reported that the PACA Trust had helped their companies to recover more than $10,000. At an annual cost of only $550.00, a $10,000 recovery over a five year period represents an annualized return on investment of 68%. For those companies that fall into the "> $100,000" bracket, the ROI improves to 236%. With this degree of cost-effectiveness, it is easy to understand the support which the PACA Branch, together with its Trust provisions, enjoys within the U.S. produce industry.

17. Has the protection provided by the PACA Trust had any effect on your company's ability to secure credit over the past five years?

	AGGREGATE	DRC	FFVA	UFPA	TPA
YES, TO AN IMPORTANT DEGREE	19%	21%	3%	27%	14%
YES, SOMEWHAT	20%	22%	17%	16%	14%
NOT VERY MUCH	22%	22%	21%	27%	14%
NONE AT ALL	39%	35%	59%	30%	58%

In the course of discussions regarding adoption of comparable Trust provisions within Canada, the Canadian banking community has argued that implementation of such a Trust would have a powerful adverse affect on the ability of produce companies to secure credit from financial institutions. Based on the responses here, that does not appear to be the case in the United States. The majority (61%) of respondents indicated that PACA Trust protection has had little or no effect on their ability to secure credit. With respect to the 39% of respondents who indicated the Trust had influenced their access to credit, this question was not crafted in such a way as to determine whether the effect was positive or negative. In the opinions of the drafters of the questionnaire, and of the produce professionals who have been asked to consider this response, it is universally believed that the effect on credit access reported here is a positive one. Confirmation of this belief will, however, require a follow-up survey with a clearer formulation of this question.

18. Which of the ranges below best describes your company's annual sales revenues?

	AGGREGATE	DRC	FFVA	UFPA	TPA
< $1,000,000	4%	3%	12%	0	0
$1,000,000 - $10,000,000	21%	15%	34%	20%	43%
$10,000,000 - $50,000,000	37%	40%	33%	37%	14%
$50,000,000 - $100,000,000	16%	18%	9%	10%	43%
> $100,000,000	22%	24%	12%	33%	0

Based on the pattern of this response, the primary annual revenue range among respondents is $10-$50 million, followed by significant segments at the > $100 million and the $1-$10 million ranges. On balance, this appears to be somewhat higher than the profile of the U.S. produce shipper community at large. It is estimated that there are some 3,500 active produce shippers in the United States, generating annual revenues of some $20 billion. The average annual revenue among all U.S. produce shippers would thus be $5.7 million. It is not surprising that the average size of survey respondents would be larger than the shipper community at large. The survey was distributed to companies with membership in the DRC and/or in regional or national associations. Membership in these groups is generally believed to be skewed toward the larger companies within the sector. The response pattern to this final question of the survey would appear to be consistent with this assumption.

Appendix 1

1. Did your company sell fresh fruits or vegetables to customers in Canada at anytime over the past five years?			
		Response Percent	**Response Count**
Yes		**84.5%**	196
No		15.5%	36
	answered question		**232**
	skipped question		**3**

2. What percent of your company's total revenues over the past five years were generated on sales to Canadian customers?

		Response Percent	Response Count
Less than 5%		32.4%	58
5-10%		**33.0%**	59
10-20%		17.9%	32
20-30%		10.1%	18
30-40%		3.9%	7
40-50%		1.7%	3
More than 50%		1.1%	2
	answered question		**179**
	skipped question		**56**

3. On its sales to Canada, did your company experience any problems over the past five years related to claims?

		Response Percent	Response Count
Yes		**71.8%**	127
No		28.2%	50
	answered question		**177**
	skipped question		**58**

4. What reduction in the original sales value have Canadian claims caused for your company?			
		Response Percent	**Response Count**
0-5%		**27.9%**	34
5-10%		25.4%	31
10-20%		13.1%	16
20-30%		10.7%	13
30-40%		9.0%	11
40-50%		4.1%	5
More than 50%		9.8%	12
	answered question		**122**
	skipped question		**113**

5. How does this compare with your company's claims experience on US sales?			
		Response Percent	**Response Count**
Much Higher		**44.2%**	53
Somewhat Higher		28.3%	34
Somewhat Lower		3.3%	4
Much Lower		8.3%	10
About the Same		15.8%	19
	answered question		**120**
	skipped question		**115**

6. On its sales to Canada, did your company experience any problems over the past five years related to payments?

		Response Percent	Response Count
Yes		**53.8%**	91
No		46.2%	78
	answered question		**169**
	skipped question		**66**

7. What percent of your company's bad debt over the past five years has come as a result of sales to Canada?

		Response Percent	Response Count
0-5%		**63.0%**	58
5-10%		10.9%	10
10-20%		9.8%	9
20-30%		3.3%	3
30-40%		5.4%	5
40-50%		2.2%	2
More than 50%		5.4%	5
	answered question		**92**
	skipped question		**143**

8. What reduction in its final collections have payments problems on Canadian sales created for your company?

		Response Percent	Response Count
0-5%		**55.7%**	49
5-10%		19.3%	17
10-20%		13.6%	12
20-30%		3.4%	3
30-40%		2.3%	2
40-50%		1.1%	1
More than 50%		4.5%	4
	answered question		**88**
	skipped question		**147**

9. How does this compare with your company's bad debt experiences on sales within the US?			
		Response Percent	**Response Count**
Much Higher		**38.6%**	34
Somewhat Higher		21.6%	19
Somewhat Lower		9.1%	8
Much Lower		8.0%	7
About the Same		22.7%	20
	answered question		**88**
	skipped question		**147**

10. Does your company incorporate PACA Trust language on its invoices?			
		Response Percent	**Response Count**
Always		**87.7%**	164
Usually		1.6%	3
Sometimes		2.7%	5
Never		8.0%	15
	answered question		**187**
	skipped question		**48**

11. How often does your company contact a PACA field office with a question regarding quality or payment?

	Response Percent	Response Count
Weekly	3.2%	6
Monthly	8.6%	16
A few times a year	**49.7%**	92
Once a year	8.6%	16
Less than once a year	20.0%	37
Never	9.7%	18
	answered question	**185**
	skipped question	**50**

12. Has your company used the PACA Trust over the past five years to assist with collections from US customers who have filed for bankruptcy?

		Response Percent	Response Count
Yes		**67.8%**	124
No		32.2%	59
	answered question		**183**
	skipped question		**52**

13. If so, how many times has your company used the PACA Trust over the past five years to assist with collections from US customers who have filed for bankruptcy?

		Response Percent	Response Count
1		20.8%	25
2		**29.2%**	35
3		22.5%	27
4		6.7%	8
5		4.2%	5
More than 5		16.7%	20
	answered question		**120**
	skipped question		**115**

14. Has your company used the PACA Trust provisions in the Federal Courts over the past five years to secure a judgment or temporary restraining order against customers who have not filed bankruptcy, but simply refuse to pay or have not paid in a timely manner?

		Response Percent	Response Count
Yes		42.1%	75
No		**57.9%**	103
	answered question		**178**
	skipped question		**57**

15. If so, how many times has your company used the PACA Trust provisions in the Federal Courts over the past five years to secure a judgment or temporary restraining order against a delinquent customer before that customer has filed for bankruptcy protection?

		Response Percent	Response Count
1		**30.6%**	22
2		**30.6%**	22
3		19.4%	14
4		4.2%	3
5		4.2%	3
More than 5		11.1%	8
	answered question		**72**
	skipped question		**163**

16. How much has the PACA Trust helped your company to recover over the past five years?			
		Response Percent	**Response Count**
Less than $10,000		**39.9%**	67
$10,000-$25,000		11.9%	20
$25,000-$50,000		17.3%	29
$50,000-$100,000		10.7%	18
More than $100,000		20.2%	34
	answered question		**168**
	skipped question		**67**

17. Has the protection provided by the PACA Trust had any effect on your company's ability to secure credit over the past five years?

	Response Percent	Response Count
Yes, to an important degree	18.8%	31
Yes, somewhat	20.0%	33
Not very much	21.8%	36
None at all	**39.4%**	65
	answered question	**165**
	skipped question	**70**

18. Which of the ranges below best describes your company's annual sales revenues?			
		Response Percent	**Response Count**
Less than $ 1 million		4.1%	7
$1-10 million		20.6%	35
$10-50 million		**37.1%**	63
$50-100 million		15.9%	27
More than $100 million		22.4%	38
	answered question		**170**
	skipped question		**65**

FINAL REPORT OF THE FEDERAL-PROVINCIAL WORKING GROUP ON FAIR AND ETHICAL TRADING PRACTICES IN THE CANADIAN HORTICULTURAL SECTOR

For submission to the joint meeting of the:

Federal-Provincial-Territorial Agriculture Policy
Assistant Deputy Minister Committee
and
Federal-Provincial-Territorial Agriculture Regulatory
Assistant Deputy Minister Committee

May 12, 2009

FINAL REPORT OF THE FEDERAL-PROVINCIAL WORKING GROUP ON FAIR AND ETHICAL TRADING PRACTICES IN THE CANADIAN HORTICULTURAL SECTOR

GLOSSARY OF ABBREVIATIONS AND TERMS

AAFC	Agriculture and Agri-Food Canada
ACAAF	Advancing Canadian Agriculture and Agri-Food Program
BIA	Bankruptcy and Insolvency Act
CAP Act	Canada Agricultural Products Act
CBA	Canadian Bankers Association
CFIA	Canadian Food Inspection Agency
CHC	Canadian Horticultural Council
CPMA	Canadian Produce Marketing Association
DRC	Fruit and Vegetable Dispute Resolution Corporation
FPA	Fresh Produce Alliance
FPT ADMs	Federal-Provincial-Territorial Assistant Deputy Ministers
LARs	Licensing and Arbitration Regulations
MRAS	Market Research and Analysis Section (AAFC)
NAFTA	North American Free Trade Agreement
OMAFRA	Ontario Ministry of Agriculture, Food and Rural Affairs
OSB	Office of the Superintendent of Bankruptcy
PACA	Perishable Agricultural Commodities Act
USDA	United States Department of Agriculture

Fresh Produce – for the purposes of the Working Group and this report, the fresh produce sector is comprised of fresh fruits and vegetables, including potatoes and mushrooms.

Horticulture – the horticulture sector is defined as including fresh fruits and vegetables, potatoes, mushrooms, floriculture, nursery and sod, Christmas trees and honey.

Perishable Agricultural Commodities – includes fresh fruits and vegetables of every kind, including those frozen or packed in ice and cherries in brine. This definition concurs with the definition of perishable agricultural commodities in the U.S. *Perishable Agricultural Commodities Act.*

"Pervasive" – employed in this report, and in the Terms of Reference of the Federal-Provincial Working Group on Fair and Ethical Trading Practices in the Horticultural Sector, to indicate "frequent".

FINAL REPORT OF THE FEDERAL-PROVINCIAL WORKING GROUP ON FAIR AND ETHICAL TRADING PRACTICES IN THE CANADIAN HORTICULTURAL SECTOR

EXECUTIVE SUMMARY

INTRODUCTION

This report presents the work and includes recommendations of the Federal-Provincial Working Group on Fair and Ethical Trading Practices in the Canadian Horticultural Sector. The Working Group was established by the Federal/Provincial/Territorial Assistant Deputy Ministers for Agricultural Policy (FPT Policy ADMs) in the fall of 2006, in response to concerns expressed by the Fresh Produce Alliance (FPA), representing the Canadian fresh fruit and vegetable industry, regarding fraud and unethical business practices by market participants.

The Working Group, consisting of six (6) federal departments and agencies and all provinces except Newfoundland and Labrador,[1] held its first meeting in November, 2006. Its mandate was to validate the pervasiveness of imprudent and unethical business practices in the fresh produce sector, to review recommendations made by the Fresh Produce Alliance (FPA)[2] in the *Hedley Report*[3], to identify situations where industry/government collaboration could increase financial stability while meeting the changing demands of the marketplace; and prepare a federal/provincial response document examining possible options for action to the FPT Policy ADMs.

In addition, the mandate of the Working Group fulfilled a commitment by Minister Strahl, AAFC, to the U.S. Secretary of Agriculture Mitchell, to explore measures to improve the financial stability of fresh produce sellers in Canada.[4]

It was a priority of the Working Group to work closely with the FPA. The co-chairs of the Working Group met regularly with members of the FPA, and the Working Group gratefully acknowledges the contribution of the FPA in facilitating and developing the qualitative and quantitative surveys, as well as providing valuable expertise, insight and information to the Working Group.

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[1] Membership of the Federal-Provincial Working Group on Fair and Ethical Trading Practices in the Canadian Horticultural Sector is attached to this document as Annex A.

[2] The Fresh Produce Alliance is an industry association comprised of the Canadian Produce Marketing Association, the Fruit and Vegetable Dispute Resolution Corporation, and the Canadian Horticultural Council.

[3] *Report to the Fresh Produce Alliance on the Financial Practices of the Canadian Horticulture Sector*, or "*Hedley Report*", by Douglas Hedley, can be found on the Fresh Produce Alliance website at http://www.freshproducealliance.com/text/publication_Eng.htm

[4] Former U.S. Secretary of Agriculture Mike Johanns wrote letters to former federal Ministers of Agriculture Andy Mitchell and Chuck Strahl in July 2005 and December 2006, respectively, requesting consideration of a statutory deemed trust provision. Minister Strahl responded in February, 2007, informing the Secretary that a working group had been formed to review industry recommendations for improving fair ad ethical trading practices, including a trust similar to that of the *U.S. Perishable Agricultural Commodities Act* (*PACA*) and advised that the Working Group would be submitting a Final Report containing recommendations for potential government actions.

THE FRESH FRUIT AND VEGETABLE INDUSTY IN CANADA

Farm gate value for all fruits and vegetables produced in Canada is estimated to be $3.1 billion in 2007. Of this, $1.1 billion is exported, mostly to the United States. Imports have grown steadily and are continuing to increase with the 2007 value at $6.3 billion involving trade with countries from around the world. A significant amount of produce consumed in Canada is imported from the United States.

THE *HEDLEY REPORT*

The FPA would like Canada to adopt the recommendations in the *Hedley Report*,[5] which it presented to the FPT Policy ADMs in June, 2006. The report proposes several areas for government action, notably delegation of federal and provincial licensing and arbitration responsibilities for fresh produce trade to a third party non-government organization, as well as adoption of a regulatory framework mirroring the U.S. *Perishable Agricultural Commodities Act* (*PACA*), including a statutory deemed trust for the fresh produce industry. The report also recommends increased market information, increased law enforcement against fraudulent bankruptcy within the sector and methods for improving industry awareness.

CANADIAN REGIME

The government of Canada is responsible for matters relating to trade and commerce, including interprovincial and export trade, bankruptcy and insolvency, and criminal law. Provincial governments are responsible for property and civil rights, including contract law, civil law matters, and intraprovincial trade.

Federal Jurisdiction

The Canadian Food Inspection Agency (CFIA) is the federal agency responsible for regulating fair and equitable trade practices in the Canadian fresh fruit and vegetable sector. Its authority is derived from the *Licensing and Arbitration Regulations (LAR*s) made pursuant to the *Canada Agricultural Products Act (CAP Act)*[6] The *LAR*s set out licensing requirements for the purposes of international and interprovincial trade in fresh produce, as well as the duties, standards and rules which licensees must follow.

The Fruit and Vegetable Dispute Resolution Corporation (DRC), a private, non-profit organization of produce and transportation companies established in 1999, pursuant to the North American Free Trade Agreement, can address issues regarding contract law, intra provincial transactions and timeliness of enforcement and arbitration, which may be beyond the authority of the *LAR*s. To accommodate the DRC, the *LAR*s were amended to exempt members of the DRC from the regulations. Over 80% of all dealers required to

[5] *Report to the Fresh Produce Alliance on the Financial Practices of the Canadian Horticulture Sector*, or "*Hedley Report*" can be found on the Fresh Produce Alliance website at http://www.freshproducealliance.com/text/publication_Eng.htm

[6] The *CAP Act* can be found at *http://laws.justice.gc.ca/en/C-0.4/SOR-84-432*

hold a federal produce licence have chosen membership with the DRC over being licensed under the *LAR*s.

Canada's bankruptcy and insolvency regime is governed by the *Bankruptcy and Insolvency Act (BIA).* Section 81.1 of the *BIA* provides unpaid suppliers with the right to repossess their goods that were delivered to a purchaser who subsequently became bankrupt or had a receiver appointed over its property. However, in order to be repossessed, the goods must be identifiable as the goods delivered by the seller and in the same state as when they were delivered, stipulations which are often problematic for a seller of perishable produce.

Section 81.2 of the *BIA* provides unpaid farmers, fishermen and aquaculturalists with a priority charge over all the inventory of a debtor who became bankrupt or had a receiver appointed over their property.[7] The priority charge ranks above every other claim or right in respect of inventory except the right of repossession under s. 81.1 of the *BIA*.

Provincial Jurisdiction

Provinces are responsible for governing intraprovincial agricultural commerce. Provinces have legislation which provides regulatory power to create marketing boards and commissions with authority in relation to licensing and registration, as well as authority to request financial securities, although the processes for provinces to operationalize these marketing powers are extensive and complex. Each province also possesses a *Sale of Goods Act* or similar dispositions such as those contained in the *Quebec Civil Code.* These acts contain provisions pertaining to the formation, effects and actions for breach of contract and other general remedies and rights of an unpaid seller. Provincial methods for dispute resolution include bringing matters to Small Claims Court or the provincial Superior Court, or mediation or arbitration.

AMERICAN REGIME

The U.S. fresh produce sector is governed by the *PACA*, which is administered by the United States Department of Agriculture (USDA). The *PACA* requires federal licensing of all individuals operating in the U.S. who are engaged in interstate and international fresh produce trade and the public disclosure of information and bonding for licensees with a history of non-payment, bankruptcy, and other non-compliant business activities. The *PACA* provides dispute resolution mechanisms for those who wish to resolve contractual disagreements through mediation and arbitration as opposed to resorting to the judicial system. The *PACA* also creates a statutory trust on all fresh and frozen fresh produce transactions. The trust mandates that unpaid produce suppliers be considered priority creditors during the liquidation of a bankrupt estate's assets.

STAKEHOLDER PERSPECTIVES

[7] This is a right of charge over inventory equal to the value of sales from farmers, fishermen and aquaculturalists. It is not a charge against other assets such as accounts receivable, cash, or other equity.

The Working Group heard from the FPA, and its constituent members the DRC, the Canadian Produce Marketing Association (CPMA) and the Canadian Horticultural Council (CHC). The Working Group also heard from other stakeholders in the Canadian and American fresh produce industries. They were: the CPMA Grower/Shipper Task Force; participants in a qualitative survey of members of the fresh fruit and vegetable value chain conducted for the Working Group; selected grower/shippers interviewed by Alberta, Ontario, Nova Scotia, and Prince Edward Island; Oppenheimer Group, a Canadian marketing, importing and financing company; and Western Growers Association, a U.S. produce marketing association.

The Working Group sought the view of the Canadian financial industry, namely the Canadian Bankers Association (CBA), and Farm Credit Canada (FCC), as well as the perspective of a trustee in bankruptcy Deloitte and Touche, LLP.

To better understand the issue of law enforcement in the sector, the Working Group heard from a representative of Donald McCleery & Associates, who presented a report prepared for the FPA on the topic. [8]

The Working Group co-chairs met with USDA officials in Washington, D.C., in February, 2007, where the USDA reiterated the position that Canada should adopt a *PACA*-like deemed trust. Finally, a USDA representative presented to the whole Working Group, in May, 2007, on the elements of the *PACA* program and how it functions in practice.

WORKING GROUP RESEARCH

In response to industry allegations that bankruptcies are a significant problem within this sector, the Working Group obtained statistical information from the DRC and from the Office of the Superintendant of Bankruptcy (OSB), which demonstrated that between January 1999 and December 2006, there were 50 bankruptcies in the Canadian fresh fruit and vegetable sector. The 50 bankruptcies represent losses to all creditors, not only those who supplied fresh fruits and vegetables, of approximately $19.1M during the eight year period. Even if the erroneous assumption was made that the total liabilities of $19.1M was owed exclusively to sellers of fresh produce, this loss would represent 0.08% of total annual sales in the fresh fruit and vegetable industry.

The Working Group found that bad debt (accounts receivable that will likely remain uncollectible) to Quebec horticultural producers, recorded by the Quebec branch of the Canadian Agricultural Income Stabilization Program, averaged less than 1.3% of gross revenue between 2003 to 2006 inclusive.

The Working Group conducted a quantitative internet survey of the Canadian fresh produce value chain to measure the frequency and impact of delayed, partial and non-

[8] "*Report for the Fresh Produce Alliance*" by Jean-Louis Granger can be found on the Fresh Produce Alliance website at www.freshproducealliance.com/Download/20060213McCleery's%20report%20anglais%202.doc

payment in the Canadian fresh produce marketplace.[9] Survey results indicate that delayed, partial and non-payment occur in the Canadian fresh produce market, but the associated losses are not usually severe and that due diligence practices on the part of the Canadian fresh produce industry were frequently lacking.[10]

WORKING GROUP OBSERVATIONS

1) Delayed, partial and non-payment occur in the Canadian fresh produce market but it is not evident that the problems are significant.

2) Losses to the Canadian fresh fruit and vegetable industry resulting from bankruptcy form a very small percentage of the gross sales in the sector.

3) Risky credit practices and lack of due diligence are pervasive throughout the Canadian fresh fruit and vegetable industry.

4) The protections provided under section 81.2 of the *BIA* offer considerable protection for unpaid farmers in a buyer bankruptcy situation, but may not be well understood. Section 81.1 offers only limited protection to other sellers of many perishable fresh produce products.

5) There are various federal and provincial remedies for breach of contract (courts, *Sales of Good Act/Quebec Civil Code*, mediation and arbitration). These may be under-utilized.

6) Government and industry initiatives have been completed or are underway which address some of the concerns of industry (recent and proposed amendments to LARs, improvements to market information through enhancement of AAFC's InfoHort and FPA data collection project, new DRC bonding policy).

7) Statutory provision of super-priorities that impact the secured creditor status of banks and other lenders could have a negative impact on the availability of credit within the fresh produce industry.

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[9] Survey results are published in the "*Report on the Survey of the Commercial Practices of the Canadian Fresh Fruit and Vegetable Value Chain*", attached to this report as Annex B. Data collected by the survey pertained to 2007 only. Results indicated that : 51% of respondents reported losses to non-payment in 2007 (Annex B, p. 47); the average total net financial losses due to non-payment in the sector represented 0.80% of reported sales (Annex B, p. 78); 67.5 % of respondents reported unauthorized payment reductions (partial payments) (Annex B, p. 58); the average total net financial losses due to partial payments represented 1.24% of reported gross sales (Annex B, p.67); and 77% of businesses reported instances of delayed payment, which were received significantly beyond the agreed upon credit terms (Annex B, p. 68), with losses of approximately $0.54 million, which represented on average 0.39% of reported gross sales (Annex B, p. 78). Questionnaire of the "Survey on the Commercial Practices of the Canadian Fresh Fruit and Vegetable Industry" is attached to this document as Annex C.

[10] Survey results indicated that 33% of businesses rarely or never verify the credit rating of new clients (Annex B, p. 42); only 20% verify that new accounts hold a CFIA licence and only 27% verify that the new account is a DRC member, all or most of the time; and 7% consult the DRC for background information all or most of the time (Annex B, p. 42).

8) Because of the jurisdictional separation of intra-provincial and export trade and interprovincial trade, delegation of federal and provincial licensing powers to a third party non-government organization or adoption of a PACA-like statutory trust each raise difficult administrative, jurisdictional and political issues in Canada.[11]

RECOMMENDATIONS

As part of its work toward developing recommendations for government and industry action, the Working Group reviewed current industry and government initiatives. It also considered potential actions, primarily by the federal government. As well it considered exploratory actions such as a private insurance regime and of a default contract. The Working Group also examined the feasibility of various licensing regimes and conducted significant research and review on the feasibility and value of establishing a *PACA*-like deemed trust for the Canadian fresh fruit and vegetable industry. The following are the recommendations of the Working Group for the FPT Policy ADMs consideration:

1. Increased due diligence and credit risk management practices by industry

Working Group research demonstrated that, while delayed, partial and non-payment occur in the Canadian fresh produce market, these problems do not have an overall destabilizing impact on the industry. Also, losses to the Canadian fresh produce industry resulting from bankruptcy are not significant. In light of these findings, as well as the research findings indicating that risky credit practices and lack of due diligence are pervasive throughout the Canadian fresh produce industry, the Working Group recommends greater uptake by industry of credit risk management practices and due diligence, which are recognized as the best defence against fraud and other unethical behaviour. In cases of fraud and non-payment, the Working Group also recommends greater utilization of existing provincial and federal legal remedies.

2. Increased industry awareness and education

In some cases, lack of awareness and understanding of good due diligence practices and available legal remedies such as section 81.2 of the *BIA*, and provincial remedies, contribute to the problem. Consequently, the Working Group recommends that governments assist, where appropriate, industry efforts to improve awareness and utilization of better credit policies, due diligence practices, and existing non-payment legal remedies in the Canadian fresh produce industry for Canadian and foreign sellers.

3. Pursue current industry and government initiatives

The Working Group has noted government and industry initiatives which address some of the concerns of industry, i.e., improvements to Canadian markets information and CFIA's proposed amendments to the *LAR*s. The Working Group recommends that these initiatives continue to be pursued, and that CFIA continue to work closely with the FPA toward advancing the proposed amendments.

[11] For further explanation of Canadian jurisdictional responsibilities, see Annex C: Jurisdictional Responsibility in Canada for Payment Problems in the Canadian Fresh Produce Sector: Graph

4. Establishment of industry-government task force

The Working Group believes that an industry-government forum would facilitate the implementation of the above recommendations and permit sharing of industry and government expertise and foster collaborative efforts. Consequently, the Working Group recommends that FPT Policy ADMs establish an industry-government task force to address the recommendations of this report and other potential approaches to improve the trading environment in the fresh produce sector. The proposed mandate of the industry-government task force is found in Annex D, "Industry-Government Task Force: Proposed Action Plan".

FINAL REPORT OF THE FEDERAL-PROVINCIAL WORKING GROUP ON FAIR AND ETHICAL TRADING PRACTICES IN THE CANADIAN HORTICULTURAL SECTOR

INTRODUCTION

The purpose of this report is to provide information and advice to Federal/Provincial/Territorial Assistant Deputy Ministers for Agricultural Policy (FPT Policy ADMs) on the nature and significance of financial risks to sellers in Canadian fresh produce markets. This includes concerns raised by representatives of the Canadian fresh produce industry involving improper and unethical behaviour or the use of imprudent business practices by market participants.

The information and advice in this Final Report are based on the conclusions and recommendations of the Federal-Provincial Working Group on Fair and Ethical Trading Practices in the Canadian Horticultural Sector[1]. The Working Group, which held its first meeting in November 2006, has a mandate to:

1. determine the pervasiveness of imprudent and unethical business practices in the fresh produce sector from the national and provincial perspectives;
2. analyse and evaluate the measures and actions recommended for government in the *Report to the Fresh Produce Alliance on the Financial Practices of the Canadian Horticulture Sector,* generally referred to as *The Hedley Report*;[2]
3. identify options for industry and/or government action to improve the financial security of sellers; and
4. provide advice to FPT Policy ADMs in the form of conclusions and recommendations.

In addition to providing a response to the Fresh Produce Alliance[3] (FPA) which requested that governments address issues related to fraud, slow, adjusted or non-payment in the fresh produce sector, this report also fulfills a commitment by the federal Minister of Agriculture and Agri-Food to the U.S. Secretary of Agriculture to explore measures to improve the financial stability of fresh produce sellers in Canada, including use of a statutory deemed trust provision similar to that in the U.S. *Perishable Agricultural Commodities Act* (*PACA*).[4]

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[1] The Federal-Provincial Working Group on Fair and Ethical Trading Practices in the Canadian Horticultural Sector consists of representatives from all provinces except Newfoundland and Labrador and from Agriculture and Agri-Food Canada (AAFC), the Canadian Food Inspection Agency (CFIA), Industry Canada (IC), the Office of the Superintendent of Bankruptcy (OSB), the Department of Foreign Affairs and International Trade (DFAIT) and the Privy Council Office (PCO). It was co-chaired by Bob Forrest, Ontario Ministry of Agriculture, Food and Rural Affairs (OMAFRA) and Mark Ziegler and Ron Gerold, AAFC. Membership of the Federal-Provincial Working Group on Fair and Ethical Trading Practices in the Canadian Horticultural Sector is attached to this document as Annex A.

[2] *Report to the Fresh Produce Alliance on the Financial Practices of the Canadian Horticulture Sector,* or "*Hedley Report*", by Douglas Hedley, can be found on the Fresh Produce Alliance website at: http://www.freshproducealliance.com/text/publication_Eng.htm

[3] The Fresh Produce Alliance is comprised of the Canadian Horticultural Council, the Canadian Produce Marketing Association and the Fruit and Vegetable Dispute Resolution Corporation.

[4] Former U.S. Secretary of Agriculture Mike Johanns wrote letters to former federal Ministers of Agriculture Andy Mitchell and Chuck Strahl in July 2005 and December 2006, respectively, requesting

The focus of this report is on market transactions in the fresh produce industry in Canada and what role industry and federal and provincial governments could have in helping address the problems identified in the *Hedley Report*. Since the majority of fresh produce sold in Canada is imported, the marketing channels involve both Canadian and foreign interests. Sellers within the fresh produce value chain include growers, shippers, packers, brokers and distributors. Buyers include processors, wholesalers and retailers. The imprudent and/or unethical business practices being described in this report range from sellers who do not conduct rudimentary due diligence on potential trading partners or document transactions to instances where sellers are adversely affected by slow payment, adjusted payment (clipping) and no payment.

This report is in seven parts. The first describes the fresh produce markets in Canada, with an emphasis on marketing channels and buyer-seller relationships. The second provides an overview of the *Hedley Report* and its recommendations for industry and government action to improve the financial security of fresh produce sellers in the Canadian marketplace. The third section describes the regulatory regimes for fresh produce and markets in Canada and the U.S. as well as a general overview of various legal remedies existing in Canada related to resolving contract disputes and bankruptcy and insolvency. The fourth presents an overview of information gathered by the Working Group culminating from stakeholder and expert representations and research on the state of financial security of sellers in fresh produce markets. The fifth presents the Working Group's observations and findings. The sixth describes actions considered by the Working Group in light of its observations and findings, and the seventh and final section details the Working Groups final recommendations.

The FPA has been a much appreciated source of information, expertise and insight for the Working Group. The important contributions of the many stakeholders and government officials who made presentations to the Working Group over the last twenty months are also gratefully acknowledged.

PART I: THE FRESH FRUIT AND VEGETABLE INDUSTRY IN CANADA

The fruit and vegetable industry in Canada, including field, orchard and greenhouse crops, contribute to the agricultural economies of most provinces, especially the Maritimes, Quebec, Ontario and British Columbia. The trade in these commodities extends significantly beyond that which is related to domestic production, as a significant amount of produce consumed in Canada is imported from the United States. Farm gate value for all fruits and vegetables produced in Canada is estimated to be $3.1 billion in 2007. Of this, $1.132 billion is exported, mostly to the United States. Imports have grown steadily and are continuing to increase with the 2007 value at $6.3 billion involving trade with countries from North and South America, Europe, Asia and Africa.

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consideration of a statutory deemed trust provision. Minister Strahl responded in February, 2007, informing the Secretary that a working group had been formed to review industry recommendations for improving fair ad ethical trading practices, including a deemed trust similar to that of the U.S. *Perishable Agricultural Act* (*PACA*), and advised that the Working Group would be submitting a Final Report containing recommendations for potential government actions.

The Canadian fresh produce industry is characterized by many relatively small producers selling to local markets, but large domestic producers are building a greater profile in horticulture and are selling directly to retail grocery and food service chains. This is coinciding with the trend towards concentration, globalization and integration of production, distribution and marketing in both the Canadian and international fresh produce markets. Today, fresh produce may move from producers residing anywhere in the world through dealers, brokers, and commission merchants or wholesalers and retail or food service businesses before reaching Canadian consumers. On the other hand, it may move through rationalized value-chains where retailers are entering direct contracts with growers which may involve international movements of product.

PART II: THE HEDLEY REPORT

The *Hedley Report*, commissioned by the FPA and presented to the FPT Policy ADM's in June, 2006, identifies the following issues and recommendations:

Registration of Dealers

Hedley believes that licensing gaps prevent government and industry from regulating the Canadian fresh produce trade effectively. The current fresh fruit and vegetable market regime does not require licensing of dealers who buy exclusively within a province in which their business is located and sell intra-provincially, inter-provincially, or internationally.

Hedley recommends the following federal and provincial actions to maximize licensing of dealers: Federal regulatory amendments to the *Licensing and Arbitration Regulations* (*LAR*s) created under the *Canada Agricultural Products* (*CAP*) *Act* requiring fresh produce dealers who buy exclusively within a province but market internationally and inter-provincially to be licensed with the Canadian Food Inspection Agency (CFIA) and/or be registered with a single third-party organization such as the Fruit and Vegetable Dispute Resolution Corporation (DRC). Provincial governments would legislate that dealers be licensed for intra-provincial trade; or FPT agreements requiring these dealers be licensed with the CFIA or with a single third-party organization like the DRC; or FPT agreement and legislative and regulatory amendments which would consolidate federal and provincial licensing arrangements within a single third-party organization like the DRC.

Responsibly Connected Individuals

Canadian regulations prevent the public disclosure of information on "responsibly connected individuals"[5], although a licensee through the CFIA must provide details of "responsibly connected individuals" for the agency's records.

[5] "Responsibly connected individuals" are defined in the *PACA* as those who are actively engaged or affiliated with a commission merchant, dealer, or broker, as partner in a partnership, or an officer, director, or holder of more than 10 % of the outstanding stock of a corporation or association.

Hedley recommends the collection and publication of information on responsible persons and related corporate identification as a requirement of licensing. Such disclosure of information would allow the CFIA and ultimately the industry to track individuals with a history of unethical activities involved in the fresh produce industry. It should be noted that the DRC follows the *PACA* requirements by obliging its members to disclose information on "responsibly connected individuals" to their businesses.

Financial Responsibility

Hedley alleges that there is no non-payment recovery protection under the *CAP Act* and Regulations, since currently the amount of bond or security established through CFIA only covers CFIA inspection fees. The *Hedley Report* also interprets the *Bankruptcy and Insolvency Act* (*BIA*) as offering only negligible protection for Canadian suppliers of perishable produce whose identity and value depreciates in a short time-frame and which move rapidly onto wholesale and retail markets. Hedley points out that the perishable nature and rapid depreciation of fresh produce make asset recovery virtually pointless and secured creditors continue to have priority standing over unsecured creditors including fresh produce suppliers upon liquidation of assets during bankruptcy proceedings.

Hedley recommends: amending the *CAP Act* and the *LAR*s to create a bonding regime for produce suppliers dealing with slow payment situations, and create similar provincial legislation; amending the *CAP Act* and *LAR*s to create a default contract between buyer and seller whenever no other contract is in place for perishable produce; and amending the *CAP Act* and *LAR*s or creating new legislation and regulations such that perishable agricultural commodities are sold under a statutory trust; and apply similar trust provisions under any new or existing provincial licensing and arbitration legislation for fresh produce. Hedley also proposes the creation of a private sector insurance arrangement covering both buyer and seller as another potential remedy.

Market Policing

The *Hedley Report* recommends federal, provincial and territorial governments strengthen enforcement by police, the CFIA, Canada Revenue Agency, and the Superintendent of Bankruptcy in order to assist in making the fresh produce sector less attractive to criminal elements.

Industry Awareness and Market Information

Hedley observes that a high proportion of transactions in the Canadian fresh produce industry are by verbal arrangement without written contracts in place. He also notes that exceptional competitive pressures often cause sellers to not carry out sufficient due diligence in assessing the risks involved in transactions with unfamiliar buyers. This culture, according to Hedley, is a significant factor behind the losses in the sector and why it is an attractive environment for organized crime. Along side his call for regulatory reform and greater policing, Hedley states that industry members must practice better business risk decision-making. Hedley recommends that industry collectively mount an information campaign and provide an on-line and telephone service to alert members to problems in the industry, promote due diligence and provide information on

default contracts and the need for written contracts. Hedley also recommends that AAFC and Statistics Canada strengthen and upgrade the timeliness and coverage of the information available on the fresh produce industry as well as through InfoHort.

PART III: OVERVIEW OF CANADIAN AND AMERICAN REGIMES

The Canadian Constitution sets out the areas over which each level of government has jurisdictional authority. The Government of Canada is responsible for matters relating to trade and commerce, including interprovincial and export trade, bankruptcy and insolvency, and criminal law. Provincial governments are responsible for property and civil rights, including contract law and civil law matters, as well as matters of a local or private nature within the province which would include intraprovincial trade. Consequently, the adoption of the regulatory regime proposed in the *Hedley Report* would likely require significant federal-provincial statutory action by the various departments/agencies responsible for administering these jurisdictions and potentially federal-provincial agreements. It is the understanding of the Working Group that jurisdictional considerations were not as significant a factor in the United States (US), as they would be in Canada, when the Congress enacted the *PACA* (which applies only to interstate and export trade). The following paragraphs provides a brief overview of the US and Canadian regimes with the goal of assisting the reader to understand the broader context faced by the Working Group.

CANADIAN REGIME: FEDERAL JURISDICTION

Licensing and Arbitration

CFIA is responsible for regulating fair and equitable trade practices in the Canadian fresh fruit and vegetable sector. Its authority is derived from the *LAR*s made pursuant to the *CAP Act.*[6]

The *CAP Act* contains the authority to regulate the marketing of agricultural products, including the licensing of dealers, the bonding of dealers as a guarantee that they will comply with the terms and conditions of their licence, authorities related to the renewal, suspension and cancellation of licenses and record keeping. "Marketing" is defined in the *CAP Act* as "*the preparation and advertisement of agricultural products and includes the conveyance, purchase and sale of agricultural products and any other act necessary to make agricultural products available for consumption or use*". The regulatory framework is intended to reduce the incidence of fraud by establishing trading standards, rules, and a language of commerce by which transactions must be conducted. Federal regulatory provisions have existed in some form since the 1930's in Canada.

The *CAP Act* also contains the authority to establish a Board of Arbitration to function as a commercial dispute resolution mechanism for buyers and sellers of fresh produce. Any shipper or seller (including firms outside of Canada) may file a complaint with the Board of Arbitration when their trading partner is a licensee under the *CAP Act*. The Board of Arbitration adjudicates commercial complaints against licensees by shippers for alleged

[6] The *CAP Act* can be found at *http://laws.justice.gc.ca/en/C-0.4/SOR-84-432*

failure to comply with the regulations and the prescribed standards. These standards include conditions for the preservation of condition of product, storage, transportation and quality. The Board is able to award compensation, including interest, to the complainant in order to provide relief for the breach of standard when a complaint is determined to be well founded. The Board is considered to be a court of record and has an official seal that is judicially noticed. The Board has—with respect to the appearance, swearing and examination of witnesses; the production and inspection of documents; the enforcement of its orders; and other matters necessary or proper for the due exercise of its jurisdiction—all such powers, rights and privileges as are vested in a Superior Court of record. Between 1999 and 2001, the Board of Arbitration handled 62 formal complaints valued at $422,638 (U.S.). Since 2001, there have been fewer complaints (less than 10 formal complaints) filed with the Board of Arbitration,[7] largely because sellers prefer to deal with disputes through the DRC.

The *LAR*s set out who must be licensed for the purposes of international and interprovincial trade in fresh produce, as well as the conditions for licensing and the duties, standards and rules which licensees must follow. The *LAR*s also establish certain duties for a dealer if they are handling product that has arrived in a damaged or deteriorated condition, including the obligation to request an inspection, to provide a basis for the resolution of commercial disputes. Growers marketing only products which they have grown, are exempt from licensing requirements, but may avail themselves of the dispute resolution mechanism, or, if experiencing payment problems, may contact the CFIA if efforts to obtain payment are unsuccessful. Depending on the situation, the CFIA may pursue licensing action against a dealer in the form of bonding, suspension or cancellation actions. Under the federal scheme, remittance of outstanding funds is not guaranteed, but licensing enforcement action may result. Similar to the *PACA* provisions, the past business history of licence applicants is taken into consideration and the *LAR*s provide for the ability to require the posting of bonds for assurances that the licensee will comply with the terms and conditions of the *LAR*s.

In 1974, a decision of the Board of Arbitration was challenged in court. The Federal Court of Canada in its ruling noted the *Act* contained no provision for the constitution of a Board of Arbitration, even though the *Produce Licensing Regulations* made such reference and granted the petitioner a writ of prohibition against the Board of Arbitration – essentially indicating there was no authority for the Board to exist or make such rulings. In its findings, the court also commented that even if all the provisions contained in the regulations were embodied in the *Act*, it would be possible to argue that the powers of the Board of Arbitration might constitute an infringement of the property and civil rights provisions of the Constitution. Following the decision, the Government of Canada amended its statute, the *CAP Act*, and incorporated the authority to permit the continued operation of the Board of Arbitration. The federal government interpreted the Court's comments, and in the establishment of the *LAR*s, limited reference to non-payment and contractual obligations to licensing actions rather than Board rulings to reduce the risk of further challenges. From an industry perspective, the limitation imposed upon the Board, by the Court, to licensing action only, resulted in a less effective licensing and dispute resolution scheme in Canada.

[7] Canadian Board of Arbitration, Fresh Products Section, Canadian Food Inspection Agency

The above noted legal challenge, the decision to limit addressing non-payment issues to licensing actions and a shift in CFIA priorities resulted in the fresh produce industry claiming that Canada's licensing and arbitration program was not meeting industry needs. While the current regulations speak to conducting "business in a manner consistent with fair and orderly business practices", the regulations do not specifically prescribe terms and conditions for "fair and orderly" business practices.

Some examples of trade practices that are of concern to the industry and Canada's trading partners include: buyers failing to make payment in accordance with the terms of the agreement, requests for price adjustments (clipping) based on changes in market prices from the time the product was ordered, and seeking a credit without substantiating that the condition of the delivered product has deteriorated.

In 1999, the DRC was established as a result of discussions pursuant to Article 707 of the North American Free Trade Agreement. This private, non-profit organization of produce and transportation companies could address issues regarding contract law, intra provincial transactions and timeliness of enforcement and arbitration, which may be beyond the authority of the *LAR*s, and which could be better dealt with by an independent organization. To accommodate the DRC, the *LAR*s were amended to exempt members of the DRC from the regulations. Over 80% of all dealers required to hold a federal produce licence have chosen membership with the DRC over being licensed.

The overall structure of the DRC has been modeled after the *PACA* and to a lesser extent the *LARs*. Currently, membership within the DRC is done on a voluntary basis, although some provincial-based organizations require DRC memberships. Members are obliged to adhere to the trading practices and standards set out by the DRC and various dispute resolution options are available to members, including binding arbitration enforceable in the courts. Unlike the Board of Arbitration, the DRC arbitrates matters that are contractual in nature between its members (e.g., non-payment or non-performance of a contract for both interprovincial and intraprovincial commerce).

Prior to the release of the *Hedley Report*, the CFIA had undertaken consultations with industry representatives and USDA - *PACA* officials regarding the provisions of the *LAR*s. The consultations were aimed at preparing a package of amendments that would harmonize the regulatory provisions, as much as possible, with *PACA* provisions and DRC's Trading Standards. A regulatory amendment (SOR/2006-150) promulgated in July 2006 has fulfilled one of the *Hedley Report* recommendations by effectively removing a licensing exemption which created a loophole that allowed for businesses failing to pay debts as they came due not to be licensed with CFIA. Prior to the amendment, new companies, whose total invoice value of produce purchased in the previous calendar year was under $230,000, were not required to be licensed. The CFIA noted that, in some cases, new companies, realizing that they were not subject to having to meet regulatory requirements, were failing to pay for product repeatedly and were ceasing operations temporarily to avoid fulfilling their financial obligations to suppliers. After a temporary ceasing of operations, the companies which had previously ceased operations prior to fulfilling their financial obligations would begin to source more products under a new identity and would once again be exempt from the Regulations and would repeat the same cycle. With this amendment, these dealers are now required to be

licensed and meet their financial obligations as they come due, and if they fail to meet these conditions, would be subject to licensing action e.g. bonding, suspension, and cancellation.

CFIA continues to work closely with fresh produce industry representatives to improve the business climate in the Canadian fresh produce marketplace. CFIA proposes to introduce a comprehensive regulatory amendment package during the next twelve months into Canada's regulatory amendment process. It is anticipated that the proposed amendments would improve the regulations in the following ways:

(i) strengthen the conditions for obtaining and maintaining a licence, as well as the employment and "responsibly connected" provisions;
(ii) revise exemption provisions to require licensing of those dealers who buy product in intra-provincial trade and then subsequently market the produce in export or interprovincial trade;
(iii) enhance duties for dealers, brokers, and commission merchants; and
(iv) revamp licence suspension and cancellation provisions.

Generally, the amendments proposed are intended to provide greater context around what it means to "conduct business in a manner consistent with fair and orderly business practices." It is anticipated that advancing this regulatory amendment proposal will enhance the federal regulatory framework on an interprovincial and international level for dealing with situations of no pay or slow pay through licensing action, but it is not expected that it will fully address the industry's concerns within intraprovincial markets. It is anticipated that advancing this regulatory amendment package will enhance bilateral regulatory cooperation between Canada and the United States.

These regulatory amendments will not address the financial risks to both buyers and sellers which arise from the reliance on verbal agreements for most transactions in fresh produce markets. Exercising due diligence prior to entering into these agreements can be challenging due to the perishable nature of the product and rapid changes in supply and demand within these markets. In these situations, ongoing and stable contractual relationships can provide an important safeguard. They help to establish how growers, shippers, wholesalers, brokers, and retailers are to share production risk and price variability, and influence both the distribution of and level of quality of produce available in the market.

Bankruptcy and Insolvency

Under the Canadian insolvency regime, there are three potential proceedings that may affect a seller's ability to collect a debt. They are a bankruptcy, a proposal and a receivership. In a bankruptcy, a "trustee-in-bankruptcy" is appointed. The bankrupt's property vests in the trustee, who is responsible for adjudicating and paying all claims out of that property. Secured creditors (i.e., those who have taken security in the bankrupt's property and made the necessary filings in a provincial personal property security registry or real property registry) are entitled to seize the property over which they have a security interest to satisfy debts owing to them. Unsecured creditors, on the other hand, are prevented from continuing collection efforts (e.g. litigation). Rather, they are required to

file a one page “Proof of Claim” with the trustee, which details the debt owed, and they are required to provide proof of the debt (e.g., an invoice). Filing a Proof of Claim is an inexpensive and simple process - neither court attendance nor a lawyer is required. The trustee liquidates the remaining property and distributes the proceeds to the creditors in accordance with the distribution scheme set forth in the *BIA.*

In a proposal, the debtors remains in control of their property while they attempt to negotiate a deal that will allow them to restructure their debts and continue in business. In this case, all creditors are stayed from collection efforts. Each creditor is entitled to vote on the proposal, which must obtain a double majority to be accepted (i.e., 50% of creditors and 2/3rds of the value of debts must be voted in favour of the proposal).

In a receivership, which may be created by a contract or by court order, a receiver is appointed to take control of the debtor's property. Unsecured creditors are entitled to payment out of the property subject to the receivership only after the secured creditor is paid in full. The result is similar to a bankruptcy, where secured creditors are entitled to be paid first out the property over which they have a security interest. The surplus is paid to unsecured creditors.

There are no deemed trust provisions specifically in favour of the fresh produce sector in the Canadian insolvency regime. However, the *BIA* does contain two provisions, sections 81.1 and 81.2, which may be relevant to the fresh produce industry in the event of bankruptcy or receivership of a purchaser. They do not apply under a proposal.

Right of Repossession – Section 81.1

Section 81.1 of the *BIA* provides unpaid suppliers with the right to repossess their goods that were delivered to a purchaser who subsequently became bankrupt or had a receiver appointed over its property. In order to take advantage of this section a number of requirements must be met, namely:

- the supplier must provide a written notice of their intention to repossess the goods to the purchaser, trustee or receiver within 30 days of delivering the goods;
- the goods are in the possession of the purchaser, trustee or receiver;
- the goods are identifiable as the goods delivered by the seller;
- the goods are in the same state as when they were delivered; and
- the goods have not been sold to an arm’s length party nor are they subject to an agreement for sale at arm’s length.

If the goods were partially paid for, the seller is entitled to repossess goods proportional to the unpaid amount so long as the requirements of the section have been satisfied. The repossession right ranks above every other claim or right in respect of those goods including rights of secured creditors.

Amendments to s. 81.1 were made under chapter 47 of the *Statutes of Canada*, 2005 but those amendments are not yet in force. The effect of the amendments will be to extend the period where unpaid suppliers would be entitled to repossess their goods.[8]

Farmer, Fishermen and Aquaculturalists' Charge – Section 81.2

Section 81.2 of the *BIA* provides unpaid farmers, fishermen and aquaculturalists with a priority charge over all the inventory of a debtor who became bankrupt or had a receiver appointed over their property.[9]

Goods delivered within the 15 days prior to a bankruptcy or receivership are subject to this section. In order to obtain the priority charge, the supplier must provide a Proof of Claim to the trustee within 30 days of the bankruptcy.

The priority charge covers all the inventory of or held by the purchaser and is not limited to the goods delivered by the particular unpaid farmer. Furthermore, unlike under s. 81.1, there are no other requirements to be satisfied. The priority charge ranks above every other claim or right in respect of inventory except the right of repossession under s. 81.1.

CANADIAN REGIME: PROVINCIAL JURISDICTION

Agricultural Marketing Regulation

Provinces are responsible for governing intraprovincial agricultural commerce within their respective borders. The provincial regulatory frameworks governing fresh produce commerce examined in this report are very similar in each jurisdiction.

With respect to marketing regulation, provinces have legislation which provides regulatory power to create boards and commissions with authority to oversee the promotion, marketing and regulation of specific agricultural products in the province. Boards and commissions are created at the request of specific industry groups and the powers granted to a particular board or commission differs depending on the needs of that segment of the agricultural industry.

The authority to make marketing regulations allow for the granting of authority to commissions or boards in relation to licensing and registration. This may include the power to decide who is required to have a license, under what conditions, exemptions, and prohibited behaviour that can be grounds for losing the privilege of holding a license. The licensing and registration powers can include the authority to decide what information is needed from a licensee. A general power is usually included which enables boards and commissions to address unforeseen circumstances that impact the regulation of activity within their sector of the agriculture industry. In all provinces but

[8] Currently, the period is limited to 30 days from delivery of the goods to delivery of the written notice. Under the amendments, the period will be extended to 45 days: good delivered within 30 days of a bankruptcy will be subject to the section and the supplier will have a further 15 days to deliver the written notice.

[9] This is a right of charge over inventory equal to the value of sales from farmers, fishermen and aquaculturalists. It is not a charge against other assets such as accounts receivable, cash, or other equity.

Manitoba, the authority to request financial securities (i.e. Bonds) is available. In Manitoba, the Manitoba Farm Products Marketing Council has the authority to perform other functions necessary to exercise its power under the *Farm Products Marketing Act.* Under such provisions, securities could be requested.

Financial Security

With respect to specific statutory powers offering financial security to sellers of agriculture products, none of the provincial statutes reviewed in this study have a trust similar to the one created under *PACA.* British Columbia has the authority under the *Agricultural Produce Grading Act* to require bonding of an applicant for a licence but this would only be possible if a grading system were set up for the applicable product. However, each provincial marketing act examined provides commissions or boards the authority to create pools of money or funds in order to guarantee, equalize or adjust payments. These pools of money or funds can be used to help ensure that sellers or producers receive the proceeds of their sales and serve as a means to help spread out potential losses between members governed by the boards and commissions.
As for a default contract, commissions and boards can establish the conditions and methods of sale and payment. This gives boards and commissions a lot of flexibility on how they want different transactions to occur. For example, the Ontario Tender Fruit Producers' Marketing Board has established a default contract under its regulations**.**

Not withstanding all of the above, the drivers necessary for any individual province to operationalize the various powers and structures contemplated in the preceding paragraphs are usually extensive and complex. Provincial governments do not typically change the levels of existing powers, or implement new ones without significant input from the commodity sector involved. In many provinces, Ontario for example, powers and authorities are delegated to commodity groups individually. Implementing the structures contemplated for the industry as a whole would involve altering about 25 agreements, assuming the support of those groups could be secured. In the absence of compelling arguments in support of such an initiative, and none are known to have been presented by provincial commodity sectors to date, it is unlikely that a proposal to proceed with such an initiative would receive much support. Additionally, it must be noted that, although some protections could be implemented for domestic producers through the contemplated mechanisms, no protection would exist beyond that group. Supply chain participants beyond the producer and outside the individual province in question would remain unprotected.

Property Law and the *Personal Property Security Act*

Each province examined also has a *Personal Property Security Act* (*PPSA*) or similar dispositions in the *Quebec Civil Code*. These provincial acts establish a comprehensive set of rules that govern the rights of debtors and creditors in the event personal property is used as collateral to secure payment of a debt. Personal property generally is any collateral other than real property, and includes vehicles, furniture, equipment, etc. The essence of this statute is that when parties to a transaction agree in a contract that payment will be guaranteed by an item of personal property, this guarantee is registered in a public database. Creditors, including unpaid fresh produce vendors, may secure

payment of a debt by having the debtor agree to give a security interest in the personal property of the debtor and registering a financing statement under the *PPSA***.** This information permits an entity to verify indebtedness of another entity or if an item of personal property is already put up as guarantee, another item might be requested. The database may also indicate how much collateral or guarantee an individual has leveraged against his or her debts. It also helps to establish priorities between entities with competing interests in that same personal property used as collateral. Similar registries exist for real estate and are used to identify the current owner and show all outstanding registered interests in the land, such as mortgages and liens. The public has the right to access these registries but the information may be complex and professional assistance may be required to access and understand the available information.

While theoretically possible for a seller of fresh produce to take security in a buyer's personal property or in the commodities that are the subject of their contractual relationship, the *PPSA* system is not practical for registering security which is perishable and fungible. Negotiating better contractual arrangements permitting non-judicial remedies in case of breach of contract probably provide better security against losses for fresh produce dealers. These could include contractual terms permitting, for example, a 3-day delay in payment or a percentage hold-back of the purchase price. Both options would permit the parties a cooling-off period to ensure they are satisfied with respect to each other's contract performance before final payment is made.

Civil Dispute Remedies

When a supplier is not paid, the supplier may sue the purchaser for breach of contract. The value of the claim determines in which court the action will be tried, with claims for smaller amounts being adjudicated in the Small Claims Court (for example < $25,000 British Columbia and Nova Scotia; < $10,000 Ontario; < $7,000 Quebec). Small Claims Court trials are often conducted without the assistance of a lawyer. Claims that are for a greater amount than this will be heard, depending on the province, in the provincial or territorial Superior Court, Supreme Court, or Court of Queen's Bench. These courts often have a streamlined procedure for smaller claims, for example the "Simplified Procedure" applies in Ontario to claims between $10,000 and $50,000. For all other claims the actions will be tried in accordance with the ordinary court procedure. For non-Small Claims Court trials an individual may represent him or herself, but court permission is often required for a corporation to be represented by a non-lawyer. That said, the participants in these trials are most often represented by lawyers.

All courts have procedures designed to support an expeditious resolution while ensuring that justice is done for the parties. The length of a trial, and the delay between filing a claim and obtaining a court date, is affected by many factors. In contract cases, if the claimant has a written contract and clear documentation regarding the transaction, issues will be more easily identified which often leads to a quicker and less expensive resolution. A straight-forward case, with limited issues in contention, may result in settlement without the need for a trial. If a trial is necessary, the case may proceed more quickly to trial and the trial will be shorter.

At the other extreme, if the contract is not written or there is limited documentation regarding the transaction, the supplier must prove his or her case through other means. The supplier will need to present witnesses to provide oral evidence as to the terms of the contract and the conduct of the transaction, which will lengthen the trial and increase costs. Further, it typically takes more time to obtain trial dates for longer trials as they are more demanding on court resources. Finally, the absence of clear documentation hinders the ability to settle, as parties are unable to objectively assess the strength of the other party's case based on the documentation and, therefore, must wait for oral evidence presented at trial or pre-trial discoveries to know all the evidence in the case against them. Therefore, although there are many factors that may increase a supplier's legal costs and the time between commencing a proceeding and having a trial – from strategic steps taken by the defendant to the court resources available in the jurisdiction of the trial – a supplier may increase the chances of a speedy, economical and successful resolution by maintaining a clear paper trail documenting the contractual arrangement and the conduct of the transaction. This due diligence, commonly referred to as 'papering the transaction', often ensures that disputes do not arise in the first place as all parties are clear on their obligations, assists when disputes do arise in bringing about a settlement, and finally assists when a settlement can not be obtained by securing a favourable and expeditious result in court.

Where a claimant is successful in a court proceeding, the court will issue a monetary judgment in his or her favour. If the defendant does not voluntarily pay the full amount of the judgment, the courts have procedures that will assist in collection, for example, through garnishment of the defendant's receivables or sale of the defendant's real property. If the defendant is unable to satisfy the judgment, he or she may be insolvent, and the defendant may either voluntarily become bankrupt or be forced into bankruptcy by his or her creditors. As discussed elsewhere in this report, bankruptcy means that the claimant will file with the trustee a proof of claim appending the judgment to it and wait for receipt of payment from the trustee as an unsecured creditor.

Contract law and the *Sale of Goods Act*

Each province also possesses a *Sale of Goods Act* or similar dispositions in the *Quebec Civil Code.* These acts contain provisions pertaining to the formation, effects and actions for breach of contract. They also contain provisions on the rights of unpaid sellers. These may include a right to retain the goods or the creation of a lien. All these rights apply according to the provisions of each provincial act, but only as long as the person who breached the contract has not become bankrupt. If bankruptcy has occurred the trustee in bankruptcy, in accordance with the *BIA*, will determine what the unpaid supplier is entitled to recover (see "Bankruptcy and Insolvency" above)**.**

This legislation, along with common law rules of contract law, is very important to the formation, performance and enforcement of contractual obligations that arise in the Canadian horticultural sector. The Ontario *Sale of Goods Act*, for example, contains statutory provisions setting out rules for the formation of a contract, effects of a contract, performance of a contract, the rights of unpaid sellers against goods sold, the availability of court actions for breach of contract and other general provisions. However, an

important provision in section 53 gives contracting parties great freedom to opt out of these default provisions to create their own terms of contract. It states that:

> Where any right, duty or liability would arise under a contract of sale by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties, or by usage, if the usage is such as to bind both parties to the contract.

Furthermore, the Ontario *Sales of Good Act* also contains specific provisions relating to contracts for perishable goods. Sections 7 and 8 set out general rules whereby if specific goods of a contract of sale or an agreement to sell have perished before the contract is made, or before the risk has passed to the buyer in an agreement for sale, the contract or the agreement is void. As well, section 46(3) states that: "Where the goods are of a perishable nature or where the unpaid seller gives notice to the buyer of intention to resell and the buyer does not within a reasonable time pay or tender the price, the unpaid seller may resell the goods and recover from the original buyer damages for any loss occasioned by a breach of contract."

In addition to commencing an action for breach of contract for damages, other general remedies and rights of an unpaid seller are set out in the *Sales of Goods Act*. They include: a lien on the goods or a right to retain them for the price while in possession of them; in the case of an insolvency of the buyer, the right of stopping the goods in the course of transit after parting with the possession of them; and a limited right of resale (s. 38).

Rights and remedies arising from a breach of contract continue to be governed by provincial law until such time as the breach has been corrected, the parties have come to a mutual agreement as to how the contractual differences are to be resolved, an action has been adjudicated in a court of competent jurisdiction, or one of the parties becomes subject to federal bankruptcy and insolvency legislation. In the latter case, provincial laws are, in almost all respects, superseded by the federal regime governed by the *BIA*.

All contracts concluded in a particular province are subject to its rules and remedies set out in that province's *Sales of Goods Act*, unless the parties expressly opt-out of these rules. Common law rules like the right to set-off can also be applied if the relationship between buyer and seller is an ongoing one. However, oral contracts and payment by the buyer before delivery of the goods from the seller while still subject to the rules in the *Sales of Goods Act*, present practical difficulties both in proving breaches and in exercising some of the non-judicial remedies set out in the *Sales of Goods Act*.

Alternative Dispute Resolution Remedies

Parties may agree to mediate their disputes. Mediation may occur consensually between the parties when a dispute arises, and may also occur voluntarily or mandatorily as an element of a court proceeding. The decision of a mediator is not binding on the parties, and therefore if the mediation does not result in a resolution the parties will have to seek resolution by other means, often by way of litigation or through a binding arbitration process.

Parties often agree in advance that any dispute between them will be resolved by arbitration rather than by the court. This is done to ensure that cases are resolved in a manner that meets the parties' needs, for example within a short time frame or by an arbitrator with unique knowledge of their industry. Parties may decide in advance how long an arbitration may take, who will be the arbitrator, what evidence will be admissible, how quickly an arbitrator must make his or her decision, and whether there is any right to appeal. Therefore parties will be able to predict at the outset of their contractual relations how disputes will be resolved and the possible costs of such a dispute. It is this flexibility and predictability that has made arbitration popular in many industries as an alternative to civil litigation.

Parties are free to decide to arbitrate their disputes, even after a dispute arises, based on the contract that governs their interaction, based on mutual consent if no such contractual term already exists, or through provincial marketing schemes that sometimes provide authority to arbitrate disputes between licensed members. If an arbitrator makes a decision requiring payment to the successful party and the unsuccessful party fails to make payment, provincial arbitration legislation permits the successful party to have the decision converted into a judgment of the court. Once this is done, all of the measures available for enforcing a judgment will be available to the successful party.

CANADIAN MARKETS INFORMATION

Agriculture and Agri-Food Canada provides a publicly accessible online horticultural information collection and dissemination service. InfoHort provides the Canadian horticultural value chain with the price, volume and crop information to make informed production and marketing decisions. The majority of this information is currently collected by CFIA Operations staff in the regions. It is then verified and disseminated by staff in the Markets and Industry Services Branch, AAFC.

InfoHort disseminates current and historical data on Canadian horticultural commodities via a publicly accessible website. The large historical database of information can be used for research or to analyze trends. The website includes daily reports for two markets (Montréal and Toronto), and weekly reports for ten other markets of domestic and imported commodities offered for sale. All quoted prices are supplied on a confidential basis by a select surveyed group of wholesalers operating in that specific market. The prices quoted represent the wholesalers 'asking price' to the retail level for a commodity and do not represent any arrangements or deals. The website data covers commodities, varieties, origins, pack weight or count and price range.

InfoHort also publishes storage holdings reports, by province, for several commodities, which indicate volumes as of the first of each month from November to June (or July, in the case of apples).

Other reports available on the InfoHort website include F.O.B. (Free on Board) prices for selected commodities, fruit and vegetable crop news reports, and honey crop reports.[10]

AAFC is now working with the FPA and CFIA to complete the transfer of data collection responsibility from CFIA to an industry-based collection model for data collection which will hopefully result in the availability of more timely and accurate markets information on the InfoHort website.

U.S. REGIME

The U.S. fresh produce sector is governed by the *PACA*, which is administered by the United States Department of Agriculture (USDA). The *PACA* was passed by Congress in 1930 and amended subsequently, the most significant being the inclusion of a statutory trust by Congress in 1984. The *PACA* establishes a regulatory framework that aims to help facilitate fair trading practices in the marketing of fresh and frozen fruits and vegetables in interstate and foreign commerce. One of the primary objectives of *PACA* is to help ensure that sellers of fresh and frozen fruits and vegetables are paid for the produce delivered to buyers, including when a customer goes out of business, declares bankruptcy, or refuses to pay for the fruits and vegetables received.

The *PACA* requires federal licensing of all individuals operating in the U.S. that are engaged in interstate and international fresh produce trade and the public disclosure of information and bonding for licensees with a history of non-payment, bankruptcy, and other non-compliant business activities. Growers marketing only products which they have grown, are exempt from licensing, but have full access to the system. USDA, under the auspices of the *PACA*, provides dispute resolution mechanisms for those who wish to resolve contractual disagreements through mediation and arbitration as opposed to resorting to the judicial system. The *PACA* also creates a statutory trust on all fresh and frozen fresh produce transactions. The trust applies to the buyer's accounts receivable, inventory and cash. The trust exists until full payment on produce delivered has been made in order to protect the seller from slow or non-payment or bankruptcy of the buyer after delivery of goods. Payment is usually received within 14 days. However, claims below $30,000 are not usually pursued under the *PACA* trust as legal costs eclipse the potential recovery.

The *PACA* and its regulatory framework are enforced by USDA's Agriculture Marketing Service through the *PACA* Branch. The *PACA* Branch is headed by a Chief who oversees three sections in Washington, D.C. (Trade Practices, Dispute Resolution and Licensing), and three regional offices. Each Regional Office is staffed with persons available to answer questions about the law or contract disputes and to investigate violations of the law. The *PACA* Branch is assisted by USDA, Office of General Counsel attorneys, who act as Presiding Officers in deciding contract disputes and who advise the *PACA* Branch on all legal questions.

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[10] For further information, see Infohort website at: http://www3.agr.gc.ca/apps/infohort/

USDA may enforce the *PACA* on its own initiative by first investigating a complaint against a produce company. If the investigation shows that a violation has been committed, USDA will begin formal proceedings against the company. If the matter is not settled, the company is entitled to a hearing before an administrative law judge. If the company is found to have violated *PACA* laws and regulations including an "industry code of conduct", it can be fined, or have its license suspended or revoked. A license suspension or revocation prohibits the officers, directors and shareholders of the company from obtaining a license or working in the industry.

The *PACA* also provides a method of resolving disputes for trading partners outside the court system. A produce company can file a complaint against another produce company and USDA will assist in resolving the dispute. The case can be resolved either informally by agreement between the parties, or through the formal complaint process. USDA may dismiss the complaint or require the indebted produce company to pay reparations and/or damages. If payment is not made as ordered, USDA must suspend the *PACA* license of the non-compliant company and the creditor can further pursue its interests in the US judicial system. Nearly all awards made by USDA are paid voluntarily to avoid an adverse action on their license.

Any seller (including firms outside of the United States) may use the *PACA* system. Most firms outside the United States must post a bond equal to twice the amount of the claim with *PACA*. This bond is held and may be applied to any successful counterclaim raised by the buyer. Canadian produce firms that are members of the DRC or licensed by CFIA are currently exempt from this bonding requirement.

The *PACA* also enables USDA to require a licensee (individuals and/or firm) to post a bond if it has been cited for previous violations of the *PACA*, involved in, or responsibly connected to, a bankruptcy in the previous three years or employs an individual under *PACA* employment restrictions. The purpose of the bond is to provide assurance that the licensee will conduct its business in accordance with the *PACA* and that it will pay any reparation order issued against the firm. If a reparation order involving transactions that occurred during the bonding period are not paid by the licensee, the USDA, on behalf of the unpaid reparation holder will make claim on the bond.

The *PACA* also provides a very strong collection remedy in the form of the *PACA* trust. It allows a produce supplier to file suit immediately in federal court to freeze the assets of a buyer who has not paid the seller in a timely fashion. It also mandates that unpaid produce suppliers be considered priority creditors during the liquidation of a bankrupt estate's assets under management of a trustee in bankruptcy or other liquidation of assets. Two methods are available to *PACA* licensees for preserving trust rights under the *PACA*: 1) by a separate mailing of the trust notice to the buyer, or 2) by giving notice to the debtor on the invoice. If the licensee uses the second method, the following exact wording must appear on the face of the invoice:

> "The perishable agricultural commodities listed on this invoice are sold subject to the statutory trust authorized by section 5(c) of the *Perishable Agricultural Commodities Act*, 1930 (7 U.S.C. 499e(c)). The seller of these commodities retains a trust claim 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."

Unlicensed growers in the US and firms outside of the US who want to preserve their trust rights must continue to provide a separate trust notice to the buyer or agent as provided in method one above. Only *PACA* licensees can use Method two. Notification, either on the invoice or by separate mailing of the trust notice, must be given within 30 days from the date payment is due. Terms for payment cannot exceed 30 days from acceptance to qualify for trust protection. Payment terms other than the *PACA* prompt payment terms stated in the *PACA* regulations, (usually 10 days) must be reduced to writing.

PART IV: STAKEHOLDER PERSPECTIVES AND WORKING GROUP RESEARCH

STAKEHOLER PERSPECTIVES

The following subsections recount the various opinions and positions presented to the Working Group by different interest groups.

Canadian and American Fresh Produce Industries

The Fresh Produce Alliance

The Working Group heard the perspective of the FPA when it presented the *Hedley Report* to the Working Group at its first face to face meeting in December, 2006. The Working Group has also heard from two of the FPA's constituent organizations, the CHC and the DRC, as well as the CPMA's Grower/Shipper Task Force Committee. Finally, there were regular consultations between the co-chairs of the Working Group and the FPA.

The Canadian Horticultural Council

Anne Fowlie, Executive Director, CHC, presented the CHC perspective to the Working Group on February 27, 2008. The CHC membership includes provincial and national horticultural organizations representing more than 25,000 producers in Canada as well as allied and service organizations, provincial governments, and individual producers and packers. The focus of the CHC is to: support the development of tools to facilitate the marketing of horticultural production; promote equitable business risk management programs for all horticultural producers in Canada; ensure federal labour policies provide for a competitive environment for horticultural producers; support the development and implementation of food safety programs; ensure access to crop protection tools and new technologies; and ensure research excellence in the sector.

Anne Fowlie stressed that the issue of fair and ethical trading practices is important to the CHC. She referred to the *Hedley Report* which suggested that the frequency of bankruptcies and insolvencies in the Canadian horticultural sector is 4 times greater than in other sectors, and 10 times greater than in other agricultural sectors.[11]

[11] The *Hedley Report*, p. 24, estimates the rate of bankruptcy in the fruit and vegetable wholesale trade as over ten times the rates in the highly regulated sectors of grains and poultry. Research by the Office of the

The CHC supports the creation of a *PACA*-like trust provision for the sector. It believes that a Canadian deemed trust provision would provide greater access for growers to credit, possibly at reduced rates. As well, it believes that a deemed trust would provide protection for all members of the value chain, e.g., suppliers and other sellers of growers' product, such as packers, shippers, and wholesalers and would be an important business risk management tool for the Canadian horticultural sector and allow for parity with the U.S. fresh produce sector and Canadian agricultural sectors which have other instruments for financial protection, such as supply management and bonding.

The CHC also supports extending licensing to cover intra-provincial trade in order to allow growers who market intra-provincially to benefit from the advantages provided by being licensed, e.g., having recourse in cases of no pay, slow pay, or "unfair" pay to the Board of Arbitration, as well as licensing sanctions.

It should be noted that at the recent annual general meeting of the CHC in Ottawa, Ontario, in March, 2008, the following resolutions were passed: supporting the establishment of a statutory "deemed trust" in Canada for the fresh produce industry and the establishment of an enhanced licensing system in Canada for trading fresh produce; that the CHC clearly demonstrate to AAFC and provincial and territorial agricultural ministers its support for these important recommendations; and that the CHC write to all regional industry associations to encourage them and their members to demonstrate to their respective provincial and territorial governments the importance of the recommendations for the local fresh produce industry.

The Fruit and Vegetable Dispute Resolution Corporation

Stephen Whitney, President and CEO, DRC, presented to the Working Group on October 4, 2007. The DRC was established in 1999 pursuant to Article 707 of the *North American Free Trade Agreement* which provides for the creation of private commercial dispute resolution organizations for agricultural goods. The DRC is a private, non-profit organization of produce and transportation companies from Canada, the U.S. and Mexico. The DRC deals with all types of disputes including condition, contract and payment disputes. It can help with disputes that arise between regular members domestically (e.g. within provinces or states, between provinces and states) and internationally. It can also help with disputes that arise internationally between associate members and regular members. To qualify for dispute resolution services, companies need to be members before the dispute arises. The DRC adopted a bonding policy in April, 2008, which will provide the DRC with greater flexibility to manage applications and expulsions. [12]

Superintendent of Bankruptcy indicates that there were 4 bankruptcies in the poultry wholesale trade (NAICS codes 41313 and 413130) in the period Jan 2000 - September 2008 and 11 bankruptcies in the oilseed and grain wholesale trade (NAICS 41112 and 411120) during the same period. For more information, see "Working Group Research: Bankruptcy Statistics" pg. 28 of this report.

[12] For more information on the DRC bonding policy, see p. 37.

Stephen Whitney presented DRC statistics which indicated that half of the total complaints received by the DRC are complaints from U.S. membership on trade with Canada. The remainder of complaints are categorized as U.S.A. to U.S.A.; Canada to U.S.A.; inter-provincial; intra-provincial; Mexico to Canada; Mexico to USA; and "Other". Between September, 1999, and May 2007, the DRC recorded 106 bankruptcies, arrangements and receiverships in the Canadian marketplace with liabilities to all creditors, not only those in the fresh produce sector, totaling approximately $92 million.[13]

The short and medium term priorities of the DRC are: working with provincial commodity groups to extend the benefits of the DRC system to intra-provincial trade; expanding to other commodities and sectors; supporting improvements to the destination inspection system, grade standardization, the *LAR*s; supporting the creation of a federal/provincial licensing system to extend coverage to growers from all provinces and to provide for reciprocity with the *PACA*; and supporting the creation of trust provisions.

CPMA Grower/Shipper Task Force Committee

The Working Group met with the Grower/Shipper Task Force Committee, at the CPMA convention in Montreal, May 4, 2007. The grower/shippers felt that horticultural trade needed to be recognized as a unique regulatory context due to the perishable nature of fresh produce. They would like to see regulatory or legislative change to afford honest players greater protection from fraudulent business practices, and felt that the reputation of the Canadian fresh produce market suffers internationally as a result of these business practices. They believe a lack of resources for Canadian enforcement and justice systems has meant that fraudulent activity is often unaddressed.

The Oppenheimer Group

Greg Sheldon, Vice-President, Categories, Oppenheimer Group, provided the Working Group with a Canadian fresh produce company perspective. The Oppenheimer Group is a 150 year old fresh produce company which markets its own branded produce as well as the produce of its partners; and imports and delivers over 100 types of produce from over 20 countries.

As part of its marketing role, the Oppenheimer Group stores, invoices, collects receivables and commissions and remits back to the growers. The Oppenheimer Group also finances growers to the sum of approximately $100 million annually, which the Oppenheimer Group is able to fund by drawing upon its line of credit. This 'pre-season financing' is necessary for the growers to produce their annual crop, which in turn is supplied to the Oppenheimer Group. Mr. Sheldon advised that if the Oppenheimer Group did not provide this financing to their growers these growers would be unable to obtain financing elsewhere. He further advised that this type of financing (producers

[13] According to information provided by DRC, the total liabilities to all creditors as a result of bankruptcies between April 1999 and May 2007, was approximately CA $83 million. The total liabilities to all creditors for bankruptcies, arrangements and receiverships during this period was approximately CA $92 million. These figures include amounts owing to **all creditors** in those files and not just creditors in the fresh produce sector.

financing their suppliers) is common in the industry. When asked, he advised that if the Oppenheimer Group's lender were to reduce its line of credit this would adversely affect its ability to finance its growers, and that this would hurt its business. This question was put to Mr. Sheldon as the Working Group had heard from the Canadian Bankers Association, Farm Credit Canada, and Deloitte and Touche LLP that the introduction of a 'statutory deemed trust' would result in a reduction in credit availability.

The Oppenheimer Group has $500 million in annual sales. Its loss rate is minimal, at less than $100,000/year, with 80% of that sum resulting from losses in Canada, and 20% resulting from losses in the U.S. Mr. Sheldon cited examples of two large losses suffered by the Oppenheimer Group. Eight years ago, the company lost $18,000 worth of tomatoes and ten years ago it lost $600,000 to a Vancouver wholesaler. In both cases, the Oppenheimer Group was unable to recoup any of the losses.

It is Mr. Sheldon's opinion that the U.S. *PACA* trust provides superior financial protection for sellers and that similar deemed trust provisions in Canada would benefit the Canadian fresh produce industry. Mr. Sheldon noted that there is resistance in Canada to financing credit insurance for marketers of fresh produce due to the perishability of the product. Banks are reluctant to loan to growers since fresh produce production is considered high risk. According to Mr. Sheldon, the banks with which the Oppenheimer Group has lines of credit approve of the U.S. *PACA* trust provisions since, within the *PACA*, the Oppenheimer Group is a priority creditor.

Western Growers Association

The Western Growers Association (WGA) is a U.S. marketing association representing 3,000 members in California and Arizona and accounting for 50% of fresh produce grown in the U.S. Matt McInerney, WGA, delivered a presentation to the Working Group on October 4, 2007, outlining the advantages of the *PACA* and citing reasons why Canadian grower/shippers would benefit from similar deemed trust provisions. Mr. McInerney referred to a concern by the U.S. fresh produce industry regarding financial stability in Canadian markets. He approximated that only 15-20% of growers associated with the WGA ship to Canada. U.S. growers will take the risk of having their product deteriorate while they seek a U.S. buyer who is registered under the *PACA*, rather than sell into the Canadian market. The WGA believes that Canadian bankruptcy settlements are lengthy and Canadian bankruptcy provisions do not provide adequate protection for grower/shippers.

Members of the Canadian Fresh Produce Value Chain: Qualitative Survey Interviews

A priority of the Working Group was to understand the significance and pervasiveness of the problems of delayed, partial and non-payment due to bankruptcy and breach of contract in the Canadian fresh produce value chain. Consequently, the Working Group decided to conduct a statistically based quantitative survey to measure the experiences of buyers and sellers in the Canadian fresh produce market.[14]

[14] "*Report on the Survey of the Commercial Practices of the Canadian Fresh Fruit and Vegetable Value Chain*" is attached to this report as Annex B.

As a necessary developmental tool for the quantitative survey, the Market Research and Analysis Section (MRAS), AAFC, and a consultant, conducted a qualitative survey, or exploratory study of members of the horticultural value chain during the CPMA convention in Montreal, May 9-11, 2007. The qualitative survey was organized and developed by MRAS and officials from AAFC in consultation with the FPA.

The qualitative survey consisted of French and English focus groups and in-depth one on one interviews. The 24 Canadian participants came from a broad cross section of the horticultural value chain, ranging from representatives of multinational companies, distributors, wholesalers and large retail chains, to grower-shippers and importer/exporters of small local companies. The survey also interviewed 1 American grower/shipper from a U.S. trade association. The majority of interviewees had worked in the horticultural sector for decades.

Due to the small sample size, results of the qualitative survey are not statistically representative of the Canadian fresh produce industry. Nonetheless, results from the qualitative survey demonstrate the problems encountered by some members of the North American fresh produce value chain when trading in Canada, and provide examples of the modus operandi of the Canadian fresh produce market.

The qualitative survey results demonstrate an industry wherein contracts are usually verbal, with purchase orders and invoices as the only evidence of transactions. Participants reported verifying the solvency and reliability of new clients by referring to the Blue Book or the Red Book, industry resources which publish credit ratings; engaging firms specializing in credit investigations; or relying on their own resources to conduct credit checks of potential clients by contacting banks and previous business partners. Interviewees also consult with the DRC or with colleagues in the fresh produce industry. A number of survey participants will only deal with members of the DRC or those with whom they have had long-standing business relationships.

A few of the participants reported experiencing what they considered to be fraudulent business practices in recent years. Many reported that they had experienced what they perceived to be fraud in the past, but no longer experience problems due to practicing increased diligence. A number of participants reported referring trading problems to, and receiving help from the DRC. Rarely do they bring matters to court. If payment problems arise when dealing with the U.S. market, most participants use the trust provisions in the U.S. *PACA* to recover outstanding debts. Other methods used by businesses to protect themselves, beyond diligence in evaluation new clients, are: reducing the time period within the terms of payment, limiting the credit available to new clients, and demanding cash on delivery.[15]

Selected Provincial Fresh Produce Growers

Four provincial departments represented on the Working Group also conducted interviews of growers, grower/shippers, and grower/packers in their provinces: Alberta

[15] For more information on the qualitative survey results, see Annex B.

Agriculture and Rural Development; OMAFRA; Nova Scotia Department of Agriculture; and Prince Edward Island Department of Agriculture. The questions asked during these interviews were recommended by AAFC. A total of 32 interviews were conducted. Provinces conducted phone interviews, with follow-up e-mails.

The majority of respondents had been in business over 20 years, and most were members of grower or marketing associations in their provinces.

Producers interviewed recognized that unfair trading practices such as slow payment, no payment, or adjusted payment, are common. Ontario had the highest ratio of respondents claiming they had lost sales income during the last five years due to a buyer's non-payment, slow payment or bankruptcy (8 out of 10 respondents), although the problem was not seen to be growing. Alberta growers also had losses due to buyer bankruptcies but considered these losses to be frequently a result of inadequate due diligence. Alberta growers more often identified slow and adjusted payment as their primary concern.

Canadian Financial Industry and Practices Expert Consultations

The Working Group also sought the views of Canadian lending institutions, i.e., the Canadian Bankers Association (CBA) and Farm Credit Canada (FCC), on statutory deemed trusts and other financial security measures, as well as on FCC's experience, if any, of the impact on that institution from non-payment within the horticulture sector.

Canadian Bankers Association

On May 8, 2007, Robert Hall, TD Canada Trust's Vice-President of Agriculture for Eastern Canada, made a presentation to the Working Group on behalf of the CBA. He advised that the CBA generally opposes measures that create 'super-priorities', such as deemed trusts. He presented scenarios demonstrating the negative impact of a deemed trust on credit availability. It is his experience that a deemed trust usually harms the borrower by reducing the credit available to him, as lenders will not lend against collateral if there is a potential -- no matter how remote based on the borrower's credit history -- that the borrower's collateral could become subject to a deemed trust. His scenarios demonstrated how a borrower's credit availability is reduced automatically if deemed trust legislation is created, regardless of the fact that the borrower is not and may never be subject to a deemed trust. As a result a loan will require increased capital to support it. In addition, a deemed trust increases the costs of monitoring by the bank -- costs which are passed on to the borrower -- and involves added reporting requirements on the part of the borrower.

In summary, the CBA believes super-priorities limit the availability of operating credit; add to creditors' monitoring costs, which are reflected in higher interest rates; add to borrowers' costs, as borrowers need to provide more detailed inventory and accounts payable accountings; duplicate existing supplier protection mechanisms; and may promote lax credit granting practices on the part of suppliers.

According to Mr. Hall super-priorities result in a reduction of competition in the marketplace as the artificial inflation of borrowing costs and the reduction in credit forces out some market participants.

Farm Credit Canada

The Working Group heard from Joseph Joubert, Senior Account Manager, Special Credit, Farm Credit Canada (FCC) on February 27, 2008. Established in 1959 through the *Farm Credit Act*, FCC is a self-sustaining Crown corporation responsible to the Minister of Agriculture. FCC works from 100 offices across the country and is Canada's largest provider of business and financial services to farms and agribusiness. The corporation provides financing, equity, insurance, management software, information and learning programs. It does not provide operating credit, which is provided by the banks.

In cases of non-payment and insolvencies, the seller is most impacted, followed by the lender of operating credit. FCC is only impacted when the working capital of the seller's business is depleted. However, FCC has witnessed the effect of non-payment on its customers. Of 5,300 accounts which FCC has managed since 2003, 400 have been related to horticulture. Since 2003, FCC has witnessed $113 million in losses to clients, $8 million of which was lost in the horticultural sector. FCC does not track how these losses occurred and cannot identify how much of the losses suffered by its clients in the horticultural sector was related to problems of payment.

Mr. Joubert has personally worked with 7 horticultural accounts, since 2003, which were impacted by non-payment or adjusted payment. The 7 accounts represent 1 horticultural marketer, 2 producer bankruptcies where FCC suffered losses, 2 cases where clients were able to recover slowly from the losses, and 2 cases where FCC lost a total of $700,000. Unfortunately, many clients do not practice diligent record keeping and therefore are unable to file a legal claim or benefit from Section 81.2 of the *BIA.*

Mr. Joubert identified the following problems in the commercial practices and regime of the Canadian horticultural sector: lack of written contracts and misunderstanding of terms of contracts; incomplete record keeping; inadequate payment history/information on responsible individuals available to sellers; the current discretionary nature of bonding; and limited use of account receivable insurance.

According to Mr. Joubert, a deemed trust would create restrictions on operating credit as well as higher credit and monitoring costs for the marketer. These higher costs would trickle down to the producer. Mr. Joubert also expressed the concern that a deemed trust would enhance poor record keeping due to increased supplier complacency. To improve the trading environment in the horticultural sector, Mr. Joubert recommends universal licensing for marketers and mandatory bonding of an amount based on the volume of sales.

Trustee-in-bankruptcy

John Saunders, Trustee, Deloitte and Touche, LLP, presented to the Working Group on October 3, 2007, on the Canadian insolvency regime and the rights of the unpaid supplier.

Mr. Saunders noted there are already measures available to the fresh produce industry to protect against financial loss such as: demanding cash on delivery terms from customers with high credit risk; demanding personal guarantee of owner; obtaining accounts receivable insurance for exports; and registering security over customer's inventory (and possibly other assets) to obtain priority over other creditors.

Moreover, he noted that in the event of financial loss, non-legal remedies can be taken to recoup losses, such as not extending further credit and/or deliver additional produce until payment or other security received, and/or conducting aggressive collection activity including use of collection agencies.

Mr. Saunders pointed out that legal steps can also be taken to recoup financial loss, including suing customers for unpaid amount; petitioning customers into bankruptcy; upon bankruptcy or receivership of customer making claim under s. 81.1 or s. 81.2 of the *BIA*.

Mr. Saunders was able to identify only one instance in which his firm was involved where s. 81.1 ("the repossession remedy") was used and one instance where s. 81.2 ("the super-priority charge") was used. Mr. Saunders acknowledged that s. 81.1 often had little benefit for fresh produce suppliers since produce generally perishes by the time it is recovered. He expressed the view that s. 81.2 is the appropriate remedy for the industry, but that it is rarely used due to the low level of bankruptcies or receiverships in agricultural businesses that purchase directly from farmers or fisherman, the growing trend by businesses to try to restructure instead of liquidate, and a lack of awareness by farmers and fishermen of their rights under the *BIA*.

Detective: Law Enforcement for the Canadian Fresh Produce Sector

Presentation by Mr. Jean-Louis Granger, Donald McCleery & Associates:

Mr. Granger, retired from the Royal Canadian Mounted Police (RCMP), and currently a detective with Donald McCleery & Associates, spoke to the Working Group on the subject of law enforcement relating to breaches of contract within the Canadian fresh produce sector. Mr. Granger has published a study on the subject for the FPA in February, 2006, "Report for the Fresh Produce Alliance".[16]

In researching for his study, Mr. Granger met, in August, 2005, at the Office of the Superintendent of Bankruptcy in Montreal, with representatives from the RCMP, Quebec Public Security (QPS), Montreal police supervisors of fraud of the Service of Police of

[16] "*Report for the Fresh Produce Alliance*" by Jean-Louis Granger can be found on the Fresh Produce Alliance website at: www.freshproducealliance.com/Download/20060213McCleery's%20report%20anglais%202.doc

the city of Montreal (SPVM), CFIA, Quebec Produce Growers Association, Quebec Produce Marketing Association, DRC, CPMA, FPA, as well as two lawyers representing fruit and vegetable companies. The testimony of the RCMP, QPS, and SPVM revealed that very few investigations had been initiated by these organizations due to the fact that only a few complaints were received from fresh produce sellers. Mr. Granger suggested that the lack of complaints may be due to ignorance on how to file a complaint, and lack of proper record keeping to offer investigators. He noted that law enforcement agencies may commit more resources to addressing fraud in the industry if they received more complaints. Mr.Granger recommended industry raise any concerns about the performance of law enforcement agencies to the political representatives responsible for them.

During his investigation, Mr. Granger did not see evidence that fraud in the Canadian fresh fruit and vegetable sector stemmed from organized crime. As protection against fraud, Mr. Granger stressed the need for greater due diligence on the part of members of the fresh fruit and vegetable value chain. He recommended that industry members check into potential trading partners by consulting the Blue Book or the Red Book, industry resources which publish credit ratings, researching whether a potential trading partner is a member of the DRC or licensed with the CFIA, and conducting credit checks. Mr. Granger also emphasized the need to keep good records, to be aware of procedures to file a complaint promptly, and to pursue due payment, potentially by hiring an investigator. He also recommended that foreign companies open a bank account with a financial institution situated in Canada in order to deposit cheques issued by Canadian buyers. Canadian banks notify clients of a cheque with insufficient funds within 48 hours. This is a faster notification period than offered by most U.S. banks, and would allow a buyer to pursue his/her due payment more promptly and discourage potential fraud.

United States Department of Agriculture

The USDA has taken an active interest in the issue of fair and ethical trading practices in the Canadian fresh produce sector.

In August 2005, Secretary Mike Johanns, USDA, sent a letter to former Minister Mitchell encouraging Canada to adopt trust provisions similar to those contained in the *PACA*. Minister Mitchell responded in a letter which outlined the special provisions available for unpaid suppliers and farmers under the *BIA*. Minister Mitchell also noted that studies, (the *Hedley Report* and other FPA fair and ethical trading practices research), examining criminal practices in the sector as well as the adequacy of the *LARs*, were underway.

In December 2006, Secretary Johanns sent a letter to Minister Strahl commending Canada for closing licensing loopholes in the *LARs* and for the improvements made to the Canadian destination inspection system. The letter also encouraged the adoption of a *PACA*-like trust in Canada. Minister Strahl responded, in February 2007, by informing the Secretary that a working group had been formed to review industry recommendations for improving fair and ethical trading practices, including a *PACA*-like trust, and would be submitting a final report containing recommendations for future government action.

Mark Ziegler, former federal Working Group co-chair, and Bob Forrest, provincial co-chair, along with Michael Presley, former Director General, Food Value Chain Bureau,

AAFC, met with USDA officials in Washington, in February 2007 on this matter. During the meeting, Mr. Ken Clayton, Associate Administrator, Agriculture Marketing Service, expressed U.S. satisfaction with recent improvements and amendments by the CFIA in the areas of destination inspection and licensing regulations under the *LARs* and noted the importance of accurate and timely markets information to the maintenance of fair and ethical trading practices. However, USDA officials also expressed the opinion that Canada is unable to provide adequate protection for U.S. sellers in the fresh produce sector unless it adopts provisions similar to those in the *PACA*, in particular a statutory deemed trust for the benefit of unpaid sellers. The USDA voiced concern that the special *BIA* provisions under sections 81.1 and 81.2, which include the right of repossession for unpaid suppliers and a priority charge over inventory for farmers, fishermen and aquaculturalists, are of little value for Americans selling perishable goods to Canadians and fail to offer rights that are comparable to those under the *PACA*.

For future action, the USDA would like to see Canada continue to improve the destination inspection system and market information to provide for a better tracking system, which is considered a necessity if a statutory deemed trust is to function effectively. Mr. Clayton suggested that progress could start with further changes to the *LARs* and the development of statutory deemed trust provisions following at a later date. Additionally, improvements on the accuracy and timeliness of market information in Canada could help both sellers and buyers of fresh produce operate more prudently.

The Working Group also heard from the USDA at its meeting in Montreal, on May, 2007. Mr. Summers presented to the Working Group on the elements of the *PACA* program and how it functions in practice.

Mr. Summers advised that the *PACA* trust has been effective primarily because of the speed at which creditors can go to court and freeze assets. Ninety percent of cases are settled within three months. The *PACA* is applied by industry, with little involvement by the USDA. Generally, groups of creditors hire a lawyer and share legal costs. When a court injunction freezes assets, the location of those assets is usually available in the Blue or Red Book. If not, a private investigator is employed to find the assets, or the USDA will pursue an investigation, although that process is slower. There are occasions when there are no receivables to collect, however a debtor can be sued by a creditor if it is suspected that the debtor has kept some of the assets. In some cases, court costs can deter creditors from exercising their *PACA* rights. Smaller losses, e.g. $5,000 - $30,000 are often not pursued due to litigation costs.

Mr. Summers also advised that the US banking industry did not oppose the introduction of the *PACA*, although produce wholesalers expressed concern over the possibility that the *PACA* would detrimentally impact their ability to get financing. Since *PACA* has been enacted there has been significant consolidation within the wholesale industry, which may or may not be related to the *PACA*.

WORKING GROUP RESEARCH

Bankruptcy Statistics

In response to industry allegations that bankruptcies are a significant problem within this sector, the Working Group thought it necessary to examine the statistics available in this area to quantify the extent of the issue.

In order to assess the frequency and impact of bankruptcy on the sector, the Working Group obtained statistical information from the DRC and from the OSB. First, the DRC compiled a list of companies that it had recorded as having entered into formal insolvency proceedings (including bankruptcies, proposals under the *BIA* and receiverships) at the wholesale / distributor level of the industry during the 8 year period January 1999 – December 2006. Second, the OSB produced a list of companies that had filed for bankruptcy under the Fresh Fruit and Vegetable Wholesaler / Distributors code of the North American Industrial Classification System (NAICS code 413150) and under the Standard Industrial Classification System (SIC code 5216) during the same 8 year time frame. In order to determine the impact of bankruptcy on the sector, it was necessary to exclude from the DRC list those companies that had not, in fact, become bankrupt. Representatives from the OSB and the DRC worked together to determine the number of bankruptcies over the 8 year period.

The results of the collaborative effort reveal that there were only 50 bankruptcies reported under the Fresh Fruit and Vegetable Wholesaler / Distributors code over the 8 year period.[17] The Working Group notes that due to the nature of the coding systems, it is possible that the total of 50 bankruptcies may not be precisely accurate. Specifically, it is possible that some bankruptcies in the sector were erroneously coded and so remain unreported. Conversely, the total may be overly inclusive by listing bankruptcies which should have been classified under another code. There is no evidence, however, to indicate that any inaccuracy in the total number of bankruptcies is significant.

The OSB list includes the total liabilities (i.e., amounts owing to all creditors, and not only those who supplied fresh fruits and vegetables) and total assets as disclosed by the debtor at the date of bankruptcy. The information regarding the 50 bankruptcies indicates total liabilities to all creditors of $23.3M offset by total assets of $4.2M. It is not possible based on the available information to segregate the amount owed only to the suppliers of fresh fruits and vegetables from the total liability figure, however, it is clear that the suppliers of fresh fruits and vegetables are not the only creditors in the files.

Based on the liabilities and assets noted above, the 50 bankruptcy files represent losses to all creditors of approximately $19.1M during the 8 year period. The losses to all creditors should be read in the context of average annual sales in the fresh fruit and vegetable industry of approximately $3B (or $22.5B over an 8 year period). Even if the erroneous assumption were made that the total liabilities of $19.1M was owed

[17] To further put the statistics in context, we note there were 71,221 business bankruptcies in Canada over the same 8 year period, with total liabilities of over $36.6B and total assets of over $9.9B. In the Agriculture, Forestry, Fishing and Hunting Sector on its own there were 3,313 business bankruptcies in Canada over the same 8 year period with total liabilities of approximately $2.5B and total assets of approximately $0.6B. (Source: The Office of the Superintendent of Bankruptcy, March, 2008)

exclusively to sellers of fresh produce, this loss would represent 0.08% of total annual sales.

Canadian Agricultural Income Stabilization Program: Quebec

Quebec Working Group members researched bad debt[18] statistics recorded by the Quebec branch of the Canadian Agricultural Income Stabilization Program. The bad debt statistics were from the Quebec horticultural sector from 2003 to 2006 inclusive. Analysis of the data revealed that, in the Quebec horticultural sector, bad debt of producers during that period as a percentage of gross revenue averaged less than 1.3%.

Quantitative Survey

The Working Group conducted a quantitative internet survey of the Canadian fresh produce value chain in February – March, 2008.[19] The internet survey was designed to measure the frequency and impact of losses, in 2007, to members of the Canadian fresh fruit and vegetable value chain as a result of delayed, adjusted and non-payment. The internet survey questionnaire was designed by MRAS, AAFC, and a steering committee comprised of the DRC and CPMA as well as officers from AAFC and the CFIA. The FPA and other members of the Working Group also provided input into the questionnaire. After the pre-test, the internet survey was e-mailed, along with a letter of introduction from the Working Group Co-chairs and the FPA, to 877 members of the Canadian fresh produce value chain and faxed to 13 Hutterite communities.

The e-mail contact list was a compilation of all members located in Canada of the DRC, CPMA, British Columbia Produce Marketing Association, Ontario Produce Marketing Association, and Quebec Produce Marketing Association and was supplemented by names from the provincial producer organizations. It was determined that the survey would have a significantly better rate of response, and a more accurately representative response, if the Working Group and the FPA collaborated on developing a list of contacts to be surveyed, rather than purchasing such a list from a private survey firm. Purchased lists are often of questionable quality and would not be made available to the Working Group for evaluation as they are the property of the survey firm. Concerns about the objectivity of using a list provided by industry are addressed by the fact that 80% of those who trade fresh produce in Canada are members of the DRC. Furthermore, this list was supplemented by the extra names provided by the provincial producer organizations.

Consequently, the internet survey was e-mailed to virtually all major marketers of fresh produce in Canada in late February.

[18] Bad debt is defined as accounts receivable that will likely remain uncollectible and will be written off. Bad debts appear as an expense on a company's income statement, thus reducing net income. In general, companies make an estimate of bad debt expenses that might be incurred based on past records as part of the process of estimating earnings. Most companies make a bad debt allowance since it is unlikely that all of their debtors will pay them in full.

[19] Annex B: "*Report on the Survey on the Commercial Practices in the Canadian Fresh Fruit and Vegetable Value Chain*".

The Working Group was not able to conduct a parallel survey of growers in Canada who do not ship produce or play any other role in the fresh produce value chain. Federal and provincial data on this "growers-only" category is limited. Consequently, the Working Group approached the CHC to request that the CHC contact its constituent organizations and invite them to provide the coordinates of their grower membership for the purposes of the survey. While the CHC expressed support of the survey, the CHC noted that many of its constituent associations may not be permitted to release their memberships. However, the internet survey was e-mailed to "growers-only" whose coordinates were provided by provincial producer organizations. It was also sent by fax to a number of Hutterite communities who are not connected to the internet.

The response rate to the survey was 27%. Survey results are cited in PART V (following) of this report, as well as in the "Report on the Survey on the Commercial Practices in the Canadian Fresh Produce Value Chain" (Annex B).

PART V: OBSERVATIONS AND FINDINGS

1) Delayed, partial and non-payment occur in the Canadian fresh produce market, but it is not evident that the problems are significant.

The Working Group heard reports from stakeholder representatives and various stakeholders about experiences involving delayed, partial and non-payment incidents in various Canadian markets. Incidents ranging from buyers using their market power to dictate credit terms with producers, buyers arbitrarily reducing agreed upon prices because of changing market conditions (clipping), and sellers being victims of fraud schemes were recounted by stakeholders to the Working Group.

In order to attain a better understanding on whether the incidents involving delayed, partial and non-payment were pervasive and significant, the Working Group undertook a quantitative survey analysis of the Canadian fresh produce value-chain in collaboration with the FPA. The results of this analysis show that incidents involving delayed, partial and non-payment occur in the Canadian fresh produce market but it is not evident that these problems are significant and detrimental to the overall stability of the industry. The following points from the Working Group's survey of the sector are indicative of this observation:

- In 2007, about half (51%) of the Canadian fresh fruit and vegetables business experienced at least one instance of non payment in the trade of fresh fruit and vegetables.[20] Of those that experienced non payment, 61% said they occurred on somewhere between 1 to 5 transactions.[21]
- Of those that experienced non payment, 16% reported that they occurred between 6 to 10 times;[22]
- Of those that experienced non payment, 7% experienced them on more than 50 transactions.[23]

[20] Annex B: "*Report on the Survey on the Commercial Practices in the Canadian Fresh Fruit and Vegetable Value Chain*" p. 47.
[21] Ibid., p. 49
[22] Ibid., p. 49

- Total net financial losses due to non-payment by the industry in 2007 were estimated to be $1.59 million.[24]
- The mean net loss by business due to non-payment represented 0.80% of their reported gross revenues. [25]
- 67.5 % of respondents reported partial payments in 2007.[26]
- Of those that experienced partial payment 48% reported that they had occurred on somewhere between 1 to 10 transactions.[27]
- Of those that experienced partial payment, 19% reported partial payment occurred on somewhere between 11 and 20 transactions.[28]
- Of those that experienced partial payment, 17% reported partial payment occurred over 50 times.[29]
- Total net financial losses due to partial payments by the industry were estimated at $2.15 million in 2007.[30]
- The mean net loss by business due to partial payments represented 1.24% of their reported gross revenues. [31]
- 77% of businesses reported instances of delayed payment, beyond the agreed upon credit terms.[32]
- The total net financial losses due to delayed payments by the industry were estimated to be about $0.54 million.[33]
- The mean net loss by business due to delayed payments represented 0.39% of their reported gross revenues. [34]

The results of this survey are consistent with the observations of the Working Group from other stakeholder consultation and research activities. Greg Sheldon, Oppenheimer Group, advised the Working Group that its loss rate is less than $100,000 out of 500 million in annual sales, although he did indicate that 80% of that sum resulted from losses in Canada. Similarly, only a small number of the 24 CPMA participants in the May 2007 qualitative survey organized by AAFC and the FPA reported what they perceived to be fraud in the past but not at the present due to better credit policies. However, a number of these participants reported referring payment problems to the DRC and all highlighted the adoption of various policies to reduce credit risk with positive results.

Provincial interviews of 32 fresh produce growers in Ontario, Alberta, Nova Scotia and PEI also revealed awareness and experience with payment problems in the fresh produce industry but interviewees were of the opinion that the phenomenon was not growing rapidly. The data from Quebec's CAIS program reflects this trend revealing that bad debt

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[23] Ibid., p. 49
[24] Ibid., p.77
[25] Ibid., p.78
[26] Ibid., p. 58
[27] Ibid., p. 59
[28] Ibid., p. 59
[29] Ibid., p. 59
[30] Ibid., p.77
[31] Ibid., p.78
[32] Ibid., p. 68
[33] Ibid., p. 77
[34] Ibid., p.78

represented only 1.3% of average gross revenue of provincial horticulture producers between 2003 and 2006. In sum, the Working Group feels confident concluding that many participants in the Canadian fresh produce market experience occasional payment problems. However, the problem is not growing, and the magnitude may not be greater than business norms.

The Working Group would like to point out one observation of potential concern with respect to the circumstances of partial payments. In 2007, 48% of survey respondents reported that the client did not pay the full amount due to invoice "clipping".[35] This is a common term in the fresh produce industry used to describe a transaction where the buyer arbitrarily reduces the previously agreed upon purchase price with the seller, usually because of market price decline. 65% reported that the client made payment deductions based upon documented condition problems with the product without an inspection by a recognized inspection service.[36] The Working Group is aware of some fresh produce industry members who consider this behaviour to be an abuse of market power resulting from the concentration of retail food distributors and grocers. On the other hand, other industry members, including sellers, have indicated that clipping is recognized as a necessary inventory clearing process that respects the real market value of a product moving through the value chain. At this time, no concrete data exists that demonstrate that this situation poses a threat to the stability to Canadian fresh produce marketplace. However, further analysis may be warranted in collaboration with stakeholders to better understand the dynamics behind clipping and its impact on the long- term structure of the industry.

2) Losses to the Canadian fresh produce industry resulting from bankruptcy are not significant.

Sellers indicated that non-payment as a result of buyer bankruptcy is of particular concern for sellers in the Canadian fresh produce marketplace. In the survey of the Canadian fresh produce industry, almost 33% of respondents reported that a "client filed for bankruptcy or was petitioned for bankruptcy" as the circumstance behind a non-payment.[37] The *Hedley Report* includes an analysis of bankruptcies within Canadian agriculture and concludes that "bankruptcies appear substantially higher in the fruit and vegetable wholesale trade than in other subsectors of agriculture". This conclusion is based upon a ratio calculation of the number of bankruptcies listed by the OSB in each agriculture subsector per billion dollars of farm cash sales by agriculture sector between 1995 and 2002. [38]

The Working Group, however, is of the opinion that the bankruptcy analysis in the Hedley Report does not assess the significance or financial impact of bankruptcies within the Canadian fresh produce market. It does not provide insight on whether there are a high number of bankruptcies relative to the number of fresh produce industry players or if

[35] Annex B: "*Report on the Survey on the Commercial Practices in the Canadian Fresh Fruit and Vegetable Value Chain*" p. 58.
[36] Ibid., p. 58
[37] Ibid., p. 48
[38] *Hedley Report*, p. 24.

the financial losses related to these bankruptcies are significant relative to the overall size of industry sales.

After undertaking its own analysis of the significance and impact of bankruptcies as contained in the OSB's database under the North American Industry Classification System codes for fresh fruit and vegetable wholesaler-distributors and in DRC records, the Working Group is of the view that bankruptcies do not appear to be a pervasive or significant problem in the Canadian fresh produce industry. The Working Group's study reveals that there were 50 bankruptcies between 1999 and 2006. The study also shows that these 50 bankruptcy files represented approximately $19.1 million dollars of losses to all creditors. Even if the erroneous assumption were made that the total liabilities of $19.1M was owed exclusively to sellers of fresh produce, this loss would represent 0.08% of total annual sales when put into the context of this industry which has over $3 billion in sales annually. This conclusion is consistent with the presentation by John Saunders, Trustee, Deloitte and Touche, who reported to the Working Group on the low level of bankruptcies and receiverships in agriculture businesses that purchase directly from farmers and the growing trend by businesses to try to restructure instead of liquidate. As a result of these findings, the Working Group is comfortable concluding that there is little evidence to indicate that bankruptcies are pervasive or significant in the Canadian fresh produce industry.

3) Risky credit practices and lack of due diligence are pervasive throughout the Canadian fresh produce industry.

Based on the information gathered through the quantitative survey research and expert consultation, the Working Group is of the view that risky credit practices and lack of due diligence are pervasive throughout the Canadian fresh produce industry. Sellers acknowledge this frankly and justify this behaviour on grounds of market pressures and produce perishability while industry observers point out that not enough time and resources are invested into due diligent business practices such as tighter credit controls, written contracts and record-keeping. The following points from the Working Group's quantitative survey of the sector are indicative of these observations:

- Only 14% reduced the credit period for new customers, all of the time or most of the time. Fifty eight percent rarely or never did.[39]
- Seventy two percent rarely or never seek prepayment or payment on delivery with new clients.[40]
- Sixty six percent of sellers confirm transactions verbally all or most of the time. Only 21% confirm sales with a written agreement all or most of the time.[41]
- 33% of businesses rarely or never verify the credit rating of new clients with a credit research agency.[42]

[39] Annex B: "*Report on the Survey of the Commercial Practices in the Canadian Fresh Fruit and Vegetable Value Chain*" p. 34.

[40] Annex B: "*Report on the Survey of the Commercial Practices in the Canadian Fresh Fruit and Vegetable Value Chain*" p. 35.
[41] Ibid., p. 40.
[42] Ibid., p. 42.

- Only 20% verify that new accounts hold a CFIA licence and only 27% verify that the new account is a DRC member, all or most of the time.[43]
- Only 7% consult DRC for background information on new clients, all or most of the time.[44]

Joseph Joubert, FCC, also identified this phenomenon during his presentation to the Working Group. He noted that many of FCC's horticulture clients do not use written contracts or understand the terms of contracts nor do they keep complete records about incidents involving partial or non-payment. Mr. Joubert, recommended governments improve licensing regulations and universal bonding. Similarly, Louis Granger, Donald and McCleery & Associates, echoed these views before the Working Group when commenting about his research into how the fresh produce industry could protect itself against fraud. He stressed that the fresh produce industry needed to practice greater due diligence into the credit status of clients by utilizing the industry's Red and Blue Books, CFIA and DRC resources, and other public credit investigations tools.

Mr. Granger also emphasized that the fresh produce industry needed to keep better records of its transactions in order to effectively utilize the various payment problem remedies. The *Hedley Report* also acknowledges the tendency within the Canadian fresh produce industry to operate without written contracts and the willingness to grant credit for longer periods than witnessed in the United States. Although the *Hedley Report* posits that inadequate and untimely information about industry players is a major factor behind this situation it also suggests "some lack of attention to business management"[45] as another underlying reason. As a result of these findings, the Working Group is comfortable concluding that risky credit practices and lack of due diligence is pervasive throughout the Canadian fresh produce industry.

4) The protections provided to unpaid farmers in a buyer bankruptcy situation under section 81.2 of the *BIA* are not well understood. However, section 81.1 offers limited protection to sellers of many perishable fresh produce products.

Although the *Hedley Report* does not recommend changes to the provisions of the *BIA*, it criticizes s. 81.1, which provides unpaid suppliers with the right to repossess their goods that were delivered to a purchaser who subsequently became bankrupt or had a receiver appointed over its property; and s. 81.2 which provides unpaid farmers, fishermen and aquaculturalists with a priority charge over all the inventory of a debtor who became bankrupt or had a receiver appointed over their property, as unusable for fresh produce sellers because of the nature and context of the fresh produce marketplace.[46] The basis of the criticism of s. 81.1 is that the timeframes to use the right to repossess is too short, the unpaid seller must be able to identify and distinguish his or her produce from others, and the unpaid goods must be in the same condition as when delivered. Similarly, the basis of the criticism in the *Hedley Report* of s. 81.2 is that the time pressures of moving fresh produce and its lack of "identifiability" after delivery normally prevent usage of this section. These criticisms were also expressed during a senior level meeting between

[43] Ibid., p. 42.
[44] Ibid., p. 42
[45] *Hedley Report*, p. 41.
[46] *Hedley Report*, p. 21.

USDA, AAFC and the Working Group Co-Chairs in February 2007. John Saunders, Trustee in Bankruptcy, also commented that often s. 81.1 has little benefit for the fresh produce suppliers because produce generally perishes by the time it is recovered. However, he stated that s. 81.2 is an appropriate remedy for the fresh produce industry.

The Working Group is of the view that the *Hedley Report* makes legitimate criticisms against s. 81.1 of the *BIA*. The timeframes to use section 81.1, as it is currently structured, make it unusable for many sellers of perishable agriculture products. Furthermore, it is highly unlikely that many sellers of perishable agriculture products would be able to meet the requirement that the goods be in the same state or condition when delivered. Under the current regime, it is possible that a buyer could become bankrupt 29 days after delivery thereby only giving the supplier 1 day to act because of the requirement that a written demand be presented by the supplier within 30 days of delivery. Although amendments to s. 81.1 of the *BIA* were passed by Parliament in 2005, they are not yet in force. Once in place, goods delivered in the 30 days period prior to a bankruptcy will be subject to s. 81.1 and the supplier will have 15 days following the bankruptcy to deliver the written notice of the claim to the trustee.

Despite the pending promulgation of the amendments to the *BIA*, the Working Group believes the ability to use s. 81.1 will continue to be challenging for many sellers of perishable fresh produce. Even if fresh produce suppliers were in a position to meet the repossession timeframe requirements under the current or amended version of section 81.1, they will still need to demonstrate that their goods were in the same condition when delivered; provided they were not already sold by the buyer. It is possible that some perishable products preserved in controlled environments, like apples and some root vegetables, could meet this requirement but it is highly unlikely for many other products like berries and green leafy vegetables. The Working Group is therefore of the view that in many cases, s. 81.1 is of little use to fresh produce sellers.

Regarding s.81.2, the criticisms levied against this provision in the *Hedley Report* are incorrect and the Working Group believes this section does offer considerable protection for unpaid farmers in a buyer bankruptcy situation. When a farmer is owed money for produce or goods delivered upon the bankruptcy of a buyer, he or she can use s. 81.2 to secure a priority charge if the produce or goods were delivered within 15 days prior to bankruptcy or receivership. In order to obtain the priority charge, the farmer must provide a proof of claim to the trustee within 30 days of bankruptcy. This priority charge covers all the inventory of, or held by, the purchaser and is not limited to the goods delivered by the particular unpaid farmer. The priority charge ranks above every other claim or right in respect to inventory expect the repossession right under s. 81.1. In other words, contrary to the *Hedley Report*, there is not an onus on farmers to distinguish their goods from others under s. 81.2 and they have 30 days after bankruptcy, not after delivery, to utilize this right. However, it is important to point out that only farmers who sell their own produce may avail themselves of s. 81.2. All other sellers of agriculture goods such as wholesalers and distributors do not enjoy the rights provided under s. 81.2 and must pursue their right of repossession under the provisions of s. 81.1.

5) There are provincial remedies for breach of contract.

In the case of bankruptcy, provincial laws are, in almost all respects, superseded by the federal regime governed by the *BIA*. However, in the event of breach of contract, several provincial remedies are available to the aggrieved party. Clauses in the sales contract, provisions contained in the *Sales of Good Act*, or similar provisions in the *Quebec Civil Code*, and the common law set out a bundle of rights which permit the aggrieved party to satisfy any losses arising from the breach. In some cases, certain rights exist which permit the aggrieved party to act immediately upon the occurrence of the breach without the intervention of court or state officials.

The most common remedy for a non-defaulting party to breach of contract is to sue for damages in court. While claims for larger amounts must be pursued in courts of general jurisdiction, modest amounts can be pursued in Small Claims Court, where the procedure is inexpensive and fairly expeditious.

In certain provinces, the court system offers mediation in order to facilitate the litigation process, e.g. in case management (Ontario) or in the small claims process (Quebec). Sometimes provincial marketing schemes provide authority to arbitrate disputes between licensed members. Finally, sometimes under their contract of purchase and sale, parties may agree to proceed to private arbitration if a dispute arises.

All of the above remedies require, or are most effective, when supported by proper record keeping and written contracts. Oral contracts present practical difficulties both in proving breaches and in exercising some of the remedies.

6) Government and industry initiatives have been completed or are underway which address some of the concerns of industry

Since the creation of this Working Group, government and industry initiatives have been completed or are underway which address some of the concerns and recommendations in the *Hedley Report*. These initiatives are in the following areas:

Licensing

In 2007, the *LAR*s were amended to close a licensing loophole that enabled a licensee to close operations without paying its debts and start a new operation under a new federal license. Currently, CFIA is working closely with the FPA to further improve the business climate in the Canadian fresh produce industry. CFIA is considering regulatory amendments related to licensing of all dealers and responsibly connected individuals. Specifically, these regulatory reforms would strengthen the conditions for qualifying and maintaining a federal licence including employment and responsibly connected individual provisions. They would also cover dealers who buy produce intra-provincially and market inter-provincially and internationally and strengthen license suspension and cancellation provisions.

Market Information

AAFC also provided the CPMA $285,000 from the Advancing Canadian Agriculture and Agri-Food (ACAAF) program to complete its “Fresh Produce Industry Data Collection”

project by March 31, 2009. This project aims to improve the availability of industry statistics and market behaviour information on the fresh produce industry in Canada. The FPA is managing this project and is looking at ways to develop and provide its members an information gathering system and database about marketing channels and activities in the Canadian fresh produce industry. The FPA hopes this project will put the fresh produce industry in a position to develop long-term strategic responses to competitive pressures and problems involving delayed, partial and non-payment.

DRC Bonding

The DRC adopted a bonding policy in April, 2008. The policy provides the DRC with greater flexibility to manage applications as well as expulsions.

Bonds, or other forms of financial security, are now required by the DRC for applicants and members who have not fulfilled financial obligations in the past. Bonding provides an assurance to the DRC membership that the entity posting the security will conduct business in accordance with the DRC's rules and that the member will pay all arbitration awards which may be issued against it in connection with transactions that occurred during the bonding period. Bonds are forfeited to pay creditors, similar to the *PACA.* The DRC publishes the names of members who are bonded and the amount bonded, also similar to the *PACA.*

The DRC has established two (2) categories of bonding: applicant and member bonds, which also cover any persons responsibly connected to an applicant who fail to meet the membership conditions of the Corporation; and employment bonds, for persons who were responsibly connected to entities in the past who failed to meet the membership conditions of the Corporation.[47]

A bond will be posted for a maximum of three (3) years plus nine months from the date of issuance. The period may be extended for failure to fulfil ongoing conditions of membership.

The DRC has also obtained an enhanced form of commercial errors and omissions liability insurance from Chubb Insurance Company of Canada to protect the DRC in the event that it is sued for injunctive relief, i.e. claims alleging a wrongful act that includes a demand for a judicial declaration of some kind involving non-monetary damages. This is a new product that was not previously available and it broadens the scope of the errors and omission insurance the DRC has always carried to protect itself from lawsuits seeking compensatory damages.

[47] DRC by-laws define "responsibly connected persons" as "individual owners, partners, members, officers, Directors or holders of more than 10% of the outstanding stock of a business, and any individuals who function in an executive or managerial capacity". "Employee or employees" are defined as having "any affiliation of any person with the business operations of a member or applicant with or without compensation, whether on a permanent, temporary or contract basis, and includes, but is not limited to, owners, self-employed individuals, contractors, contractees, associates and consultants."

7) Statutory provision of super-priorities that impact the secured creditor status of banks and other lenders could have a negative impact on the availability of credit within the fresh produce industry.

One issue of debate among various stakeholders and experts engaged by the Working Group is whether all fresh produce sellers should be super priority creditors under the *BIA*. The Working Group understands from its research of parliamentary records and judicial academic opinion that Parliament enacted section 81.1 of the *BIA* in order to offer protection to unpaid suppliers who delivered goods shortly before bankruptcy of the buyer. In addition, Parliament also enacted s. 81.2 because farmers, fishermen and aquaculturalists were considered to have limited marketing opportunities and sell products that are difficult to identity after delivery.[48] Most of the opposition to these rights came from the banking and credit granting sector which feared losing or sharing part of its secured creditor status through the elevation of unsecured creditors with rights that superseded secured creditors.

The banking sector's opposition to super-priorities like a *PACA* trust continues at this present time. Rob Hall, Canadian Bankers Association, advised the working group that his organization generally opposes measures that create super-priorities like deemed trusts. He also noted that when super-priorities are established, borrowers subject to them usually suffer a reduction in available credit as the bank has less collateral to use as security against the loan regardless of a borrower good credit history. Anne Fowlie, Canadian Horticulture Council, disagreed with this assessment and advised the Working Group that the implementation of super-priorities like the *PACA* trust would improve the commercial transaction security of borrowers. In her opinion, these mechanisms reduce the risk of loan defaults by these borrowers stemming from non-payment and bankruptcies thereby reducing their credit risk with banks. When asked for an opinion on this matter, Joseph Joubert, FFC, advised the Working Group that deemed trusts and other super-priorities could tend to create restrictions on operating credit and narrow profit margins of covered sectors. Joubert based his view on the fact that super-priorities usually reduce the collateral available for banks to secure loans and they increase the credit monitoring costs of sellers dealing with covered buyers. He also expressed the concern that super-priorities like deemed trusts would enhance poor record keeping due to increased supplier complacency about the credit risks of potential buyers.

8) Delegation of federal and provincial licensing powers to a third party non-government organization or adoption of a *PACA*-like trust would be an onerous constitutional, political and administrative undertaking in Canada and not warranted in light of the findings of this Working Group.

One of the key objectives of the FPA is for the federal government and provinces to undertake comprehensive regulatory initiatives and reforms to their respective fresh produce licensing and marketing regimes and delegate these responsibilities to a third party non-government organization. The FPA envisions both the provinces and federal government requiring extensive licensing of fresh produce buyers and sellers. It also

[48] Roland C.C. Cuming, "*Priority for Unpaid Supplier of Goods and Services in Bankruptcy, Insolvency, Winding-Up and Receivership Proceeding*" University of Saskatchewan, June 1998.

anticipates that both levels of government will enter agreements with a non-government organization to enable this third party to regulate licensees on their behalf and give it the capacity to create and administer various tools and industry services to improve financial responsibility in the fresh produce industry. These tools and services would include such things as bonding, identification of responsible connected individuals with non-compliance records, and regular market behaviour information.

Another key objective of the FPA is for Canada to enact a *PACA*-like trust. This trust would enable unpaid fresh produce sellers to seek court action to resolve non-payments on the basis of proposed/new statutory recognition that unpaid produce, or earnings and assets derived from unpaid produce, are the property of the seller until full payment. It would also identify fresh produce sellers as priority creditors above banks and other secured creditors in the event of buyer bankruptcy. Once in effect, the FPA envisions that this trust would empower unpaid sellers to ask Canadian courts to freeze the assets of companies and/or their proprietors until receipt of full payment and to make trustees and receivers responsible for compensating unpaid produce sellers should their trust rights not be respected during bankruptcy proceedings.

For the FPA, this federal-provincial statutory initiative, delegation of responsibility, and adoption of a *PACA*-like trust would ensure that Canada has one comprehensive fresh produce licensing and marketing system capable of limiting the business risks and losses associated with non-payment for whatever reason in the industry. However, the Working Group is of the view that the enactment and implementation of these recommendations would be a significant and onerous jurisdictional, political and administrative undertaking in Canada.

Constitutionally, the federal government is responsible for inter-provincial and international trade and commerce and regulating bankruptcy and insolvency. Provinces, on the other hand, have jurisdiction over matters pertaining to property and civil law and regulation of intra-provincial commerce.[49] Consequently, most, if not all, elements of the regime envisioned by the FPA would require political will and stakeholder acceptance within each jurisdiction and cooperation among the jurisdictions. This would necessitate consensus that the situation in the Canadian fresh produce industry warrants these undertakings. The evidence does not support such a conclusion.

PART VI: OPTIONS REVIEWED AND CONSIDERED

The Working Group reviewed and considered the feasibility of potential actions or options ranging from initiatives already underway which will continue to their logical conclusions, through a series of more comprehensive measures, including the institution of a *PACA*-like deemed trust. The measures were reviewed individually and/or in combination. The individual measures which were reviewed by the Working Group are listed in estimated order of difficulty of implementation:

Current industry and government initiatives

[49] For further explanation on jurisdictional responsibilities, see Annex C: Jurisdictional Responsibility in Canada for Addressing Payment Problems in the Canadian Fresh Produce Sector: Graph

The Working Group reviewed current industry and government initiatives such as the CFIA's planned amendments to the *LAR*s. It is supportive of improvements to market information through enhancements to the AAFC market information system (InfoHort) which will result in improvements to day-to-day trading information on shipment volumes and prices, and the continuing development by the FPA of a separate national markets information database on the incidence of unethical behaviour within Canadian marketing channels. This database has been developed with funding already allocated to the FPA for this purpose under the ACAAF Program.

Additional measures to enhance financial security

The Working Group considered potential actions, primarily by the federal government, which included the creation of more stringent licensing requirements by the CFIA whereby licensees are encouraged to migrate to the DRC; meetings between Industry Canada/OSB and the FPA to promote industry awareness of the financial security provisions in the *BIA*; as well as exploratory actions such as feasibility assessments of a private insurance regime and of a default contract.

Delegation of licensing

The Working Group examined the feasibility of potential actions in relation to licensing of fresh produce dealers. The actions reviewed ranged from: federal government delegation of its licensing authority for the fresh produce sector to the DRC and the establishment of provincial contracts with DRC to handle the licensing of fresh produce traders within their respective jurisdictions; to federal government delegation of its licensing authority to the provinces with a DRC exemption, whereby provincial governments license all dealers operating intra-provincially, inter-provincially and internationally, and allow an exemption from licensing through membership with the DRC; to federal and provincial government delegation of their respective licensing authorities for the fresh produce sector to the DRC.

Enhanced financial security mechanisms:

The Working Group conducted significant research and review on the feasibility and value of establishing a *PACA*-like deemed trust for the Canadian fresh produce industry to provide sellers of fresh produce with priority over other creditors.

PART VII: RECOMMENDATIONS

The Working Group believes that implementation of the recommendations below will improve the business environment of the Canadian fresh produce sector in a timely, cost effective manner, and will be well received by stakeholders outside of agriculture as well.

1. Increased due diligence and credit risk management practices by industry

Working Group research demonstrated that, while delayed, partial and non-payment occur in the Canadian fresh produce market, these problems do not have an overall

destabilizing impact on the industry. Also, losses to the Canadian fresh produce industry resulting from bankruptcy are not significant. In light of these findings, as well as the research findings indicating that risky credit practices and lack of due diligence are pervasive throughout the Canadian fresh produce industry, the Working Group recommends greater uptake by industry of credit risk management practices and due diligence, which are recognized as the best defence against fraud and other unethical behaviour. In cases of fraud and non-payment, the Working Group also recommends greater utilization of existing provincial and federal legal remedies.

2. Increased industry awareness and education

In some cases, lack of awareness and understanding of good due diligence practices and available legal remedies such as section 81.2 of the *BIA*, and provincial remedies, contribute to the problem. Consequently, the Working Group recommends that governments assist, where appropriate, industry efforts to improve awareness and utilization of better credit policies, due diligence practices, and existing non-payment legal remedies in the Canadian fresh produce industry for Canadian and foreign sellers.

3. Pursue current industry and government initiatives

The Working Group has noted government and industry initiatives which address some of the concerns of industry, i.e., improvements to Canadian markets information and CFIA's proposed amendments to the *LAR*s. The Working Group recommends that these initiatives continue to be pursued, and that CFIA continue to work closely with the FPA toward advancing the proposed amendments.

4. Establishment of industry-government task force

The Working Group believes that an industry-government forum would facilitate the implementation of the above recommendations and permit sharing of industry and government expertise and foster collaborative efforts. Consequently, the Working Group recommends that FPT Policy ADMs establish an industry-government task force to address the recommendations of this report and other potential approaches to improve the trading environment in the fresh produce sector. The proposed mandate of the industry-government task force is found in Annex D, "Industry-Government Task Force: Proposed Action Plan".

Options for Financial Risk Mitigation in Canada's Fresh Produce Industry

Final Report

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March 2012

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INTRODUCTION

Overview

For quite a number of years the fresh produce industry, lead by the Fresh Produce Alliance ("FPA")[1], has complained about deficiencies in the instruments available in Canada to unpaid sellers of fresh produce. The industry stakeholders express frustration with the actual losses being experienced by some members of the industry, and also concern about the effect that the potential for loss has on the competitiveness of the Canadian industry and on consumers.

The issues around payment for fresh produce deliveries revolve around three distinct situations: when a buyer does not pay, pays slowly, or is unable to pay due to bankruptcy.

Study Objectives

In March 2010, it was agreed between fresh produce industry representatives, officials from Agriculture and Agri-Food Canada ("AAFC"), and the provincial Assistant Deputy Ministers of Agriculture from British Columbia, Quebec, and Ontario that a government-industry task force be created to examine the problems faced in Canada by unpaid sellers of fresh produce. This present study was commissioned by that group to "conduct further analysis of the feasibility of options given criteria identified by the Task Force and in light of the Canadian political and legal and constitutional policy considerations."

The focus of the present study was to examine the benefits of and barriers to various tools which could be considered, and to inform the decision making process at the ETP Working Group level. Analysis of the various tools available to the fresh produce industry occurred through a combination of legal analysis, combined with input from both government and industry stakeholders.

The Fresh Produce Industry

The Canadian fresh fruit and vegetable industry is estimated at approximately $3 billion annually and is a large part of the agricultural production value in seven of the ten provinces of Canada, especially in Ontario, Quebec, and British Columbia.

While the industry began with primarily local sales, the nature of the

[1] An alliance of the Canadian Produce Marketing Association, the Canadian Horticultural Council, and the Fruit & Vegetable Dispute Resolution Corporation.

industry has changed considerably both with greater centralization in the retail segment of the agrifood industries and with changes to regulatory environments due in part to globalization and international trade agreements which removed many barriers to trade. There is now considerable trade both across provincial boundaries within Canada, and across international borders.

Exports have grown rapidly over the past ten years to well over $1 billion, with the vast majority being to the United States. Imports have also grown sharply in the same period to over $4 billion, with the United States as the largest source, although there is strong growth in imports from Mexico, Chile, and Costa Rica as well[2].

This international trade is now essential to ensuring the continuity not only of markets for Canadian produce, but also the supply of fresh produce from other countries to Canadian consumers demanding an ever-increasing variety of fresh produce year-round.

Business models have changed significantly in the fresh fruit and vegetable industries, resulting generally in value chains that have at once greater levels of integration, but also greater levels of concentration and formalization. For example, many producers now operate through a number of different corporate entities. Multiple farmers may have entered into a true cooperative, or have formed a corporation that purchases all of their produce and then resells it either directly to consumers or through the conventional value chains. At the same time, there has been a tendency for buyers to centralize as well, with larger grocery chains purchasing relatively more directly (through fewer levels of a value chain). The above are of course generalizations, given the very diverse nature of the industry in terms of the large variety of crops, with most having somewhat unique sales chains.

The integration of the fresh produce industry, both within jurisdictions and across borders, has placed new and different pressures on both producers and dealers in fresh fruits and vegetables. The quick pace required to move highly perishable fresh produce to market is a critical element in the arrangements between growers and the rest of the supply chain – it has created great interdependency that exacerbates issues created by payment defaults.

[2] Hedley, Douglas, *Report to the Fresh Produce Alliance on the Financial Practices of the Canadian Horticultural Sector Project,* 6206646 Canada Inc (2005).

The Problem

Any failure in meeting contractual arrangements along the chain, whether deliberate, accidentally or by design, can disrupt normal operations and negatively affect the business of many others in the chain.

Historically, most fresh produce transactions were between individuals reasonably well known to each, and they were based on trust and a commitment to exchange goods against either payment or a promise of future payment. The reason for the existence of the Fresh Produce Alliance, the creation of the industry-government Task Force, and the commissioning of this study is that this trust relationship has been broken by a few industry participants, both by deliberate unethical behavior and by unintended insolvency that has created losses for the industry.

The direct scope of the impact (the money not received by unpaid sellers) is not entirely clear – despite attempts by the FPA and AAFC to quantify that element of the problem. Estimates of the impact of bankruptcy and bad debt on the industry in Canada vary widely. However, it has been agreed that despite uncertainty about the size of the problem, that further work should be done to examine tools to combat this issue, and to develop options for a financial protection program.

The fresh produce industry differs from most other industries in Canada by the extremely perishable nature of fruit and vegetable commodities. The industry's favourite saying is a most apt description of this problem – "sell it or smell it". This perishability has two major effects not faced by other unpaid sellers trying to recover from delinquent buyers. Firstly, many legal enforcement mechanisms focus on specific delivery or return of identifiable goods for which payment has not been made. In most instances, this becomes practically impossible given the need to quickly resell or process the commodity. Even at the expiration of the short 10-20 day payment terms often imposed on transactions, the physical return of the specific goods delivered is simply impossible, as the produce will have at the least become intermingled with others, if not already further processed or resold.

Secondly, this perishability has resulted in an industry which is highly interdependent. Given the immense pressure created by the short shelf life of these products, systems have developed for movement of these products through several layers of brokers, dealers, shippers, agents, distributors, wholesalers and retailers.

The rapid physical movement of the product is such a priority that the financial payment is not necessarily completed at one stage before the product is moved (and resold) to further stages of the value chain. This results in situations where the primary producer may not yet received payment for goods sold to a wholesaler, who in turn has already sold the goods to a foodservice distributor. It is this entire chain that requires protection from delinquent buyers, not just the selling party in the most recent transaction in the chain.

The challenge to be met by this study is to identify what instruments can be used in a Canadian context firstly to reduce instances of slow payment and non-payment and secondly to improve sellers' ability to receive payment when buyers cannot or do not meet their payment obligations.

Analytical Framework & Methodology

Outcomes Desired

This study will identify options to effectively use existing mechanisms or create new tools given the Canadian legal and business contexts.

These options will focus on **industry discipline** and the successful reparation of unpaid sellers. The latter outcome will be further divided into effective **recovery from solvent buyers** and **recovery from insolvent buyers,** given that the potential options and processes are so vastly different in the case of bankruptcy.

These three overarching outcomes are further divided into seven objectives:

- Effective licensing regime
- Effective trading standards
- Effective due diligence
- Effective reparation through voluntary processes
- Effective reparation through forced processes
- Effective enforcement
- Effective recovery by unpaid sellers from insolvent buyers
-

Table 1, on page 7, examines these seven objectives and lists those options or instruments which were considered and analyzed in the course of this study.

Evaluation Criteria

The analysis and evaluation of the tools currently in use, or which could potentially be developed, was based on the following criteria:

Effectively mitigates risk

The probability and timeliness of successful financial outcomes are equally important. Effectiveness of a risk mitigation tools also requires efficiency in its enforcement.

Makes efficient use of resources

A desire has been expressed by both government and industry to avoid unnecessary regulation and reduce administrative burden. As much as possible, new instruments should be capable of being administered by existing agencies. This is important both for effectiveness of systems and for the efficient use of resources.

Provides transparency and predictability, avoids complexity and duplication

Most transactions are already successful -- largely based on clarity for both parties on the outcomes if the transaction does not proceed smoothly. The industry will be aided most by having a system in which the repercussions of unfair trading practices are fully understood by all buyers and sellers.

Protects interjurisdictional market participants

The Canadian market may suffer significant setbacks if its risk mitigation tools do not apply reasonably uniformly across provincial boundaries, or if they are not accessible to international sellers. In addition, the instruments chosen must not be so onerous that they place Canadian industry at a competitive disadvantage in foreign markets.

Is achievable given business realities

The essential nature of the fresh produce industry, with its quick transactions and movement of goods, will not change. The instruments chosen to protect the industry must be reasonably capable of implementation without requiring drastic change to the nature of the transactions themselves.

Is achievable given legal realities

As with industry, it is not to be expected that the overall interpretation of the Constitution or general civil enforcement processes would change. Instruments should reduce unnecessary litigation, withstand legal challenge, and rely on

existing legal mechanisms wherever possible. Given Canada's constitutional division of powers, implementation of national solutions will likely require action by both federal and provincial governments.

Does not create moral hazard or further liability

Overreliance on risk mitigation or risk transfer mechanisms can result in a false sense of security and under emphasis of preventative measures. There must remain an onus on sellers to conduct due diligence on individual transactions, to protect the industry in aggregate.

Instruments Examined

All instruments and options for action outlined in Table 1 were examined in the course of this study. However, from initial review of documents and conversations with some stakeholders, it became clear that there are some tools and instruments which require less study due to the fact that they are already quite effective in Canada.

As an example, the alternative dispute resolution processes used by the Fruit & Vegetable Dispute Resolution Corporation ("DRC") are already quite effectively providing informal complaints mechanisms to its members. While it is within the scope of this study to review those processes to ensure they align with recommendations and options presented, they were not hyper analyzed to identify further small refinements to existing and effective mechanisms. The focus, rather, was on those changes which could provide the biggest benefit to the industry.

Table 1: Desirable Outcomes and Options to be Considered

Desirable outcomes	Options/instruments to be considered
Industry Discipline	
Effective licensing regime	Reduce gaps in licensing regimes
	Create greater uniformity/transparency in licensing requirements
Effective trading standards	Tools to effect wider adoption of default contracts
Effective Due Diligence Tools	Raise awareness of need for due diligence by individual sellers
	Raise awareness of specific risk mitigation tools
	Provide tools for due diligence
	Insurance
	Self-insurance or industry protection funds
	Bonding or other vendor security
Effective Recovery from Solvent Buyers	
Effective Reparation – Voluntary Processes	Provide support for negotiated resolutions
	Effective mediation process
	Effective voluntary arbitration process
	Tools for preserving rights and freezing assets
	Insurance, self-insurance or industry protection funds
Effective Reparation -- Forced Processes	Effective binding arbitration
Effective enforcement	Tools for enforcement of arbitration decisions
	Effective use of existing enforcement mechanisms
Effective Recovery from Insolvent Buyers	
Effective recovery by unpaid sellers from insolvent buyers	Amendments to BIA and/or CCAA
	Potential for statutory trusts in Canadian context

CURRENT RISK MITIGATION MODELS

The Canadian Model

The *Canada Agricultural Products Act* ("CAPA") provides the legislative basis for the interprovincial and international sale of fresh produce. In 1967, a Board of Arbitration was created by the *Produce Licensing Regulations* made pursuant to CAPA. That Board was to have the power to make binding decisions, amongst other matters, on complaints about a licensee failing to pay an account. These regulations also provided for appeal of those decisions and a requirement that the Minister must cancel a license if a licensee did not comply with the decision of the Board of Arbitration.

Unfortunately, the Federal Court ruled in 1974 (in the decision *Re Steve Dart Co* v. *D.J. Duer & Co)* that those Regulations were made without being authorized by CAPA. In addition, the appointments to the board were made by sub-delegated power, which was also held to have been made without authority.

Based on consultations with individuals from industry, it appears that this Board of Arbitration was highly effective, given the combination of binding arbitration and enforcement through licensing. Following the Steve Dart decision, government and industry needed to find an equivalent mechanism that complied with legislative authority.

The result was that the Fruit and Vegetable Dispute Resolution Corporation (DRC) was created as a non-governmental organization under the North American Free Trade Agreement (NAFTA), consisting of members of the produce industry (initially in Canada, the US, and Mexico) who would expressly agree not only to certain trading standards, but also to arbitration processes. The organization was developed specifically for the purpose of "promoting fair and ethical trading and resolving commercial disputes that arise between its member companies."

The licensing regime under CAPA was left intact, remains in existence today, and is administered by the Canadian Food Inspection Agency. Currently all dealers of fresh fruits and vegetables and edible fungi who market their product in import, export or interprovincial trade are required to hold a license under CAPA except[3]:

- Dealers selling only products grown themselves

[3] Licensing and Arbitration Regulations, SOR/84-432, section 2.1.

- Dealers selling only products purchased within the province where business is located
- Dealers selling only directly to consumers for less than $230,000 annually
- Several other exemptions not of direct relevance[4]

However, the most significant exemption is for those individuals who are members of the DRC[5]. While the DRC does not technically license its members, they are bound to comply with the by-laws of the corporation through the contract of membership. Dealers selling produce exclusively within a province are not required to be licensed under CAPA or with the DRC. This will be discussed in greater detail later, but is mentioned here as it is of high relevance to the legal barriers that would need to be overcome to create a national solution to the issue of non-payment.

The DRC is not a governmental organization, so the requirement for membership and the terms of that membership are not technically a license. However, the practical result is that there are two parallel bodies, the DRC and CFIA, who exert similar controls over their respective members. Dealers involved in cross-jurisdictional trade must be licensed either under CAPA or registered with the Dispute Resolution Corporation. It should be considered carefully whether Canada should continue to have what amount to dual parallel licensing mechanisms. This is discussed in greater detail below in the Licensing section, at page 18.

Over the past decade, the DRC has become the favoured regulatory body for much of the fresh produce industry in Canada, especially in central and eastern Canada. The DRC has over 1,400 members, including a wide cross-section of industry participants such as "growers, packers, shippers, produce brokers, wholesalers, fresh processors, food service distributors, retailers, transportation brokers, freight contractors and carriers." By contrast, there are now only around 120 licensees under the *Canada Agricultural Products Act.* Likewise, the Board of Arbitration remains necessary for the integrity of the CAPA licensing regime, but has not been asked to adjudicate in the past seven years.

The US Model

Many industry stakeholders, in both the United States and Canada, both purchasers and sellers, hold the United States model of

[4] Also exempted are dealers of seed potatoes, nuts and wild fungi, or wild fruits and vegetables for which no grade has been established, products imported from the US to Akwesasne Reserve, and products donated to a charity.

[5] Licensing and Arbitration Regulations, SOR/84-432, section 2.1(2)(e).

financial risk mitigation in high esteem.

The *Perishable Agricultural Commodities Act* ("PACA") was enacted in the United States in 1930 to regulate marketing of these products in interstate and international trade. The legislation's purpose is to prevent unfair and fraudulent conduct and to facilitate the orderly flow of perishable agricultural commodities across borders. The legislation is administered by the Agricultural Marketing Service ("AMS"), an agency of the United States Department of Agriculture ("USDA").

The administration of the PACA legislation has four key elements:

- licensing
- dispute resolution
- investigative enforcement
- the deemed statutory trust

The licensing requirements under the legislation apply to the vast majority of the market participants in the fresh produce industry, including all dealers, foodservice distributors, shippers, commission merchants, and growers' agents. There are some exemptions for some categories such as retailers (based on sales volume) and processors (all purchase and processing within one state), but the vast majority of market participants are either licensed or directly impacted by the PACA licensing regime.

The legislation was amended in 1984 to include a statutory trust for the benefit of unpaid sellers. The trust is unique in two respects:

- it is a "deemed" trust, meaning that the parties do not expressly have to form an agreement to establish a trust; it is established by the force of statute
- it is a "floating" trust, meaning that the specific goods need no longer be identifiable for the trust to apply; they can be comingled with other goods or monies and the trust still applies

It has been suggested by industry that the primary element of the US model that is lacking in Canada is the "statutory trust" provided through the United States' *Perishable Agricultural Commodities Act.* However, it has become apparent that there would be significant hurdles to overcome, both with respect to the legal framework around trusts and bankruptcy, as well as ambiguity created by the constitutional division of powers in Canada.

Similar to the Canadian model, a grower can file an action in Court seeking to enforce payment, though in the United States the action is for payment under the trust while in Canada it is most commonly

an action for breach of contract. An additional tool available under the PACA, however, is the possibility for a trust enforcement action to seek a temporary restraining order, which freezes the bank accounts of the debtor until the trust creditor (grower) is paid. Many produce sellers find this a very effective tool to recover payment, even in advance of Court action, given the strong business interruption that would occur if a buyer's bank accounts were frozen.

When a licensee fails to pay after receiving an order to pay amounts owing to a seller, the AMS automatically suspends the license and that dealer is prohibited from operating in the produce industry until the award is paid. This is very similar to the provisions of licensing under CAPA and membership in the DRC. In both systems, the former licensee's officers are also prohibited from operating another business in the produce industry and cannot be employed or affiliated with any other licensee without getting explicit consent to do so (or in the case of CAPA or the DRC, without posting satisfactory security). This monitoring of the activities of individuals "responsibly connected" to a firm appears to be somewhat stronger in the US, but is also available in Canada as proactive protection for the industry.

The combination of a strong licensing regime in the US with the deemed statutory trust, and the other enforcement tools such as the temporary restraining orders together create what was in consultations often referred to as "the big stick". Many members of the industry feel that the primary benefit of the PACA to them personally was not the actual recovery of any monies, but rather in the fact that they have consistently been treated fairly by buyers in the United States and have never needed to recover any monies. They feel that they owe this fairness to the *threat* of speedy and decisive action through PACA tools, were buyers not to pay them.

From consultations with industry organizations, it became very apparent that the US model is seen by many industry stakeholders not only as one to be envied, but one worthy of potential replication in Canada. This is particularly the case due to the large volume of trade between the two countries in fresh produce. In fact, both officials from the United States Department of Agriculture ("USDA") and the U.S. Secretary of Agriculture have since 2005 requested that Canada's federal government explore measures to improve the financial stability of Canadian fresh produce sellers.

The desire to emulate the US system has been echoed by industry organizations on both sides of the board, with the Fresh Produce

Alliance (the Canadian Produce Marketing Association, the Canadian Horticultural Council, and the Fruit & Vegetable Dispute Resolution Corporation) expressing an interest particularly in the positive outcomes generated by the United States' statutory trust.

Gaps between US and Canadian Systems

Through conversations and document review, it is suggested that the following are the primary differences between the US and Canadian models:

Clarity -- It appears that the US model relies heavily on a single, strong tool for recovery of debts from delinquent buyers. The statutory trust created under the PACA legislation serves as the foundation for both due diligence and hard enforcement. It provides the basis, for example, for other sharp tools of enforcement such as the temporary restraining orders which can be issued by a Court to freeze the assets of a delinquent buyer.

Inclusiveness – The tools under PACA are available to most industry participants, as there are few exemptions from the need for licensing under PACA.
Some otherwise licensing-exempt individuals have chosen to be licensed nonetheless, primarily so that they may avail themselves of the protection provided by the deemed trust on the basis of specific wording on their invoices. Yet others utilize the tool by sending the statutorily-required notice to the debtor to preserve trust rights. However, despite the fact that there are many different ways to utilize the trust itself, it is available in some fashion to most market participants.

Speed – The statutory provisions under the PACA legislation impose short timeframes – for example, the prompt payment rules use 10 day payment terms as the default. Results are particularly fast in many instances, as long as the rights under the statutory trust are successfully established through use of specific statutorily-defined wording or by delivering trust notice to the debtor. The freezing of assets through a Temporary Restraining Order can be achieved within days, often resulting in speedy recovery of the unpaid funds. In fact, the threat of the temporary restraining order alone often expedites payment prior to proceedings formally being launched.

FOUNDATIONS: DISCIPLINE & LICENSING

Industry Discipline

Much emphasis will need to be put on finding the hard tools designed to attain binding decisions in favour of unpaid sellers, in order to actually realize a financial outcome for claimants. However, those systems will fail if the necessary factual and evidentiary basis for claims cannot first be established. Attention must therefore also be paid to reinforcing diligent practices by the industry and individual sellers to support those hard tools.

A non-payment or slow-payment situation, whether it involves a solvent or insolvent buyer, is never completely unexpected to the industry as a whole. It is the nature of any business that there is the potential for failure, or times when cash flows are tight. That is particularly the case in an industry as highly interdependent for cash flow as North American fresh produce. Despite the fact that these situations cannot be truly unexpected, they still come as a shock or at least a surprise to the individual seller who finds him or herself often immediately facing a similar cash-flow problem to that of the delinquent buyer. It may be too late to use best practices once such an event happens, especially given that the seller may tend to panic at that point as well.

By building an industry which *routinely* uses effective transactional practices, the impact on the individual seller will be reduced and his or her ability to collect will be enhanced. These practices are largely preventative and can be broken down into tools that promote due diligence (reducing the possibility of entering into a contract with a delinquent buyer in the first place) and tools that establish the evidentiary basis for a claim before an adjudicative body (default contracts and documented industry standards through uniform licensing regimes).

The fruit and vegetable industry, largely through the work of its industry associations, has already done much to raise awareness about the need for sellers of produce to mitigate their risks. For example, awareness has been raised with growers about the greater risks that accompany a sale to a purchaser who is neither a member of the Dispute Resolution Corporation nor licensed by CFIA. These efforts help to prevent some non-payment situations by avoiding those transactions which present the highest risk.

It has also become clear that having several parallel licensing streams may be somewhat problematic, as the details of a transaction may differ somewhat depending on the licensing status of the buyer and seller. For example, a transaction between two DRC members, even in the absence of any detailed written contract, can ensure great clarity both on the default terms of contract and the processes which will be used to resolve any

disputes. The same cannot be said for a transaction between one party who is exempt from any licensing and another acting under a license under CAPA.

The need for improved due diligence has long been recognized by the fresh fruit and vegetable industry. Through educational and awareness activities, industry organizations and licensing bodies have long reminded growers about the need to check into the status of buyers and to properly document transactions. For example, a California newspaper[6] reminded growers in 1940:

> *Growers may receive the best advantage from the law by promptly reporting irregularities in payment or accounting, and by doing business only with receivers properly licensed with the department. It is advisable to have all transactions reduced to a written agreement, and to insist that field representatives of buyers display the blue license card.*

Written contracts

However, consultations in Canada in 2005 revealed that a lack of due diligence is still quite pervasive in the Canadian fresh produce industry. A survey conducted by the Fresh Produce Alliance[7], which found that nearly 40 percent of all respondents reported that over half of their sales were not under contract at the time of sale. There appears to be an assumption that sales to well-known and trusted buyers do not require a written contact at the time of sale. In fact, over 70 percent of the respondents to the FPA survey reported that fewer than one percent of transactions ran into difficulty despite the lack of a contract.

Another reason stated by sellers of fresh produce for the lack of a contract is that, given the "sell it or smell it" concept, they simply feel that they often do not have the luxury of being ableto choose who they sell too, or what the exact terms of that sale will be. It
is believed that competition is too high and the products too perishable for sellers to have an effective choice to not deliver produce to a buyer who is a higher or unknown credit risk.

The Hedley Report found that the Canadian industry still has a tendency to enter into transactions without a written contract. There are also many instances where Canadian sellers will continue to trust (or hope) for payment for their produce for extended periods of time, with one third of Canadian respondents indicating that they extended credit for more than 30 days.

6 Lodi News-Sentinel, May 8, 1940
7 Hedley, Douglas, *Report to the Fresh Produce Alliance on the Financial Practices of the Canadian Horticultural Sector Project,* 6206646 Canada Inc (2005) ("the Hedley Report").

There are some who perceive the proper documentation of transactions, through invoicing and written contracts, to be an indication of mistrust. That may include a perception that insistence on written contracts is primarily as preparation for potential civil enforcement or Court action. However, proper written documentation is equally important for quick resolution through less formal methods of dispute resolution and for avoiding disputes altogether. For example, it assists helpful industry associations with informal dispute resolution to have proper documentation of the nature and quality of the goods, of the agreed payment terms, and any agreements made on the process which will be employed to resolve disputes. This is the case whether it is a body with well defined processes, such as the Dispute Resolution Corporation, or another organization of which the seller may be a member. Many organizations who represent growers primarily on policy matters are also willing to place calls and attempt to informally and quickly resolve disputes through relationships that they have built with both the sellers and the buyers of the goods.[1]

The DRC states that for cases of dispute resolution between members of their organization, documentation is rarely an issue, despite the lack of a contract in some cases, as invoices or other documentation often suffice. However, for transaction with non-members a contract may be of considerable benefit to ensure access to arbitration without requiring further consent to arbitration from the other party.

The Dispute Resolution Corporation recommends written contracts as a trading practice, but their Rules & Regulations Manual stops significantly short of requiring a written contract. Section 3 of the Trading Standards states in part:

> *It is impracticable to specify in detail every class of records which may be found essential since many different types of business are conducted in the produce industry and many different types of contracts are made covering a wide range of services by agents and others. The responsibility is placed on every member to maintain records which will disclose all essential facts regarding the transactions in his business.*

There are two ways that could be considered for greater adoption of documentation requirements. The first manner for increasing adoption of improved documentation is through educational and awareness-raising activities. The intention here is not to point directly at the Dispute Resolution Corporation to play this role alone, as they already encourage proper record keeping for their members. However, given the low rate of written contracts, consideration should be given by various industry organizations and government agencies to collaborate on such efforts, as

[1] *It should be noted that the absence of contracts is as prevalent in the US as it is in Canada. Product is often ordered as it is packed on the truck and delivered before even an invoice is generated. It is also important to understand that an invoice is not a contract, but rather evidence of a contract supplied by the seller. This does create some confusion as an invoice is the primary evidence of the agreement in most transactions; however, it is generated by one party and sent without actual written ratification by the buyer in most cases.*

the message would certainly be more effective if coordinated through multiple influential agencies.

In addition to educational initiatives, consideration should be given to creating at least greater standardization in documents -- or perhaps even mandating certain documentary requirements. The DRC already has the ability to effectively regulate the trade processes through the membership contract with their members. Requiring either a contract or certain specific credit terms would assist with the resolution of disputes with non-members, regardless of whether in Court or by alternative mechanisms. In the United States, it is not a contract, but rather the statutory PACA trust that is of crucial weight in a dispute. The PACA regulations stipulate standard prompt payment terms which default to 10 days and the Act also requires that specific statutory wording be put on an invoice to enact the protection of a statutory trust[8]:

> *The perishable agricultural commodities listed on this invoice are sold subject to the statutory trust authorized by section 5(c) of the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. 499e(c)). The seller of these commodities retains a trust claim 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.*

Though there is another method for enacting the trust through legislated notice requirements, the use of this wording on invoices is the most commonly adopted. Much as these standardized invoices now create a trust under US legislation, documents could readily be designed to form a contract in the Canadian industry, though this would obviously require the agreement of both buyer and seller.

Information on Buyers

Another element of improved due diligence is the need for sellers to have access to sufficient information to adequately assess the credit-worthiness of sellers. Currently, primary information sources on sellers are the licensing bodies and the Dispute Resolution Corporation. The CFIA, the USDA AMS, and the DRC may be able to provide information on buyers who have had rulings against them, or have been otherwise disciplined. Those who have not complied with previously arbitral rulings, for example, may have had their license or membership revoked. This information would allow a seller to make an informed decision on a sales transaction. Armed with such information, if the seller decides to proceed nonetheless, there are many security vehicles that could be employed to ensure that payment is received for that transaction, not the least of which may be the

[8] *Perishable Agricultural Commodities Act,* 1930 (7 U.S.C. 499e(c)), section 499(e)(c)(4)

request for payment at the time of delivery or an irrevocable letter of credit.

In addition to ensuring that the buyer is properly licensed (or, in the case of the DRC, a member in good standing), there are other industry sources of information on buyers of fresh produce. For example, Blue Book Services based in the United States is a voluntary listing of individuals in the fresh fruits and vegetables industry. Companies listed with that service provide financial information, which is supplemented by information collected about the company from its business partners. A rating is provided for a company based on proprietary formulas for each of three elements: an estimate of credit worthiness, an integrity rating and a pay description of the average number of days within which vendors and suppliers are paid. The rating is a reflection of the overall financial strength of a fruit and vegetable company, its trading practices and reputation in the industry. Listing with such an organization is not legislated or in any way mandatory, but most companies choose to be listed by the service as a way to ensure continuity of their business. Sellers of fresh produce would be well served by making greater use of these types of credit investigation tools.

Licensing of Buyers

There[2] are significant differences between the regulatory frameworks across Canada's provinces. The regulatory environment ranges from a highly regulated market for some vegetables in British Columbia to no registration requirements at all for vegetable purchasers in Quebec.

In British Columbia, the BC Vegetable Marketing Commission[9] regulates the production, transportation, packing, storage and marketing of more than a dozen regulated crops including greenhouse, processing, and storage crops. Central-desk marketing of those crops is undertaken through delegation of authority to ten marketing agencies (in essence, similar to a mandatory cooperative system). This centralization of marketing assists with due diligence, as the payment risk in these instances rests largely with the marketing agencies, not with the growers. The commission also licenses just over 50 processors and wholesalers, but does not generally review the financial situation of those, except if a specific complaint is received. The commission also does not presently license the retail stage of the supply chain.

Conversely, the province of Quebec does have agricultural marketing boards for some commodities, but it does not require any licensing or permit for buyers of fresh produce. This poses a significant information gap, which affects not only the ability to perform due diligence, but also for other activities such as food safety and traceability. There is a sense

[9] established pursuant to authority of the *Vegetable Scheme* under the *Natural Products Marketing (BC) Act,* RSBC 1996, c 330.

[1] ages 17 and 18 – Pei Potato and Ontario Greenhouse both require dealers to be DRC members as a condition of a provincial dealers license.

that if provincial legislation or regulations were to be amended, it would need to either be preceded or accompanied by a licensing mechanism for the buyers. This will of course significantly add to the complexity of such an endeavour, but a new financial risk mitigation tool without the certainty of a finite and known set of buyers would be unwieldy.

Those jurisdictions with legislated marketing boards, such as British Columbia, experience a somewhat different need for due diligence. Marketing by a smaller number of central agencies creates significantly greater efficiency and transparency, given that there are fewer market participants. In these situations, the agencies (unlike most primary producers) would have significantly greater oversight over potential transaction risks given intricate knowledge of their customers.

However, despite the fact that these marketing agencies expend considerable resources on due diligence activity, they still experience considerable losses, especially due to bankruptcies which individuals stated could not have been foreseen given previous long and excellent industry history. It is for this reason that improved due diligence cannot be seen as the only tool for mitigating accounts-receivable risk.

Licensing

The timing may be right for reconsidering whether the licensing under CAPA needs to remain in place, or whether the legislation could simply require that those dealers who are currently the subject of the regulations be members of the DRC. As of December 2011, there were over 1,400 active members of the DRC of which 1,000 are from Canada. In comparison, there are currently only approximately 120 licensees under the Licensing and Arbitration Regulations (LAR) of CAPA. Given the many services offered to DRC members (especially those trading with other DRC members), it begs the question why the remaining licensees choose to comply with the LAR regulations rather than being members of the DRC.

There would be many benefits to having a single licensing regime:

- Transparency for all industry participants, as there would be one license required of all participants in interprovincial or international trade. This would significantly simplify the process of researching a buyer's credit-worthiness.
- Enforcement capacity would be enhanced if "licensed" by a single body, as it removes the ability for parties to revert to licensing under the CAPA after their membership in the DRC is either revoked or begins to come into question.
- Improved efficiency would result through reduced need for administration following removal of redundant licensing
-

mechanisms.

A review of the Licensing and Arbitration Regulations under the CAPA has been in progress for the past several years. It is understood that draft amendments are currently at final stages of review by the federal government. The details of those revisions are not known to the writers of this report, but they were prepared in close consultation with industry and are focused primarily on the structure of the Destination Inspection Services. It is expected that these amendments will lead to further alignment between the CFIA,DRC and USDA regimes. However, regulatory amendment alone will not create a single licensing regime – that could only be accomplished through legislative amendment. Study and consultation into that possibility are recommended, as the dual licensing regime has allowed for the creation of a very effective arbitration organization – the Dispute Resolution Corporation. However, twelve years after creation of the DRC, it should be considered whether there remains merit to continuing the option of licensing under the CFIA, or whether there could simply be a legislated requirement for membership in the DRC.

This is not to say that there does not remain a crucial element of this system that should remain under the direct auspices of government. CFIA, in addition to its licensing function, provides destination inspection services to give an unbiased assessment of the quality of produce at the point of delivery. This is a service provided exclusively to the fresh fruit and vegetable industry to promote fairness in the industry as a part of the alternative dispute resolution system. It has been argued by some of those consulted that the CFIA's strength is in providing unbiased Destination Inspection Services, while the DRC's strength is in arbitration. Both inspection and arbitration are required, but in order to be most effective they are best provided by two separate parties, to ensure that the inspection service is (and is perceived to be) not only accurate, but also unbiased and impartial.

CFIA and the DRC have already made efforts to find efficiencies to ensure that the dual systems do not duplicate the need for administrative resources. In fact, the DRC's Good Inspection Guidelines already clearly suggest to their members that they should avail themselves of CFIA's inspection services to protect themselves:

> *The services that carry the most weight are the CFIA (Canadian Food Inspection Agency) and the USDA (United States Department of Agriculture) government inspection agencies. The next best option would be a destination inspection service which is accredited by the CFIA or USDA, however at the present time there are none. The corporation*

will accept inspection certificates issued by the USDA and the CFIA as prima facie evidence of the contents of the certificate.

Likewise, it is understood that the CFIA reciprocally and regularly directs potential licensees to the DRC, to consider whether those new market entrants would not want to be DRC members instead of subjecting themselves to the CAPA licensing requirements.

In order for an arbitration mechanism to be most effective, it should be coupled with a single, strong licensing regime. In addition, there may be some merit to federal-provincial cooperation in this respect, as the provinces could perhaps also legislatively require membership in the DRC for those trading intraprovincially, thereby creating a licensing regime for intraprovincial trade that mirrors federal licensing. As yet another less drastic alternative, there may be opportunities to provide even greater clarity about the roles of the parallel licensing/membership regimes, without dismantling either of them.

RECOVERY FROM INSOLVENT BUYERS

The initial phase of this study disclosed that Canada's insolvency legislation purports to provide considerable protection to farmers selling agricultural products. However, after a more thorough analysis, it appears that the protection is not as easily accessible as might be assumed on the surface.

Bankruptcy and Insolvency Act

Section 81.2 of the *Bankruptcy and Insolvency Act* ("BIA") provides a "Special right for farmers, fishermen and aquaculturists". High priority, even above secured creditors, theoretically accrues to a farmer who delivers agricultural products to a purchaser who then becomes bankrupt or is put in receivership within 15 days of delivery. Farmers must then file a claim within 30 days of the bankruptcy or receivership. The claim is secured by a charge on the purchaser's entire inventory, not just the specific goods delivered, and takes priority over all other charges on the inventory except the rights of unpaid sellers whose goods are still identifiable and could repossess them under section 81.1. The farmer's claim is essentially to be a priority under bankruptcy over all other secured creditors.

As stated above, the perishability of fresh produce often means that the goods must flow more rapidly than the payments for them. This results in an industry where the farmer may not yet have been paid, while a purchaser several steps along the value chain goes bankrupt. This section, even if it was intended to only protect the farmers and not the entire

industry, will require amendment if it is to appropriately protect the producers of fresh produce. Consideration will be given to closely examining the possibility for amendment of this section, to either expand the definition of farmer, or to remove the need to establish the category of person and focus rather on the nature of the products as agricultural.

The insolvency regime in Canada was amended significantly by the *Insolvency Reform Act 2005* and later by the *Insolvency Reform Act 2007.* However, it appears that there may still be opportunities to include changes beneficial to the agricultural industry in the near or medium term, as it has been suggested that the legislation will be subject to further review in any event, partially because the recent amendments to both statutes may not have fully adopted the United Nations Commission on International Trade Law ("UNCITRAL") model[10], and do not fully align with implementation by other countries.

Under Canada's constitution, the bankruptcy system is under the exclusive jurisdiction of the federal government and relies on two pieces of federal legislation. The *Companies' Creditors Arrangement Act* ("CCAA") allows financially troubled corporations owing more than $5 million the opportunity to restructure their affairs. The legislation of applicability to the present study, however, is the *Bankruptcy and Insolvency Act* ("BIA"), which sets out the rules for prioritization of creditors in the case of a bankruptcy or a receivership.

BIA Section 81.1 In 1992, the *Bankruptcy and Insolvency Act* was amended to add priority for individuals to receive the return of identifiable goods delivered just before bankruptcy (section 81.1). In addition, following considerable amendment in parliamentary committee and deliberation in the House of Commons, another section which did not require the goods to remain identifiable was added as a special right for farmers, fishermen and and aquaculturists (section 81.2). Those amendments to the *Bankruptcy and Insolvency Act* came as a result of political will, developed at least in part through strong lobbying and educational efforts of various agricultural subindustries. The intent of both of these sections was to give priority during bankruptcy proceedings to individuals who had recently delivered goods to a business just prior to the bankruptcy occurring.

However, it appears that these provisions, which were so desired by agriculture, are not the panacea that some suppliers might have hoped they were, as they have not delivered any significant protection to the agriculture industry. It appears that the sections have a number of

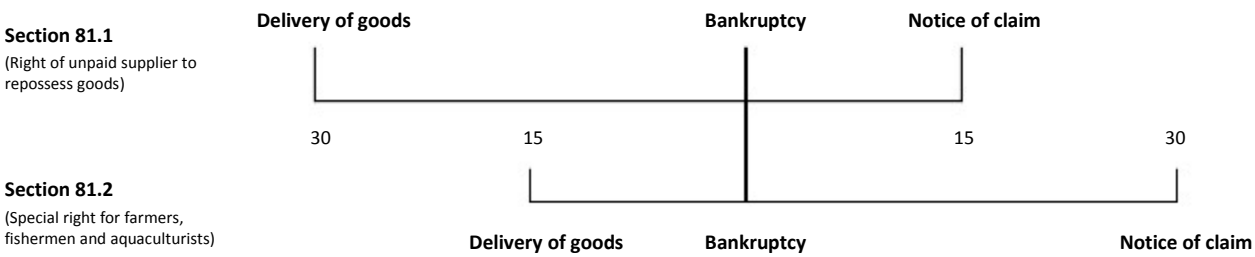
[10] The UNCITRAL prepared a Model Cross-Border Insolvency Law being considered by some countries and adopted by others. The study will examine Canada's implementation of this initiative.

limitations which make them insufficient and ineffective. Those limitations are:

1. Section 81.1 requires that goods remain identifiable, and that the goods remain in the same condition as when delivered.
2. Section 81.2 only protects a "farmer" with connection to land.
3. The time limitations of both sections 81.1 and 81.2 are too short to make them practical tools.[11]
4. Both sections only give priority over the bankrupt's inventory at the time of the bankruptcy, not over the assets or accounts receivable of the bankrupt[12].

The timeframes for making claims under both sections 81.1 and 81.2 are extremely short. The timeframes under section 81.1 were specifically examined both in the Hedley Report and by the Federal-Provincial Working Group on Fair and Ethical Trading Practices in the Canadian Horticultural Sector. The latter adopted the finding of the Hedley Report, concluding that "the timeframes to use section 81.1, as it is currently structured, make it unusable for many sellers of perishable agricultural products."

In the case of section 81.1, amendments in 2005 changed the restrictions so that goods delivered in the 30 days prior to a bankruptcy will be subject to the provision, with the supplier having 15 days following the bankruptcy to deliver notice of the claim. The timeframes for section 81.2 are essentially reversed (as shown in the diagram below), allowing the claimant to successfully serve proof of a claim within 30 days following the bankruptcy, but only for goods having been delivered within the 15 days prior to the bankruptcy.



[11] The Parliamentary Information and Research Service, in 2003 and 2008 reviews of these sections, suggested that "there has not been a great deal of criticism of section 81.2", but pointed to a paper by Professor Ronal Cuming that criticized the timeframes, the application to only inventory, and the inapplicability to reorganization proceedings.

[12] It should be noted that this issue was specifically considered by the House of Commons, with opposition members bringing a motion on June 8, 1992 to amend the provision to include accounts receivable; the motion was not supported by the government and was defeated.

BIA Section 81.2

There has quite surprisingly been limited judicial consideration of section 81.2 of the *Bankruptcy and Insolvency Act.* In fact, the writer of this report were only able to locate a single decision, made by the New Brunswick Court of Queen's Bench[13], which directly considered that section of the Act. In that case, the applicant forest products marketing board was found not to meet the definition of "farmer", as the board was marketing the forest products to the bankrupt after purchasing it from those who would qualify as farmers under the statute. The judge in that matter concluded in part:

> *In my opinion, the Boards are clearly not farmers in their own right. They do not own land; nor are they occupiers, landlords or tenants of woodlands. Accordingly, in order to take advantage of the legislative rights established by section 81.2 of the BIA, the Boards would have to be acting as agents for farmers, in this case the woodlot owners.*
>
> *In this regard, it is significant that the woodlot owners may sell directly to the mills or other consumers of the trees.*
>
> *… I reject the Boards' request to read in the words "and/or their agent" into section 81.2 of the BIA. If Parliament had intended to incorporate those words into the legislation it would have done so.*

There may be instances of successful application of section 81.2, but the writers of this report were not able to locate a single such case. Likewise, the effective use of the priority under section 81.1 (the right of unpaid sellers to repossess goods) has been problematic, often due to the difficulty in identifying the specific goods. Two decisions were found where the issue of identifiability of agricultural products was considered. In the Quebec decision[14], it was found that corn comingled with other corn was no longer identifiable, even if the grade and exact quantity of corn could be established. Likewise, while a leading Ontario decision[15] was decided for other reasons, the judge in that case considered whether orange juice could be sufficiently identifiable to be repossessed under this section. It was remarked that this would likely not be possible unless it was put into empty vats and sufficient records of vat cleaning and filling could be produced.

This requirement for identifiability would make section 81.1 impractical for most agricultural commodities, including fruits and vegetables unless they were already packaged at the time of sale in such a way that they could be clearly identified. However, there is the possibility that the provision may become more accessible as judicial consideration of the section increases. There have been recent decisions that suggest that the

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[13] *St. Anne-Nackawic Pulp Company Ltd. (Bankruptcy of); Re Forest Products Marketing Boards* v. *Green Jain Wedlake* (2005),14 C.B.R. (5th) 291.

[14th] *Re: Meunerie B.L. Inc* (2007), 38 C.B.R. (5) 1.

[15] *Bruce Agra Foods Inc.* v. *Everfresh Beverages Inc (Receiver of)* (1996), 45 C.B.R. (3d) 169.

section should be less narrowly construed.

There is another reason why section 81.1 is not useful for fruit and vegetable growers. That provision allows solely for the repossession of the specific goods in question, not for compensation in lieu of repossession. In most instances, fresh fruit and vegetable would be of little use or value after any significant amount of time has passed. Most of these products are simply too perishable for them to have any significant value unless they pass expeditiously through their usual supply and distribution channels. Their return to a previous seller would at the very least mean a very large loss in value, if the product retains any value at all.

However, on its face section 81.2 seems to remedy this for agricultural products. That section allows recovery from the entire inventory of the bankrupt buyer, not just the specific goods in question. However, many of the individuals with detailed knowledge of the industry state that there is often little inventory of any kind remaining in a bankruptcy situation. In addition, much of the inventory is also likely to consist of perishable commodities, which will have little value unless expeditiously sold and delivered by the bankruptcy trustee. Unlike the statutory deemed trust available under the United States PACA legislation, the agricultural seller does not have priority under the BIA over other secured assets or over accounts receivable.

It is clear that section 81.2 as currently drafted does not meet the original intent, as it practically provides neither effective protection to primary producers of perishable products, nor the supply chains through which these primary producers sell their products. However, it appears that some amendment to this section would allow it to come much closer to its serving the purpose for which it was originally intended.

A big part of the problem appears to be that the only individuals who can avail themselves of the priority created by section 81.2 are farmers. The definition of farmer contained in that section requires that it be demonstrated to the Court that the applicant is the owner, occupier, lessor or lessee of “land in Canada used for the purpose of farming, which term includes livestock raising, dairying, bee-keeping, fruit growing, the growing of trees and all tillage of the soil”. In must be shown not only that the product is agricultural, not only that the individual is agricultural, but that there is a direct possessory interest in land.

In many cases, especially when growers operate through corporate or cooperative entities, this requirement precludes use of the provision, even by those whom it was directly meant to protect. In order to protect the farmer/grower, that protection should be afforded to the entire value chain, not just the primary producer with an interest in land. It should be

considered, therefore, whether amendment of section 81.2, either by replacing the word “farmer” with “person” or in some other way significantly expanding the definition of farmer, would better serve the initial intent of that provision, and thereby assist with Canada’s food security by protecting the entire fruit & vegetable value chain from unethical or insolvent buyers.

The timelines in section 81.2 should also be reconsidered, with some suggesting that delivery within 30 days prior to bankruptcy (as is the case for revindication of goods under section 81.1) would be more appropriate.

If a supplier meets the criteria set forth in section 81.2, the unpaid amount is secured by a charge on all of the bankrupt’s inventory as it existed at the date of the bankruptcy. This charge ranks above all other claimants, including those of secured creditors. Accordingly, should a receiver or trustee sell the goods supplied by grower, the grower would have first claim to the net proceeds of that sale. Also, the grower is entitled to full payment of his claim should there be sufficient funds.

The bottom line is, however, that if the intent of section 81.2 was to protect the agriculture industry from unethical or insolvent buyers, then it has not achieved that result. Industry Canada will not reengage on this project as they still support the conclusions detailed in the paper prepared in 2009 by the Federal Provincial Working Group on Fair and Ethical Trading Practices in the Canadian Horticultural Sector. That report concluded in part that “statutory provision of super-priorities that impact the secured creditor status of banks and other lenders could have a negative impact on the availability of credit within the fresh produce industry.”

Another significant factor is the time it takes for bankruptcy proceedings to be completed, which can easily extend into years. In one major case, the bankruptcy of the Steinberg grocery chain, some of the bankruptcy proceeds are still being recovered approximately 19 years after the fact. If a seller does not receive compensation from some other source at the time of the loss (such as through an insurance policy or a protection fund), this passage in time could be so significant that it would negatively affect the likelihood of survival of their business. This was certainly the case for some of those who delivered produce to Steinberg stores prior to their bankruptcy. For this reason, options such as insurance, pooling, and bonding (discussed in the solvency section of this report) are equally applicable and may show similar benefits in insolvency situations.

RECOVERY FROM SOLVENT BUYERS

Unlike the recovery from buyers who have declared bankruptcy or are under receivership, the recovery from buyers who are solvent will fall largely under provincial jurisdiction, though the federal head of power to regulate interprovincial and international trade will also have an impact.

The statutory trust under the US legislation can be applied to both bankruptcy and non-bankruptcy situations, though the method of actually enforcing the trust varies. It also applies to a large cross-section of the fresh produce industry, given the more expansive licensing requirement.

There is not currently such an overarching framework specifically for enforcement of fresh produce contracts in Canada. The challenge, or the opportunity, in the absence of such an overall enforcement framework, is to find a workable mechanism that could potentially be implemented as a mechanism across jurisdictional lines, and with the cooperation of all of the relevant stakeholders.

This study examined mechanisms adopted by similar industries, including other agricultural sectors, for the protection of unpaid sellers. For example, the Ontario Beef Cattle Financial Protection Program was examined for its potential applicability to fresh produce. A number of other agricultural industries were contacted to discern what programs are in existence, and in those cases where no specific program exists, the reasons for that also informed this project.

The challenge, of course, will be to ensure that the instruments chosen for recovery from solvent and insolvent buyers are either seamlessly integrated, or at least so clear and uniform that the steps necessary to prepare for a non-payment peril are nearly identical for sellers.

Alternative Dispute Resolution

Mediation

It has become clear from the consultations that there are many parties willing and able to assist sellers of fresh produce who are having difficulty getting payment for product already delivered. Many of the grower associations contacted provide informal services and will place calls on behalf of a seller to a slow-paying buyer. Most of these services are very informal and rely on the parties being at least familiar with each others' business, if not having personal familiarity. The calls are usually placed equally informally. According to all those consulted, however,

this type of informal intervention yields significant, often speedy results and can lead to very satisfactory resolution that may include a continuation of the trading relationship even after a somewhat problematic transaction.

However, there is also a more formal, yet non-binding alternative dispute resolution process accessible to sellers through the Dispute Resolution Corporation. The Dispute Resolution Corporation binds its members through a contract of membership, through which members agree that they will adhere to a common set of trading standards, as well as mediation and arbitration procedures as outlined in the Mediation & Arbitration Rules[16]. The dispute resolution system is multi-dimensional and designed to provide timely and cost-efficient settlement, while still offering the parties choices of procedures.

The dispute settlement process of the DRC has six stages:

1. Prevention Measures (education and training)
2. Unassisted Problem Solving (negotiation among parties)
3. Consultation & Coaching (assistance provided to parties through advice, referrals, and case analysis)
4. Informal Mediation
5. Formal Mediation (if both parties agree)
6. Arbitration (with separate processes for disputes over and under a $50,000 threshold)

The timeliness and cost-efficiency of this system is derived from the fact that there are so many levels of potential resolution, with the involvement of the DRC's staff and arbitrators increasing only as required or desired.

Binding Arbitration

An essential feature of any binding arbitration system is the enforcement of arbitration agreements and awards in the courts of the affected countries.

The agreement to have a future dispute arbitrated through the DRC is most commonly made simply through membership of both of the parties in the DRC. Paragraph 9 of the DRC's By-Laws requires that:

> Each applicant for membership who is subsequently accepted as a member of the Corporation shall, by making the application, or in such other manner as the Board of Directors may determine, subscribe to, agree to

[16] DRC *Rules & Regulations Manual,* the rules are amended regularly, most recently on May 26, 2011.

> be bound by, and agree to conform with the Letters Patent, By-Laws, and Rules of the Corporation including, but not limited to, the Trading Standards, the Transportation Standards and the Mediation and Arbitration Rules of the Corporation. Each member agrees to submit disputes to arbitration in accordance with the Rules.

This agreement to arbitration may also be reinforced for a specific transaction (including with non-members) through the use of a template contract provided in the DRC Rules & Regulations Manual, which includes this provision:

> *Arbitration Clause*
> *The parties agree to submit any unresolved dispute under this contract to mediation and arbitration under the by-laws and rules of the Fruit & Vegetable Dispute Resolution Corporation, and that any such arbitration decision is final, non-appealable and enforceable under the New York Convention.*

Most arbitration awards are paid willingly by the party against whom an award is made, but in some instances it will become necessary to have the award enforced through a Court. The enforcement of these awards was studied intensely during the time of the formation of the DRC, to ensure that Courts in Canada, the United States, and Mexico would be likely to enforce the arbitration awards and direct the stay of proceedings initiated by one of the parties to the disagreement. The conclusions reached, which are still equally applicable today, are that arbitral awards are more easily enforceable and subject to substantially less judicial review than the decisions of courts from other jurisdictions. In addition, a system based on arbitration considerably reduces the barriers that can otherwise result from the constitutional division of powers in our country.

Generally speaking, the enforcement of an arbitral award is reasonably straight forward, though there are huge differences between the various provinces in this area of the law. Generally, once leave to enforce the award has been granted by a Court, the successful applicant is entitled to go through the usual judicial processes for enforcement of an arbitral award in the same manner as it would for the enforcement of a judicial judgment. This will include the usual processes for attachment of assets and other civil enforcement procedures available within the province or territory. Ultimately, satisfaction of the arbitral award will usually depend upon a party's ability to effectively seize assets.

Provincial Legislation & Civil Enforcement

All Canadian provinces have Sale of Goods legislation, including similar provisions under the civil code for Quebec. These statutes govern the formation of contracts and the processes for recovery if contracts are breached by a non-bankrupt buyer. In addition, most provinces have numerous statutes pertaining to special encumbrances which an unpaid seller may place on the buyer, usually called liens. Many of these are in the form of statutes pertaining to a specific type of transaction and a specific type of seller (or, most commonly, provider of services). Most commonly, these allow the provider or seller to place a lien on a securable property, such as a lien on a motor vehicle for a mechanic's services or a lien placed on real estate by a home builder.

There are only few instances of civil enforcement provisions relating specifically to agricultural products and even less relating more specifically to perishable agricultural products. The enforcement of contracts of sale generally occurs through the province's Sale of Goods legislation. While it is beyond the scope of this study to examine in detail the legislation governing the law of contract in every province, these statutes generally cover contracts whether they are made orally or in writing. However, the laws of evidence are such that proof not only of the existence of the contract itself, but also the specific details of that contract, are considerably more easily proven if the contract is reduced to writing.

The processes for enforcement are further guided by the common law jurisprudence on the law of contract, and by procedural guidelines outlined in the rules of court for various juridical bodies. These systems are used by many claimants and for many different sizes of claims. Consequently, the regimes vary significantly in terms of the procedural requirements.

The processes also vary with the size of a claim -- many claims could fairly easily be brought by employing small claims procedures, significantly reducing both the legal costs and the time required. In many cases, claims against a buyer who refuses to pay will result in no response from the debtor. In such instances, provinces have streamlined procedures including summary judgments that allow for quicker collection.

Provincial governments could consider specific legislative initiatives to give statutory priority to unpaid sellers of fresh produce, similar to the liens provided in most provinces to certain other professions such as mechanics and home builders. In those cases, as is arguably the case with unpaid sellers of produce, a certain unique vulnerability to accounts-receivable risk by these occupations lead to legislated liens on property.

Unlike builders' liens and mechanic's liens, however, fresh produce would not generally be sufficiently identifiable so as to be registered under the Personal Property Security Registry of a province (though the specific registration requirements may vary somewhat between provinces, the issue of secured property needing to be distinctly identifiable has been reasonably well settled in the common law).

Many individuals consulted from industry point to the United States system under the Perishable Agricultural Commodities Act as a relatively effective model for recovery of funds from delinquent buyers. The Perishable Agricultural Commodities Act was in existence in the United States from 1930, but the most significant amendment was made in 1984, when a statutory deemed trust was included in the statute. This was in furtherance of the same objective that lead to the statute in the first place – ensuring that the sellers of fruits and vegetables are paid for the produce that they deliver to their buyers.

The statutory trust under the United States legislation is one that deems the funds to be held in trust, regardless of whether they have been comingled with other funds. This is a crucial element of this model, as it allows for the recovery of various assets held by the debtor, regardless of whether the funds have specifically been set aside for the payment of accounts payable, or whether they simply constitute other liquid assets of the debtor. The general conclusion has been that there is provincial authority to enact these types of statutory trusts, including a provision that allows the comingling of trust funds, despite the common law which generally requires that trust be held separately and be strictly traceable. However, these trusts cannot be designed so as to give priority over assets once a bankruptcy has occurred, as that area of the law is exclusively within federal jurisdiction[17]. However, there does remain some ambiguity (which this study will not resolve) about whether there is authority to enact such a trust federally.

However, even if there were not the constitutional / legal barriers to enactment of an equivalent statutory trust in Canada, there are also some business limitations to the United States' model. The largest issue is that the model is only as effective as the assets held by the buyer of the goods. Especially in cases of bankruptcy, but even for instances of solvent buyers who are either not paying or slow in paying, there are often insufficient assets remaining in the buyer's possession for effective recovery. This is largely due to the nature of the fruit & vegetable industry, with its fast turnover of large volumes of goods. These systems often have low levels of capitalization and low levels of inventory at any

[17] Supreme Court of Canada in *Husky Oil Operations Ltd.* v. *Minister of National Revenue,* [1995] 3 SCR 453.

point in time. This leads to situations where a trust may in theory allow for a super-priority recovery from the buyer, but who may in fact have few assets, or in amounts significantly smaller than the losses incurred. Unlike any type of pooling or insurance mechanism, the recovery through the trust mechanism is limited to the remaining assets of the buyer.

Insurance

Insurance is a mechanism whereby an insured person can transfer a risk to a third party for a premium. In most instances, those transferring risk want to remove as much of the negative impact of a potential event as possible. Those who are willing to accept a risk transfer do so if the potential reward they receive is commensurate with the risk they will accept and yields a realistic expectation of positive returns over time.

In general, for a risk to be transferred through insurance it should be:

- quantifiable – it must be possible to assess the likelihood of an event occurring as well as the extent of its impact;
- identifiable – an insurance loss needs to be identified with a specific event, an insured peril and a time period;
- random – the timing of an insured peril should not be predictable or influenced by the insured; and
- appropriately priced – the insurance transaction must be able to generate a premium commensurate with the risk being transferred and accepted.

Traditional Insurance Policies

Each individual grower or dealer, through an insurance policy, is transferring or spreading risk geographically and over time, to members of the insurance industry. This transfer of risk is most effective if individual risks are totally independent, while transfer of risk through pooling is less effective in situations where the perils are more dependent.

Insurance and self-insurance are similar in many ways, but will be discussed separately because they are two distinct ways of dealing with risk. They also have very distinct benefits and risks in the case of fresh produce accounts-receivable risk transfer.

Insurance truly transfers risk from the insured to the insurer in exchange for a known cost (the premium). Traditional insurance is the complete transfer of risk, with the single exception to that transfer being a deductible. The various types of protection funds, on the other hand, are simply a conduit for the sharing of losses with others in the pool (the insured continues to shoulder a portion of the risk). Hybrid mechanisms may be possible, and should be explored in greater depth with actuarial assistance.

In the context of an industry-wide protection system, the question of whether to enter into an insurance-based scheme should be treated somewhat separately from the question of who will pay for that system. Unlike other industries, there are not currently administrative systems in place that would allow for a simple check-off or levy at the point of sale of fresh produce and vegetables.

The major limitation of any insurance-based risk mitigation tool is that there is the risk of motivating bad behavior if not designed properly. This is particularly the case where an insurance-based system is shared by a large portion of an industry and is well-known to all participants. Industry quite rightly expresses concern that once buyers are aware that there is an insurance "bailout" possible for sellers, there is actually a greater likelihood of that peril occurring.

In addition to that potential drawback, there are currently two significant barriers to widespread adoption of insurance policies – the general perception of accounts-receivable risk by individuals and the high premiums which have been quoted by the insurance industry to date. This high premium-to-risk ratio is likely due to the fact that the risk is not as well understood as other perils known to the insurance industry (a fact borne out by the difficulty that industry and government have had quantifying the size of the problem at a national scale).

In consultations with industry participants, several larger organizations mentioned that they had previously investigated the possibility of purchasing accounts-receivable insurance policies. In all cases, following an actuarial assessment of the risk, the premiums quoted by the insurance companies were felt to be too high compared to the perceived risk of non-payment. In fact, there is a strong feeling that the sellers should not be paying for this risk, but rather that the focus should be on mechanisms that have the buyers (or, if absolutely necessary, third parties) paying the cost of protection from this risk.

Protection Funds

Financial Protection Programs have existed in a number of jurisdictions over the years and continue to exist for some other agricultural commodities. The Government of Ontario , for example, used to administer financial protection programs for the milk and processing vegetable industry, but those were discontinued / privatized in the 1990's. In the case of processing vegetables, there was little interest by the growers in continuing to have this type of fund. This was due in part to the perception that protection provided by such a fund from a few unethical buyers did not warrant the additional costs borne by all growers.

An example of such a fund still in active use today is the Ontario Beef Cattle Financial Protection Program (OBCFPP) which was established by legislation in 1982 to provide protection to cattle sellers. The program is administered by a staff of three and consists of both a licensing regime and a protection fund. Initially supplemented with some public funds, the fund is now financed entirely through a compulsory 5 cent per head levy which is collected from the seller at the point where cattle are sold.

The OBCFPP covers losses only for transactions involving the sale to one of approximately 230 licensed buyers (abattoirs, auction markets, dealers, and packing plants). Claims are considered by an industry board appointed by the government and according to established program criteria. A claim can be made if there is a default in payment, which is defined as 6-9 days after delivery depending on the size of the transaction. Only a portion of the claim amount can be recovered -- the limit was previously 90% of the claim amount, but was raised in 2011 to 95% of the claim amount. Once a claim is paid, the claimant subrogates the entire debt to the program's board. The board then pursues the collection of that debt with the buyer -- or with the trustee if the matter is as the result of a bankruptcy.

In consultation with the OBCFPP, it was learned that there had been much success not only in protecting cattle producers with the fund, but also in collecting from dealers. The main reasons for the claims that were not successful were the default not being reported on time or a claim not being filed within the 30 day limit after payment terms were not met. Claims are also denied if a producer knowingly extended credit, by making a second delivery when payment was already late on a previous delivery. These claims criteria help to improve due diligence by producers and assist in setting payment standards for the entire cattle industry in that province.

The staff of the program suggest that the success of such a fund hinges on the combination of the recovery mechanism, complemented by prompt payment requirements and a strong licensing regime. In the case of the Ontario Beef Cattle Financial Protection Program, licensees are required to either provide financial statements or post some type of security or bond in order to be licensed.

From a whole-industry standpoint, any protection fund or other fully self-insured pooling mechanism comes at a net cost to the industry. While the fund itself would in theory not have any net financial effect, there are additional administrative costs related to collections, claims processing, and compliance enforcement issues which must also be covered. If those costs are borne by the members of the group, this comes as a net cost to the industry.

Another major limitation of any protection fund, whether funded by levies of sellers, buyers or some third party, is that the size of the fund is a finite amount. Unlike a protection fund, an insurer usually has other financial resources that can be drawn on to cover losses, thereby providing a stronger guarantee that sufficient funds will ultimately be available to cover losses that could otherwise drain a protection fund. Of course an insurance policy will also have some maximum claim amount, both for an individual and for the total group, but the financial resources of an insurer are as a rule larger than most protection funds would be.

This exhaustion of a fund was experienced, for example, by the California Farm Products Trust Fund, which was created in 1976 and funded through an annual set-aside from licensees' annual fees. That fund was built up through an annual fee of $125 paid by every licensee, and drawn down to pay farm product creditors prorated amounts of what they were owed, with maximum amounts both for the total claim and an individual's portion[18]. When it became clear that the fund would not be able to cover the costs of claims, numerous changes were made to the maximum size of claims. However, even with those changes the depletion of the fund resulted in its repeal in 1998, at which time only $500,000 remained in the fund, with well over $10 million in debt owed to growers and licensees.

Partially Group-Funded Insurance

There are other types of non-traditional insurance vehicles which warrant further investigation. For example, another vehicle which could be considered in these types of whole-industry risk transfers is a Reciprocal Insurance Exchange. In essence, a reciprocal is a pool of organizations which contract with each other to spread losses suffered by individuals across the entire group of subscribers to the reciprocal.

Reciprocals only work in situations where there is a strong commitment by subscribers to the sharing of the risk being covered. This is because premiums paid by subscribers traditionally cover some of the losses, but all subscribers must also commit to being assessed for amounts in excess of that premium. Given the strong opposition to insurance voiced by individuals in the fresh produce industry, it is unlikely that a Reciprocal could be implemented successfully in this industry.

A Group Funded Deductible Plan is the least complicated form of non-traditional insurance to implement. In essence, it is a traditional insurance policy with a large deductible that is covered by the

[18] The maximum total amount of a claim was $50,000 in 1976, but was reduced to $25,000 by the time the fund was repealed. An individual claimant could recover only up to 50% of their claim (also reduced to 30%).

participants in the plan.

This type of insurance would ensure that no single producer would have a large deductible, but still allow for lower premiums to be negotiated for the group as a whole, since a significant portion of the risk would be shouldered by the participants through pooling of resources. In short, the premium for individual members is reduced since the insurer's risk exposure is reduced.

Administration

Any type of group insurance or pooling system for the entire Canadian fresh produce industry would also require some element of central administration. Given the multitude of organizations now representing growers in the industry, there is not any central organization that could immediately and easily fill that role. Given the unique nature of even the vegetable industry, let alone the fruit industry, in each of Canada's provinces, there exist very unique systems in each of those provinces. There are some national organizations such as the CPMA, the CHC, and the DRC that to some degree represent all of the nation's growers. However, there are many organizations regionally and provincially that play at least as significant a role for growers. This diversity in the industry poses a significant challenge not only for getting agreement on a pooled insurance mechanism, but also for administering it.

In any system that involves the pooling of funds, a system for the collection of those funds will need to be created. In other industries (particularly those with Protection Funds), this is done either through an annual levy of participants or a transactional levy collected at the point of sale. Some contend that there are simply too many sellers and too many delivery points for fresh produce to make an administrative system that focuses on collection from individual transactions feasible. However, a levy could be assessed annually to minimize the administrative costs of such a system.

A traditional insurance policy, however, would not require central administration, as this could be made available directly by the insurance industry to either individual growers or groups of growers. In fact, a group policy for relatively homogenous groups of sellers may present the best opportunity to balance the need for the pooling of risk with the need for administration and the need for the risk to be quantifiable. The risk for root crop growers selling their product from British Columbia in to Alberta may be quite different, for example, than the risk for berry crop growers selling product from Ontario into Quebec.

Bonding

The posting of security is already in use in the Canadian fresh produce industry, but generally only for instances where an organization has a negative payment history. It is a mechanism for protecting an industry from *repeated* unethical or risky transactions. In fact, the Canadian

Food Inspection Agency must impose a bond (or require satisfactory security) before issuing licenses to dealers in a large number of situations[19], ranging from license suspension within the last 10 years, to certain criminal offences, to a history of slow payment of financial obligations[20].

The Dispute Resolution Corporation has an equivalent mechanism, though it is not a legislated bonding scheme. In situations where there is an arbitration award against or other serious concern about a buyer, the DRC can enter into a contract specifically with that delinquent buyer requiring some form of security (which in practice is usually the equivalent of an irrevocable letter of credit). If the buyer then defaults on the terms of that security contract, the DRC is able to both call that member's security to recover further losses and revoke their membership. Similar bonding arrangements can also be put in place for provincial licensing bodies and are in common use by licensing bodies in other industries.

Consideration might be given to whether security in these instances should be improved. It has been suggested, particularly in relation to bonding required of licensees under CAPA, that the security required of those licensees would be insufficient to provide valuable recourse in the case of a default. It should be noted that numerous individuals from industry organizations consulted in the course of this study suggest that there are serious weaknesses in the details of the security demanded of CAPA licensees.

Provincial legislation can also require the posting of bonds by fresh produce buyers. In the province of Quebec, for example, agricultural marketing legislation could be used to require the deposit of a "guarantee of financial liability to secure payment of the amounts due to the board or to the producers for the marketing of their products"[21]. However, while this provision has been used to require security for purchases of beef, grain and oilseeds, it has not yet been used to require security from purchasers of fresh produce.

The possibility has been raised of requiring buyers of fresh produce to post some type of security or bond *before* they will be allowed to purchase fresh produce in the first place, as a way to protect against unethical or risky behavior in the first instance, rather than just protecting against *repeat* behaviour. The CAPA allows for the making of

[19] *Licensing and Arbitration Regulations,* SOR/84-432, subsections 3(3)(n)(i) to 3(3)(n)(ix)
[20] *Ibid,* section 9(1)(b)
[21] *An Act respecting the marketing of agricultural, food and fish products,* RSQ, c. M-35.1, Chapter XI, s. 149(1).

regulations[22] to effect this type of universal bonding, so it would not require further legislative action for those trading intraprovincially or internationally. These types of measures have been implemented in other jurisdictions, though it appears that they have not been particularly successful, largely because of the competitive disadvantage they pose for sellers in the jurisdiction requiring such a bond.

California at one time required dealers, brokers, commission merchants, and processors to post bonds of $4,000-5,000.[23] As the industry and economy changed, the size of these bonds was seen as insufficient to cover the potential debt risks, but increasing the size of the bond was also not palatable to the market. This bonding requirement was therefore replaced in 1976 by a pooled fund[24]. Likewise, anecdotal information was received that Florida had at one time tried to impose a universal bonding requirement, but the result was a loss of business to California.

The main barrier to universal bonding by any single jurisdiction is that it creates a barrier to external sales, since buyers would need to take special action that is not required of them when purchasing from another jurisdiction. The sellers from one jurisdiction may be at a competitive disadvantage, for example, if one province alone imposed a bonding requirement on their buyers. Most large buyers who are purchasing across jurisdictional lines buy their portfolio of fruits and vegetables from many places across North America. They may indeed be deterred from purchasing from a single province if it required them to arrange security from their bank, when that is not required for purchases from any other jurisdiction.

Factoring

Another method for recovering payment from delinquent accounts is through factoring, which amounts to the sale of the accounts receivable. Financing and factoring companies purchase accounts receivable and the seller would pay the factoring company a fee, usually as a percentage of the invoice. The fee is usually based on the credit worthiness of the buyer and the strength of the receivable.

As with insurance, the one main benefit of this type of mechanism is that cash flow would remain uninterrupted using this type of system, though there is obviously a cost not only for the possibility that the factoring company may not be able to collect, but also for the interest

[22] *Canada Agricultural Products Act,* section 32(b)(v)
[23] *Produce Dealers Act* and *Processors Law.*
[24] See discussion in section on Protection Funds, at page 33.

cost for the period during which the invoice value is essentially borrowed by the seller.

The various types of invoice and accounts-receivable factoring services are too numerous to mention, and they would be heavily customized for an individual seller. The concept works either on a single-invoice basis, or on an annual contract where most commonly accounts receivable management services are bundled with the financial credit element.

There is not currently active use of factoring either in the fruit and vegetable industry or more generally in agricultural industries. The reasons for this are not known. Analysis of this option would likely need to be specific to each grower or dealer, as the cost of factoring is influenced by many factors, including especially the credit-worthiness of the customers. The costs are also affected by the terms of sale, as the cost includes interest for the time value of money. In addition, in other industries the factoring company also provides various supporting services, such as providing accounts receivable management services, monitoring credit of customers and providing aging reports. The exact terms (and especially the percentage “fee” charged) would be the subject of negotiations between the factoring company and the seller of produce.

One of the benefits of using factoring or other accounts-receivable management services is that the service provider or financing company will develop industry-specific knowledge and specialization. Successful collections by such a company will in turn help to create and encourage an atmosphere of greater due diligence in an industry.

However, if factoring is to be an effective tool in Canada, the company providing the financing and collection services will need good information on credit-worthiness of their client’s customers. Much as with other tools, this will require improved due diligence (including especially written contracts and invoices). It would also become more feasible if there were a single information source for companies who have a history of non-payment.

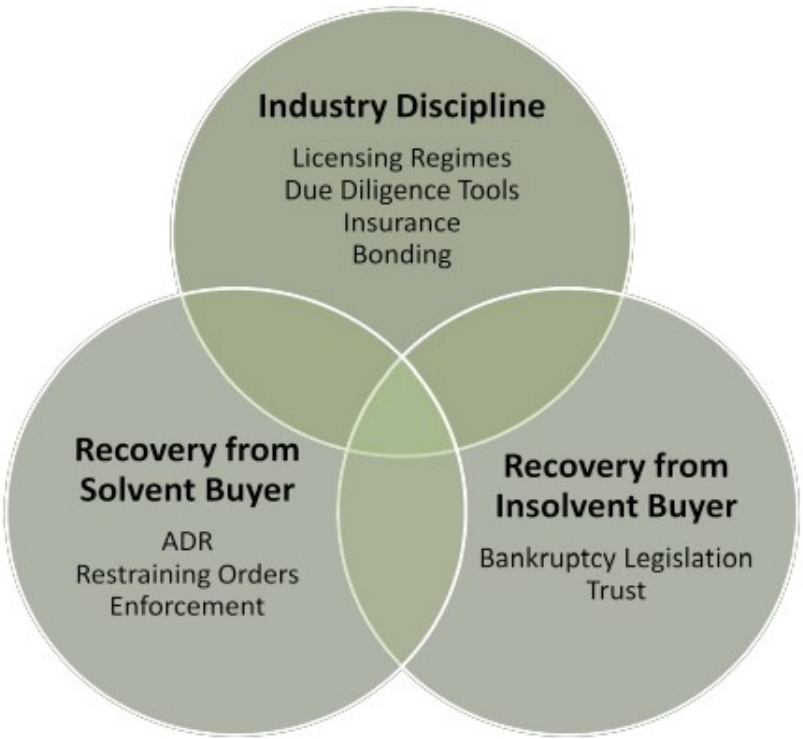
FINDING HOLISTIC SOLUTIONS

While it is hoped that solutions can be found to achieve all of the objectives and outcomes outlined in the Analysis and Methodology section above, it must be recognized that a holistic solution would be preferred as it provides greater clarity to all industry participants.

Regardless of the solutions chosen for financial reparation, those will only be effective if supported by a disciplined industry that adopts processes that routinely establish the basis for financial claims through effective due diligence by sellers.

While some instruments might be extremely effective at achieving recovery from a solvent buyer, they may be less effective at recovering from insolvent buyers. The challenge, of course, will be to find instruments that do not conflict with each other, but rather support each other and serve as a continuous set of tools for sellers.

Given the constitutional division of powers and the unique processes necessarily required for the two main types of reparation proceedings (from solvent and bankrupt buyers), this study examined the instruments for each outcome (Industry Discipline, Recovery from Solvent Buyer, Recovery from Insolvent Buyer) separately. This section attempts to reconcile these with each other and suggest opportunities for these options to support each other.



Both due diligence and clarity in licensing regimes are essential to the implementation of any other recovery mechanisms. Both are equally required for prevention of disputes as they are as integral elements of any enforcement mechanism. However, it has also become clear through the consultations in this study, as with studies by the FPA and various industry-government studies over the past year, that both the due diligence and licensing regimes require significant attention.

This is not to say that these alone should receive attention, but to identify that they will require improvement either before or in concert with any other initiatives (whether by way of implementing an insurance-based system or some legislative initiative).

Federal & Provincial Authority

The search for an overarching solution is complicated in Canada by the constitutional division of powers, the analysis of which has to date been a significant area of contention between various stakeholders in the search for financial risk mitigation for the fresh produce industry.

There are two relevant areas where there is little ambiguity about the division of powers under Canada's constitution. It is clear that the federal government has exclusive authority and is the only government with competence to act over the subject matter of "bankruptcy and insolvency"[25]. Likewise, the provincial governments have exclusive authority and competence to act with respect civil contract enforcement mechanisms through the head of power over "civil rights in the province"[26].

Both authority over bankruptcy and civil enforcement processes will be essential to any effective financial risk mitigation solution. It must therefore be recognized at the outset that any global solution to this issue will require some action by **both** federal and provincial authorities.

However, there are also several areas of significant ambiguity, where it is unclear which authority should or could act. This is particularly the case with respect to the regulation of trade. The federal government has authority over the "regulation of trade and commerce" under section 91(2) of the Constitution, while the provincial government has authority over "property" which has been held to include intraprovincial trade.

This study will examine both business and legal realities and identify

[25] *Constitution Act,* 1867, s.91(21)
[26] *Constitution Act,* 1867, s. 92(13)

potential barriers to successful implementation of various options. The study does not constitute a legal opinion, however, and as such will not resolve those areas where there is uncertainty on whether federal or provincial authority trumps. However, it must be recognized that this area of ambiguity does exist. The fact that there is this ambiguity will have two results that will ultimately affect decisions by all stakeholders as to which instruments they wish to pursue:

Firstly, the ambiguity will affect the manner in which the instruments are implemented. If agreement can be reached between federal and provincial/territorial authorities on global or holistic solutions, the focus could then shift to how to implement that solution together, recognizing the ambiguity, rather than attempting to resolve the constitutional issue first.

Secondly, the ambiguity, regardless of how it is resolved and how carefully instruments are implemented, will result in litigation and require interpretation by the Courts. The scope of that litigation can be curtailed not only by careful legislative drafting, but also by creating clarity in the industry itself -- by removing the background noise that could otherwise be created through a multitude of instruments enacted by multiple authorities. In addition, there may be opportunities to reduce the potential for litigation by enacting tools uniformly both nationally and provincially, making claims of legislation being *ultra vires* less enticing for claimants.

There is no doubt that any national set of solutions would also require close administrative cooperation, but there is much reason for optimism, as this type of cooperation has historically been achieved successfully by federal and provincial authorities. The reader is reminded about the lack of clarity the Constitution provides in granting shared powers over "laws in relation to agriculture"[27]. Despite this apparent ambiguity, the two levels of government have very effectively created strong systems of supply management for agricultural products through federal/provincial/industry cooperation.

Through consultation, it became apparent that there is one area where there may be greater potential for quick results through collaborative efforts. Many provinces do not have nearly as robust a licensing system for intraprovincial fresh produce dealers as are in existence federally. The federal parallel systems (CFIA and DRC) are also worthy of close examination.

[27] *Constitution Act,* 1867, s. 95.

Might it be possible for both the federal government and those provinces with high volumes of fresh produce trade to require fresh produce dealers to be members of one body? While this would require considerable resources for that one central body, the benefits (clarity, transparency, and authoritativeness) would likely outweigh those costs. In addition, such a system would likely show some efficiency of scale and cost less overall than implementing new regulatory bodies in those provinces that do not currently have them.

Comparing Options

This study is neither a quantitative assessment of various options, nor is it meant to generate a definitive recommendation for a single solution to this issue. It is expected, however, that it is likely to serve as the basis of further discussion and negotiation between various stakeholders in the fresh produce industries. For that purpose, we have attempted to provide some rankings of the various options, based on the evaluation criteria established in the Analytical Framework for this study.

The diagrammatic representation and rankings in Table 2 are therefore to be viewed as a **guide to discussion,** a subjective ranking of the various options based on the insights of industry and government stakeholders interviewed during this study and the analyses undertaken by those conducting this study. For that purpose, rather than assign numerical rankings, each option has been rated according to whether it meets the evaluation criteria, partially meets the evaluation criteria, or has some relatively serious limitations.

Likewise, the listing of potential benefits and barriers for each of the options discussed above in Table 3 is meant as a **guide for discussion** and further analysis, rather than a definitive weighing of the relative strength of each option.

Table 2: Options rated on Evaluation Criteria

Evaluation Criteria	Insurance	Pooling	Bonding	Factoring	Bankruptcy Amendments	Provincial Legislation
Risk mitigation	↑	→	→	↑	↑	→
Efficient use of resources	→	→	→	→	↑	→
Transparency & simplicity	↑	↑	↑	↑	↑	↑
Protects interjurisdictional participants	→	↑	↑	→	↑	↓
Achievable -- business	↑	↑	↓	↓	→	→
Achievable -- legal	↑	↑	↑	↑	↓	↓
Does not create moral hazard	→	→	↑	↑	↑	↑

↑ Denotes high effectiveness, with few barriers
→ Moderately effective
↓ Denotes lower effectiveness or significant barriers

Table 3: Potential Barriers and Benefits of Options

Insurance		Pooling		Bonding	
Benefits	**Barriers**	**Benefits**	**Barriers**	**Benefits**	**Barriers**
Quick implementation	Insurance industry's lack of experience	Industry solution to industry problem	Insurance industry's lack of experience	Buyers pay costs for potential default	Competitive market disadvantage
Access to large financial reserves	Lack of reciprocity with United States	Can draw on experience of other agricultural sectors	Fresh produce industry's lack of experience	Recovery from delinquent individual, not industry	Weakens disciplinary effect of reactive bonding requirements
Complete transfer of risk outside fresh produce industry	Potentially high premium costs until experiene gained	Access to large financial reserves (if insurance-based)	If entirely industry-funded, protection fund is finite financial pool	Relatively simple processes for effecting recovery	Lack of reciprocity with United States
Immediate access to cash at time of peril	Potential moral hazard (motivating bad behaviour)	Immediate access to cash at time of peril	Potential moral hazard (motivating bad behaviour)		Ineffective protection for large risks to multiple suppliers

Factoring	
Benefits	**Barriers**
Complete transfer of risk outside fresh produce industry	Factoring industry's lack of experience in fresh produce
Immediate access to cash at time of peril	Fresh produce industry's lack of experience in factoring
General improvement in due diligence to be expected	Potentially high cost of risk transfer and time value of money
	Lack of reciprocity with United States
	Potentially high cost of risk transfer and time value of money

Bankruptcy Amendments	
Benefits	**Barriers**
Significantly increased access to buyer's assets	Requires strong political will
Reciprocity with United States	Other stakeholders will object to priority
	Regardless of priority, long time required to effect recovery
	Assets of bankrupt limited ("greater percentage of nothing")

Provincial Legislation	
Benefits	**Barriers**
New tools (increase portfolio of possibilities)	Solution only to problems with solvent buyers
Reciprocity with United States	Federal constitutional jurisdiction over bankruptcy
	Lack of licensing poses implementation problem for most prov
	Create greater complexity rather than simplifying system

CONCLUSIONS

Any improvements to the mechanisms for recovery of losses for unpaid sellers of fresh produce must be supported by an industry with both strong due diligence practices and a robust, transparent licensing regime. A number of options for reexamination of these elements of Canada's risk mitigation systems were presented in this paper. It is recommended that any other initiatives, whether by development of risk transfer mechanisms or strengthening of legislation, must be preceded or accompanied by a strengthening of these elements.

This paper identified a number of risk transfer solutions that could be considered by the fresh produce industry – insurance, pooling, bonding, and factoring. None of these are currently in active use by the fresh produce industry, so they would require considerable work in developing not only the tools themselves, but also their supporting administrative structure. Outlining a specific program design and administrative structure with sufficient detail to support accurate cost and benefit estimates is beyond the scope of this project (and would require considerable actuarial review).

The most feasible of the outlined options for recovery from solvent buyers in the short or medium term are likely to be any type of insurance or pooling, if those could be supported by existing administrative structures. On the other hand, the objection from many in the industry to these types of initiatives is that they are funded not by those who are unethical or running risky businesses, but rather by those who are diligent in the way they operate their business (it comes at a cost to the entire industry).

Legislative initiatives, while they may provide protection funded in part by unethical buyers, are unlikely to be implemented in any short or even medium timeframe. In addition, the reality will remain that in many instances the buyers will have little by way of inventory or assets to draw on. These legislative initiatives focus on giving priority over what so often amount to limited assets in any event. In addition, given the constitutional issues, both federal and provincial legislative initiatives would be required to effectively recover from both solvent and insolvent buyers, coordinated with each other and in consultation with industry. These types of measures will take much time and effort and may, in the end, be less useful to the industry than other mitigation tools. They would certainly be useful, but should not be seen as a panacea for the industry.

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January 31, 2012

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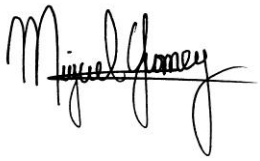
Dear Dr. Keeney,

Enclosed please find the final report of the DRC History project, entitled "ORIGINS, CREATION, AND EVOLUTION OF THE FRUIT & VEGETABLE DISPUTE RESOLUTION CORPORATION," prepared by the Cornell team under Cooperative Agreement # 12-25-A-5124 between Cornell University and the Agricultural Marketing Service of the U.S. Department of Agriculture.

This final version has been approved by Stephen Whitney and Patrick Hanemann. I thank you for your support for the completion of this project. Should you require more information please do not hesitate in contacting me at (607)-255-8159 or at mig7@cornell.edu.

Sincerely yours,



Miguel I. Gómez

Final Report:
ORIGINS, CREATION, AND EVOLUTION OF THE FRUIT & VEGETABLE DISPUTE RESOLUTION CORPORATION

January, 2012

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Prepared for the Agricultural Marketing Service, United States Department of Agriculture, Under Cooperative Agreement # 12-25-A-5124

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EXECUTIVE SUMMARY

Implementation of the North American Free Trade Agreement (NAFTA) is among the factors that have reordered trade relationships between Canada, Mexico and the United States in recent years. Some of the most profound changes trace to agriculture and fruit and vegetable (F&V) production in particular. These sectors have been increasingly transformed into a unified and integrated market. The transformation has featured rapid expansion in regional agricultural trade across a broad range of products, substantial cross-border investments in the fresh and processed food industry, and timelier cross-border price transmission. Unfortunately, growth in the F&V trade also increased the potential for private commercial disputes arising out of disagreements over product quality, timely reimbursement for product deliveries, breaches of contracts, and other related issues. While a dispute resolution system existed in the U.S. under the Perishable Agricultural Commodities Act (PACA), the pre-NAFTA regulatory system that prevailed in Canada proved to be ineffective in resolving the majority of disputes. On the other hand, no international dispute settlement mechanism existed in Mexico, meaning that disputes over Mexican imports left Canadian and U.S. trading firms little choice beyond the court system.

Anticipating the expected increase in trade disputes arising from market integration, the NAFTA produce industry and governments envisioned the creation of a unified system for F&V trade that would avoid trade irritants and facilitate effective trade dispute resolution. As a result, the Fruit and Vegetable Dispute Resolution Corporation (DRC) was established in February 2000 pursuant to Article 707 of NAFTA, which provided for the creation of a private commercial dispute resolution body for trade in agricultural commodities.

This study is a critical examination of the process that led to the creation of the DRC (1996-2000) and the evolution of this novel institution during the period 2000-2011. The study

highlights lessons learned from the DRC experience to better inform policymakers on the advantages and limitations of privately-run dispute resolution mechanisms designed to facilitate transactions involving perishable products.

The process leading to the creation of the DRC (1996-2000) was directed by the tri-national produce industry and facilitated by the NAFTA countries' governments. This process involved extensive consultations and deliberations that resulted in agreement on a tri-national dispute resolution model. Produce industry representatives and government agencies focused on mechanisms to minimize or eliminate trade irritants, thus encouraging businesses interested in expanding regional produce trade. The proposed DRC business model was largely patterned after the PACA system, which had a successful track record in the United States for several decades. The creation of the DRC was expected to mitigate a long-standing domestic problem with disputes in Canada while encouraging the development of an institutional infrastructure for the F&V trade in Mexico. Key components of that infrastructure included produce inspection, improved collaboration to facilitate harmonized quality standards in the trading zone, and training for Mexico's inspection staff. A motivating factor for the U.S. produce industry was an opportunity to extend a version of the protection offered on domestic transactions by the PACA to transactions with Canada and Mexico.

Although the creation of the DRC was an industry-led process, commitment and support from governments of the three countries was critical. The U.S. and Canadian governments, in particular, provided substantial financial, personnel, and technical assistance. Analysis of this process suggests that once an industry-wide consensus is achieved through extensive consultation and deliberation among market participants, a solution can be identified and implemented with government support. In the case of the DRC, the common interests of the

regional produce industry were recognized early in the process; subsequently, industry and government representatives embraced the task of charting out an effective framework for a dispute resolution organization for fresh produce trade in North America.

Analysis of DRC's evolution from 2000 to 2011 reveals many accomplishments, some disappointments, and certain hurdles to be overcome in the future. The DRC has developed a multi-stage, effective dispute resolution process that is valuable to certain but not all produce sectors in the region. Perhaps the most salient success of the DRC has been its contribution to a better produce trade environment in Canada. The majority of Canadian firms prefer to hold a DRC membership over a Canadian Food Inspection Agency (CFIA) license. Canadian firms embraced the DRC because it resembled the PACA system, which has been successful for many years in the United States. In addition, DRC has worked closely with all members of the supply chain, from small F&V growers to large food retailers, to garner their support and expand the Canadian membership. The Canadian government has also provided resources to investigate deficiencies in the Canadian system and has enacted changes in the regulatory framework based on DRC recommendations. Further, the DRC has conducted a series of special projects and initiatives to address structural and policy shortcomings in the Canadian system. These efforts have contributed substantially to improving the trade environment throughout the domestic produce supply chain.

In contrast, the performance of the DRC in Mexico has been a disappointment. Only a very small number of Mexican firms exporting to Canada are DRC members today, despite multiple efforts to develop membership and create inspection service infrastructure in that country. Mexican firms exporting to the U.S. are already protected by the PACA and do not have incentives to hold a DRC membership. Perhaps public and private DRC promoters in the United

States and Canada underestimated how difficult would it be to develop the necessary infrastructure for a reliable dispute resolution system in Mexico. Promoters may have not fully considered the business culture in Mexico. That culture has traditionally favored informal approaches to solve trade disputes. The approach of the Mexican Ministry of Agriculture to promote the DRC in 2002, centered on subsidizing the membership for Mexican produce firms, proved to be inappropriate. This approach did not address the root of the problem in that country: the lack of human and physical infrastructure to operate a formal, effective dispute resolution system. Garnering support from the Mexican Government to develop a reliable inspection system and convincing the domestic produce industry of the benefits from belonging to an effective formal trade dispute system remain two of the primary challenges to a truly tri-national, unified dispute resolution system in the NAFTA region.

In the United States, the DRC is relevant primarily to produce firms that seek PACA-like protection when exporting to Canada and Mexico. The DRC's effectiveness in Canada has been responsible for the steady increase in U.S. membership over the past 10 years, driven primarily by increased U.S. produce exports to Canada. However, efforts to increase the scope of DRC membership among U.S. firms have had only modest impacts. The industry has been highly satisfied with the protection services provided by the PACA, on the one hand, but concerned about the failure of membership development initiatives targeting Mexico. All considered, the DRC has led to substantial positive efforts to eliminate trade irritants and to mediate trade disputes in the NAFTA region. Today, the DRC has more than 1,400 members and it has successfully resolved over 1,300 disputes over 2000-2010, for an approximate value of $33 million. These accomplishments attest for the substantial positive effects of the DRC on produce trade in the NAFTA regions. However, the DRC has not yet evolved into a truly tri-national

organization with capacity to provide a harmonized dispute resolution framework in North America.

ORIGINS, CREATION, AND EVOLUTION OF THE FRUIT & VEGETABLE DISPUTE RESOLUTION CORPORATION

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I. Background

On January 1, 2008, the implementation of the North American Free Trade Agreement (NAFTA) was officially completed, thus marking an end to a 14-year process whereby Canada, Mexico, and the U.S. gradually removed a multitude of barriers to trade, including trade in agricultural commodities (Rosa 2003). As an outcome of the NAFTA agreement, the agricultural economies of the North American countries have been increasingly transformed into a unified and integrated market, with rapid expansion in regional agricultural trade across a broad range of products, hefty cross-border investments in the fresh and processed food industry, and speedy cross-border price transmissions.

With the implementation of NAFTA, the number of international and domestic transactions between fresh fruit and vegetable (F&V) firms operating in Canada, Mexico, and the U.S. increased dramatically. While climatic and geographic conditions imposed natural barriers to production in certain parts of North America, increased F&V trade enabled year-round availability of a wide assortment of high quality F&V for consumption in all three countries. As trade in fresh F&V grew, so did the potential for private commercial disputes arising due to disagreements over product quality, non-payment of invoices, breach of contracts, and other related issues. While a dispute resolution system existed in the U.S. under the Perishable Agricultural Commodities Act (PACA) of 1930, the regulatory system that prevailed in Canada was ineffective in resolving the majority of disputes, including disputes pertaining to contract law and non-payment, and disputes of an intra-provincial nature. On the other hand, no

international dispute settlement mechanism existed in Mexico which meant that in the event of a dispute, Canadian and U.S. trading firms had no choice but to resort to the court system. In anticipation of an increase in the number of commercial trade disputes, industry stakeholders and governments of the three countries recognized the need for establishing an international mechanism to resolve disputes effectively and efficiently among fresh F&V firms in Canada and Mexico. Such an international dispute resolution body was deemed necessary to fix the Canadian problem of incomplete regulatory coverage, establish a dispute resolution system in Mexico, and enhance trading relationships among fresh produce dealers across the NAFTA region.

As a consequence, the Fruit and Vegetable Dispute Resolution Corporation (DRC) was established in February 2000 pursuant to Article 707 of NAFTA, which provided for the creation of a private commercial dispute resolution body for trade in agricultural commodities. The DRC is an outcome of the relentless, collaborative efforts of North American produce industries and the governments of Canada, Mexico, and the U.S. to establish an organization for the effective resolution of disputes pertaining to fresh F&V trade in the region. A non-profit, industry-led organization, the DRC's membership base includes growers, packers, shippers, produce brokers, wholesalers, fresh processors, food service distributors, retailers, transportation brokers, freight contractors, and carriers in North America as well as in certain regions outside North America. The DRC is dedicated to promoting fair and ethical trading within the NAFTA region and to resolving commercial disputes that arise between member companies in a cost-effective and timely manner.

Headquartered in Ottawa (Canada), the DRC was designed based on existing dispute resolution services in the U.S. (under the Perishable Agricultural Commodities Act, PACA); and it aimed to fill the gaps within the Canadian and Mexican dispute resolution systems that

severely impeded international F&V trade transactions. Since its inception, the DRC's mediation and arbitration services have helped DRC members resolve almost 1,300 disputes in fresh F&V trade, covering transactions with an estimated value of approximately USD 32 million.[1]

Over the past ten years of operation (2000-10), the DRC has earned a reputation for promoting fair, ethical and efficient trading practices within North America, and working in collaboration with North American governments on issues of critical importance to trade in fresh produce. The DRC's mission is to establish harmonized trading standards and procedures within the NAFTA partners and provide services necessary to forestall and resolve commercial disputes in a timely and cost-effective manner. It's multi-step dispute resolution process, beginning with preventative activities and cooperative problem-solving, and gradually moving on to more binding measures, is intended to provide an effective and time-tested dispute-resolving mechanism. Total membership in the organization has steadily increased over time, with more than 1,300 members at year-end 2010. At present DRC members are located primarily in Canada and the U.S. However, membership is expanding in certain Latin American and European countries.

The overall objective of this study, commissioned by the Agricultural Marketing Service (AMS)/Fruit and Vegetable Programs, U.S. Department of Agriculture (USDA), is to establish a historical record of the creation and evolution of the DRC. To accomplish this, the study begins by describing recent trends in fresh F&V trade among the NAFTA countries. It then outlines the dispute resolution mechanisms that existed within the regional produce industry prior to the DRC. Next, it documents the origins of the DRC (1996-2000), including the composition and deliberations of the tri-national task force which was convened to give life to the provisions of Article 707, and the process whereby which the recommendations of the tri-national task force

[1] F&V Dispute Resolution Corporation Records, November 2010.

were then transformed into the DRC. The study then goes on to document the DRC's evolution (2000-2009), discussing membership composition, governance and administration, DRC's core business of providing trading assistance, and its major contributions in terms of dispute resolution and harmonization of trading standards. The final section of this study elucidates key lessons for public-private sector partnerships in promoting intra-regional trade in other sectors by reviewing the elements that led to the success of the DRC.

II. Fruit and Vegetable Trade in the NAFTA Region

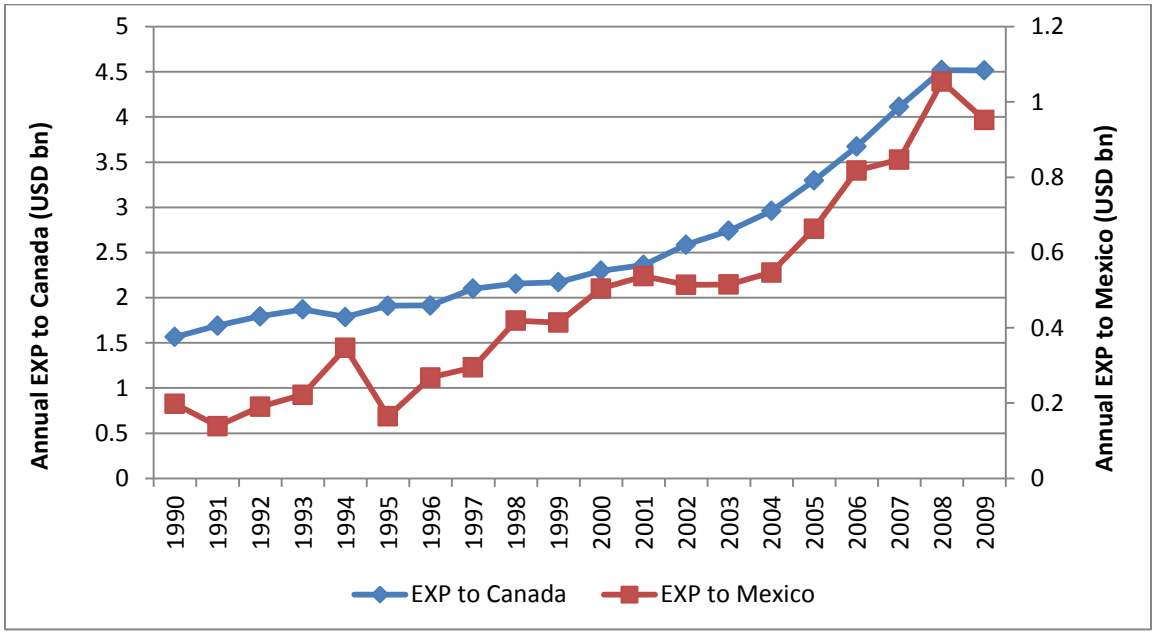
Agricultural trade among the North American countries has more than tripled since the beginning of NAFTA's implementation in 1994. In particular, integration of North America's fresh F&V markets has proceeded at a fairly rapid pace and F&V trade among the NAFTA countries has increased quickly since the agreement's initial implementation. The increase in fresh produce trade has been particularly remarkable. Fresh F&V trade between Canada and the U.S. has quadrupled since 1990[2], increasing from 3.4 million metric tons (USD 1.75 billion) to 6.1 million metric tons (USD 6.75 billion) over 1990-2009 (USDA 2010)[3]. Over the same period, the growth in fresh produce trade between Mexico and the U.S. has been even more spectacular. From an initial volume of 2.8 million metric tons and a value of USD 1.7 billion in 1990, F&V trade between the two countries had grown to 6.6 million metric tons in volume and USD 6.8 billion in value by year-end 2009 (USDA 2010). On the other hand, fresh produce trade between Canada and Mexico expanded by nearly six times over the past two decades (Statistics Canada 2010)[4]. Although regional trade in fresh produce has been increasing since the early

[2] Bilateral trade refers to total exports and imports between two countries.
[3] U.S. Department of Agriculture, Foreign Agricultural Service, Global Agricultural Trade System

[4] Canadian International Merchandise Trade Database, Statistics Canada

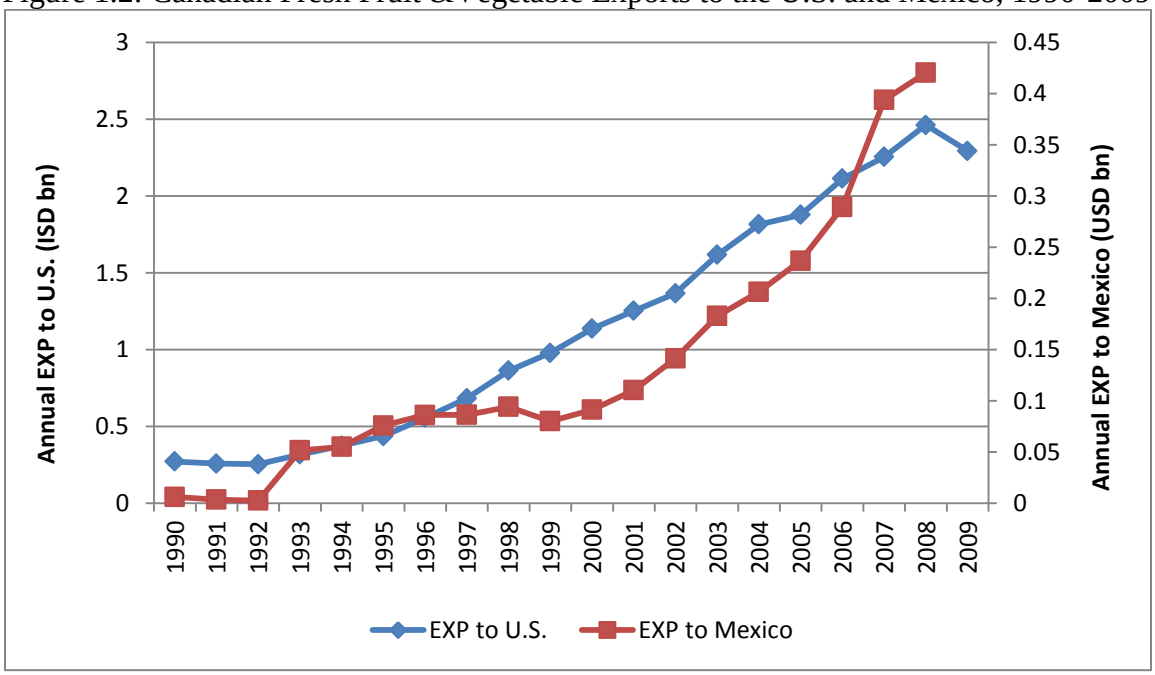
1990s, the growth in trade value and volume has been particularly dramatic beginning in 2000 (see Figures 1.1, 1.2, & 1.3).

Figure 1.1: U.S. Fresh Fruit & Vegetable Exports to Canada and Mexico, 1990-2009



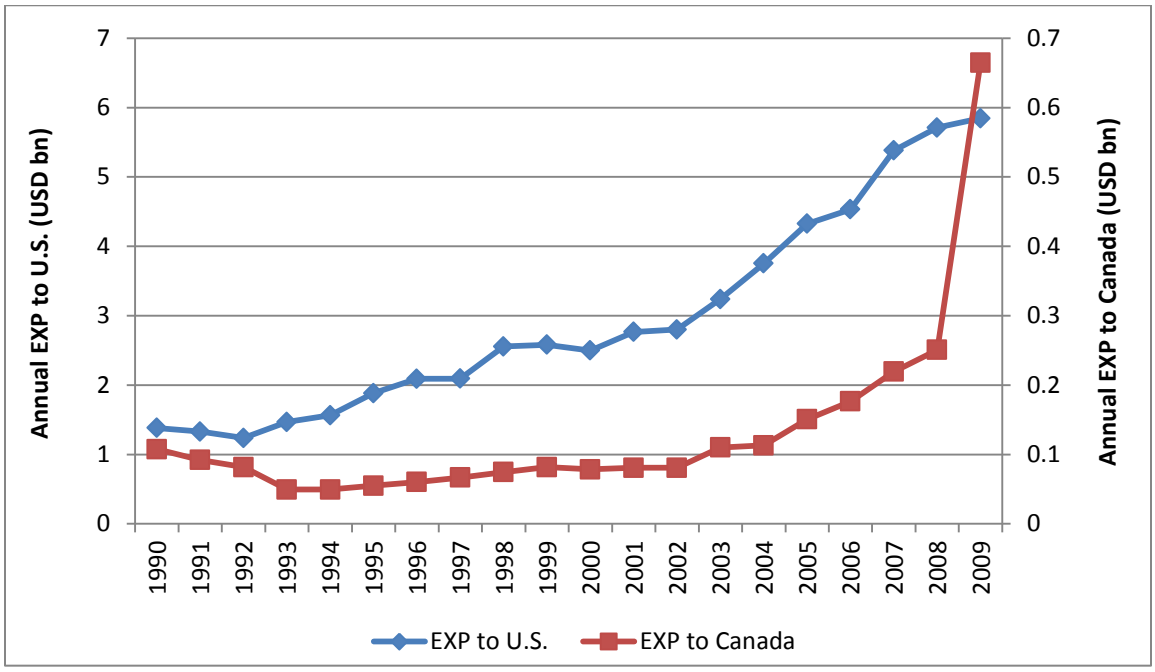
Source: Foreign Agricultural Service, U.S. Department of Agriculture
Note: EXP means exports, bn means billion

Figure 1.2: Canadian Fresh Fruit &Vegetable Exports to the U.S. and Mexico, 1990-2009



Source: Foreign Agricultural Service, U.S. Department of Agriculture
Note: EXP means exports, bn means billion

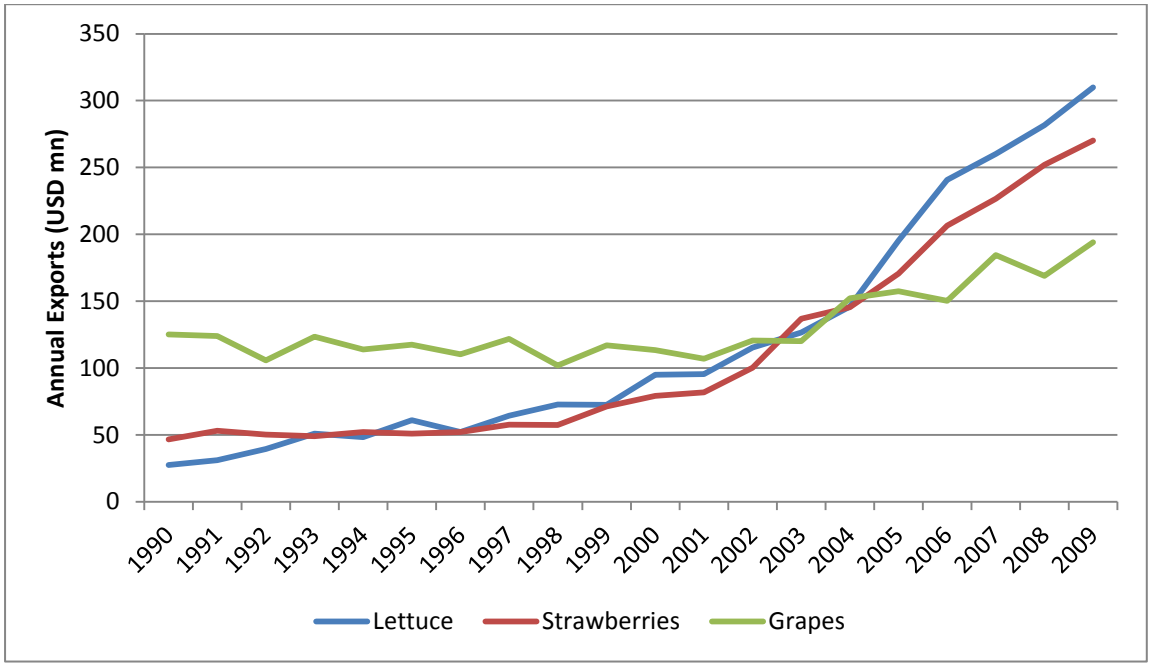
Figure 1.3: Mexican Fresh Fruit &Vegetable Exports to the U.S. and Canada, 1990-2009



Source: Foreign Agricultural Service, U.S. Department of Agriculture
Note: EXP means exports, bn means billion

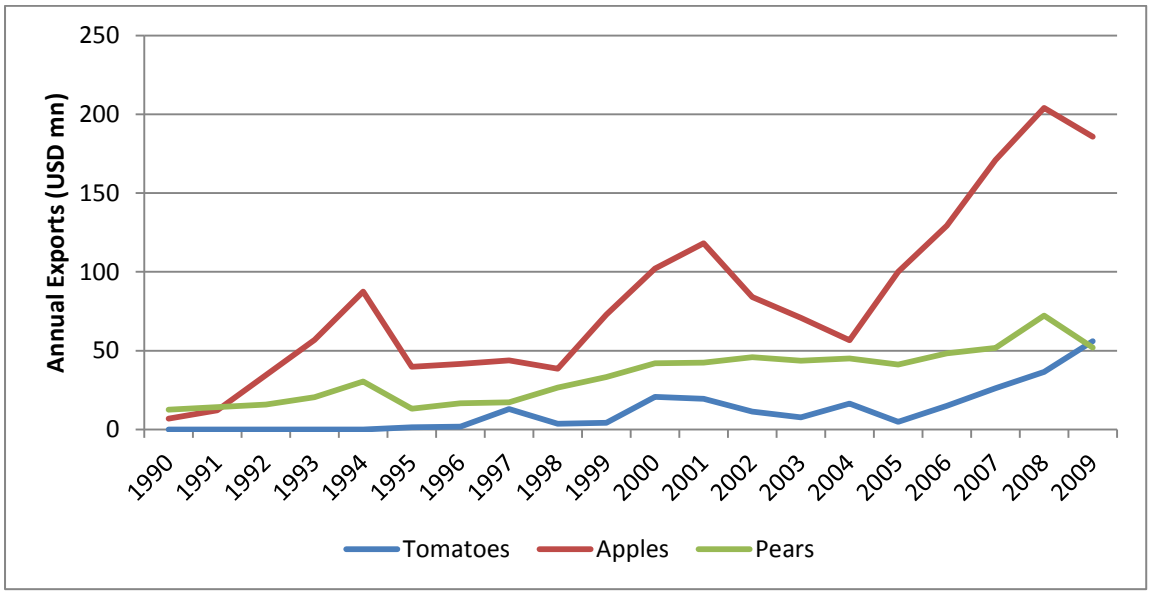
In 2009, U.S.' top F&V exports to Canada consisted of strawberries, grapes, apples, lettuce, onions, and carrots. According to the exported value in 2009, strawberries, grapes, and lettuce ranked as the top three commodities (USDA 2010). While growth in the exports of lettuce and strawberries over 1990-2009 has been rapid (increasing by almost six times), grapes' exports have increased at a relatively slower pace (see Figure 1.4). On the other hand, tomatoes, potatoes, onions, apples, pears, and grapes are the leading F&V commodities exported from the U.S. to Mexico (USDA 2010). In 2009, apples, pears, and tomatoes constituted the leading export commodities. In particular, U.S. apple exports to Mexico grew from a meager USD 10 million to USD 170 million over 1990 to 2009 (see Figure 1.5). Not only has the value of these exports risen substantially, the quantity exported has also registered appreciable growth over the last twenty years (USDA 2010).

Figure 1.4: Top U.S. Fresh Produce Exports to Canada (1990-2009)



Source: Foreign Agricultural Service, U.S. Department of Agriculture 2010

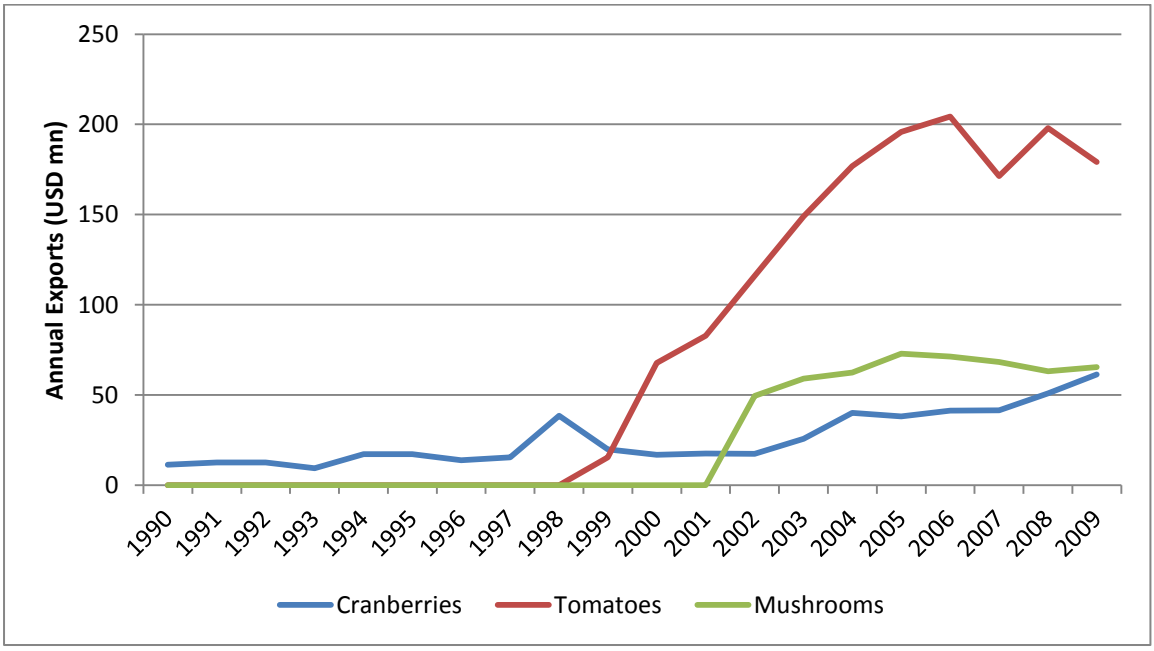
Figure 1.5: Top U.S. Fresh Produce Exports to Mexico (1990-2009)



Source: Foreign Agricultural Service, U.S. Department of Agriculture 2010

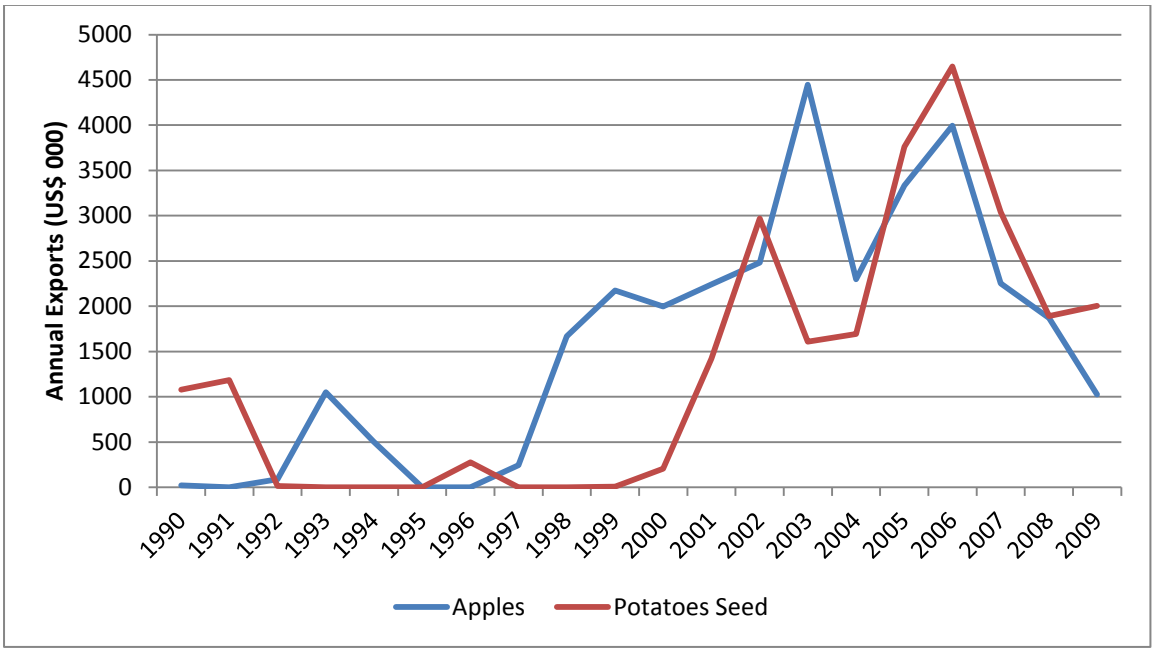
At present, cranberries, apples, cherries, and blueberries make up the leading Canadian fresh fruit exports to the U.S., whereas greenhouse tomatoes, bell peppers, and mushrooms rank among Canada's top fresh vegetable exports to the U.S. (USDA 2010). In 2009, cranberries, mushrooms, and tomatoes formed Canada's top F&V exports to the U.S (see Figure 1.6). The same year, Canada's leading F&V exports to Mexico consisted of apples and seed potatoes (see Figure 1.7) (Statistics Canada 2010).

Figure 1.6: Top Canadian Fresh Produce Exports to the U.S. (1990-2009)



Source: Foreign Agricultural Service, U.S. Department of Agriculture 2010

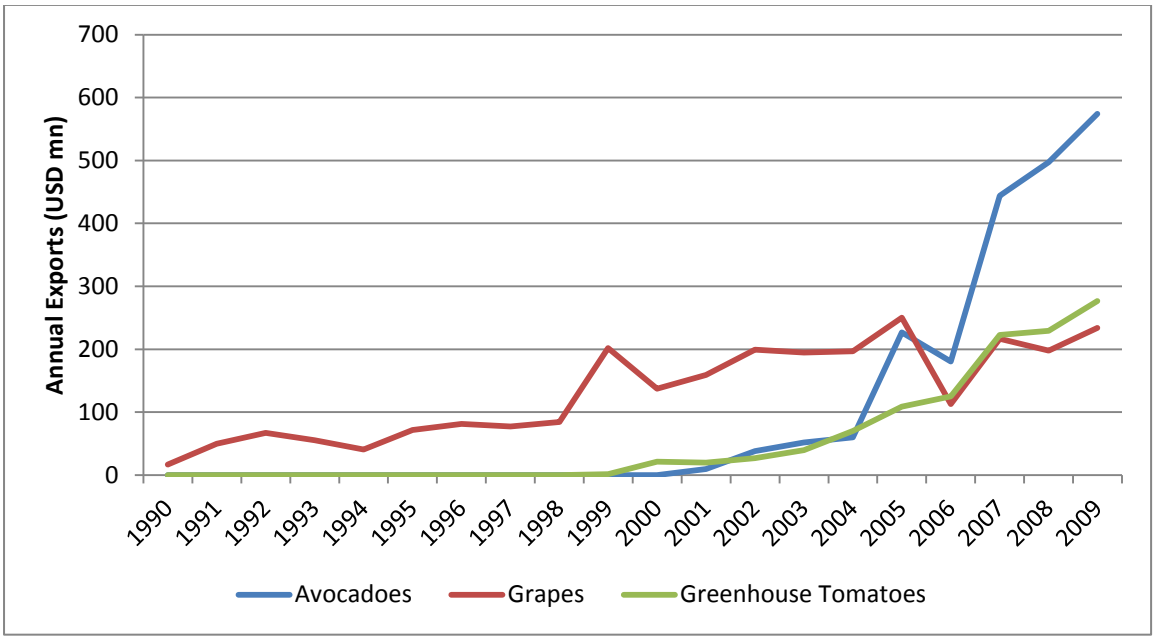
Figure 1.7: Top Canadian Fresh Produce Exports to Mexico (1990-2009)



Source: Canadian International Merchandise Trade Database, Statistics Canada 2010

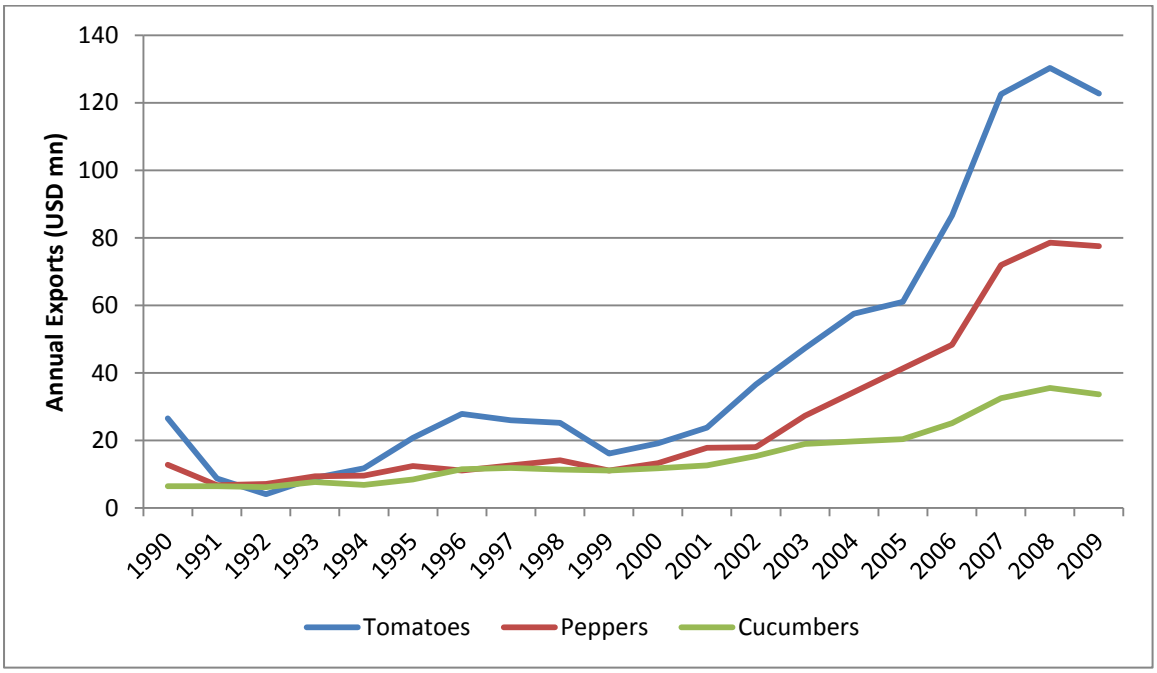
Mexico's top F&V exports to the U.S. consist of greenhouse tomatoes, chili pepper, Roma tomatoes, avocadoes, grapes, and strawberries (USDA 2010); and its top exports to Canada include tomatoes, peppers, and cucumbers (Statistics Canada 2010). In 2009, avocadoes, grapes, and greenhouse tomatoes ranked as the top three Mexican export commodities to the U.S. Over the 1990 to 2009 period, annual exports of these commodities to the U.S. have exhibited considerable variation; a general upward trend with occasional dips (see Figure 1.8). On the other hand, the value of the leading Mexican export commodities to Canada has been consistently rising, barring the minor decline in 2007-08 (see Figure 1.9).

Figure 1.8: Top Mexican Fresh Produce Exports to the U.S. (1990-2009)



Source: Foreign Agricultural Service, U.S. Department of Agriculture 2010

Figure 1.9: Top Mexican Fresh Produce Exports to Canada (1990-2009)



Source: Canadian International Merchandise Trade Database, Statistics Canada 2010

III. Mechanisms for Dispute Resolution Prior to the DRC

At the time the NAFTA treaty entered into force in January 1994, separate dispute resolution systems for F&V trade existed in the U.S. and Canada. In the U.S., the Perishable Agricultural Commodities Act (PACA) of 1930 had established an effective mechanism for ensuring that buyers and sellers of fresh and frozen F&V respect the terms of their contracts and abide by the PACA trading practices (Koller 2011). In instances where a PACA licensee failed to observe the PACA trading practices or did not act in accordance with the contract, the resulting dispute could be resolved using the informal or formal procedures for the resolution of private commercial disputes offered by PACA (Whalen 2011). Operating under a similar mandate, the Canadian Licensing and Arbitration Program regulated fresh F&V trade in Canada (Zohar-Picciano 2011). With licensing being key to the effective operation of both these systems, federal law in the U.S. stipulated that all agents trading F&V products in interstate or foreign commerce require a PACA license (Koller 2011). Likewise, all dealers and brokers marketing fresh F&V in Canada, both inter-provincially and internationally, were required to be federally licensed (Zohar-Picciano 2011). A failure to abide by the terms of a contract could potentially result in the revocation of a license, thus establishing a strong incentive for buyers and sellers to follow good trading practices. These systems served to promote orderly marketing of products and encouraged trade by providing a predictable and cost effective alternative to civil courts as a means of settling disputes over product quality considerations. Mexico, on the other hand, practically lacked a well-functioning and fully-established system for resolving international trade disputes, creating uncertainty regarding timely payments and contract enforcement that dissuaded producers in Canada and the U.S. from freely engaging in fresh produce trade with their southern neighbor (Paredes 2010).

Deficiencies of the Existing Systems

From 1934 to 1974, the Canadian Board of Arbitration (BOA) administered the licensing program for shippers and receivers of fresh F&V (Zohar-Picciano 2011). However, in 1974, the BOA's statutory authority to provide rulings over disputes was challenged in court and proven illegitimate, relegating the BOA to rule on disputes pertaining to grading standards only, and offer arbitration on a voluntary basis (Addy 1974). Even though the Canada Agricultural Products Standards (CAPS) Act was amended to partially reinstate the authority of the BOA and strengthen licensing requirements in 1983, the BOA still remained unable to rule on contract law and disputes pertaining to non-payment of invoices and intra-provincial trade, which made up a significant part of produce trade within Canada (McKenzie 2010).

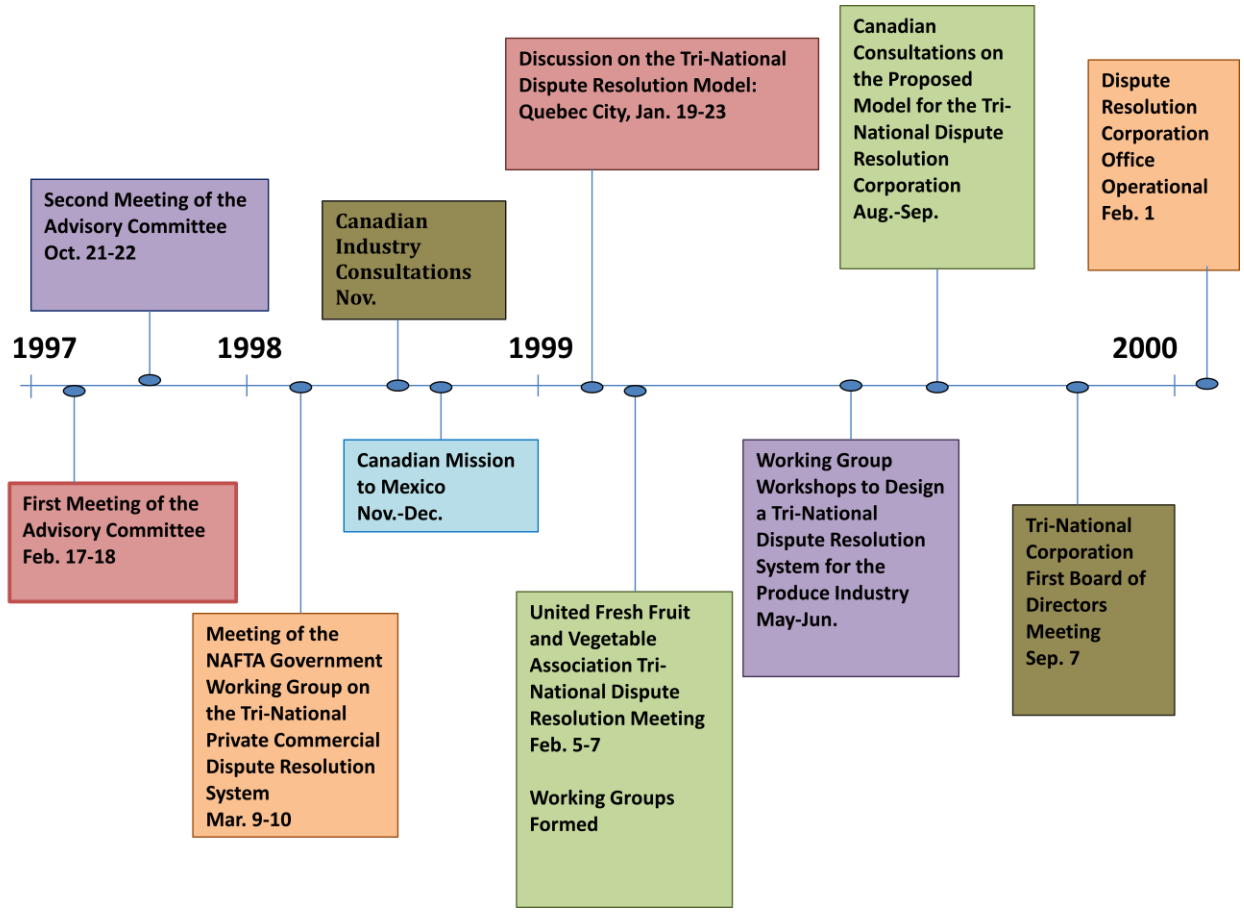
Under the Canadian constitutional arrangements, such authority could only be granted to a federal board either through a change in the Canadian constitution or the establishment of cumbersome federal-provincial agreements, both of which were practically unachievable (Whitney 2011). The Canadian BOA thus fell short of vital industry needs and expectations in several critical areas, leading to rampant incidence of non-payment and increased frustration among trading firms (Addy 1974). U.S. and Canadian shippers also encountered relatively high commercial risks and substantial transaction costs when exporting to Mexico owing to the complete absence of an international dispute settlement mechanism (McInerney 2010). The U.S. and Canadian industries were thus extremely interested in a transition from ineffective and incomplete government regulatory systems in Canada and Mexico to the creation of a mutually-beneficial, industry-driven dispute resolution system that would resolve trade-related disputes in

an effective and timely manner, and establish harmonized regional trading standards (Carberry, 2010; Chancey, 2010; Keeney 2010).

IV. Origins of the F&V Dispute Resolution Corporation: 1996-2000

The DRC was the result of the confluence of private and public objectives to develop a common and effective trade dispute resolution mechanism in North America. An unprecedented level of communication took place between private and public organizations in the three countries and multiple formal and informal meetings were undertaken to identify an ideal dispute resolution system. This section chronologically describes the key events and important milestones in the process leading to the creation of the DRC (see Figure 2).

Figure 2: Milestones in the Process Leading to the Creation of the DRC



IV.1 The Advisory Committee on Private Commercial Disputes regarding Agricultural Goods

At a meeting of the NAFTA Committee on Agricultural Trade, held on May 1, 1996 in Washington D.C., NAFTA representatives agreed to establish an Advisory Committee (AC) on Private Commercial Disputes regarding Agricultural Goods as stipulated by Article 707 under NAFTA. This AC, also known as the tri-national task force/NAFTA 707 Committee, was charged with the task of providing recommendations for the development of systems to achieve prompt and effective resolution of private commercial disputes in agricultural trade, given the perishable nature of certain agricultural commodities. The recommendations of the AC could either build on existing systems or devise alternative dispute resolution methods, with initial efforts focusing on fresh F&V only. This task force was also encouraged to explore the possibility of harmonizing trading rules and standards among the NAFTA partners. In addition, the AC was expected to identify agricultural sectors that would benefit from the use of alternative dispute resolution (ADR). Expanding private sector awareness of the need for ADR, creating opportunities for broader cooperation between institutions, and tackling issues related to the enforcement of arbitration agreements and awards were also among the AC's primary responsibilities (NAFTA Committee on Agricultural Trade 1996).

The AC was comprised of both industry and government representatives from the three countries with expertise in the resolution of private disputes in agricultural trade. The committee's work was divided into two critical stages; the initial phase comprised of identifying industry requirements and objectives, and the subsequent stage involved the development of recommendations for consideration by governments. In order to effectively accomplish the assigned tasks, the committee was required to meet at least once every year, with committee

meetings to be successively hosted by each country (NAFTA Committee on Agricultural Trade 1996).

IV.2 Trilateral Meeting in Washington D.C., April 30, 1996

In April 1996, representatives from AMS' PACA Branch and Agriculture and Agri-Food Canada's (AAFC) Licensing and Arbitration Division presented detailed information on the U.S. and Canadian arbitration mechanisms to Mexican representatives at a trilateral meeting held in Washington D.C. At this meeting, all representatives expressed interest in establishing a common dispute resolution mechanism, agreed to the mandate and terms of reference for the AC, and pointed out the need for developing a scope paper to guide the AC's tasks (NAFTA Committee on Agricultural Trade 1996). Accordingly, a scope paper was prepared by the Canadian produce industry. This scope paper was reviewed and approved with certain amendments at a working group meeting of the NAFTA Section 2022 Advisory Committee held on June 18, 1996. This document described the background, mandate, composition, and goals for the AC. At this meeting, country representatives reported on their preliminary efforts to identify private sector and government representatives for the AC. Following this meeting, detailed planning ensued on the agenda and procedural details for the first official meeting of the AC to be held in the fall of 1996. In preparation of the AC's first formal meeting, U.S. industry representatives began work on an initial draft for an appropriate tri-national model for dispute resolution (NAFTA Section 1996).

IV.3 First Meeting of the Advisory Committee: February 17-18, 1997 (Mazatlan, Mexico)

The first formal meeting of the AC was held in Mazatlan (Mexico) on February 17-18, 1997. Although the AC emphasized F&V trade as the main focus of its discussions, it recognized that the scope of future meetings might be broadened to include other agricultural commodities. The primary objectives of the Mazatlan Meeting were to achieve a better understanding of each country's existing dispute resolution systems, to identify contentious issues pertaining to the effective resolution of commercial disputes in the region, and to propose viable alternatives for addressing them (Advisory Committee 1996). After meticulous deliberation, delegation members put forth a list of criteria which was to guide the future development of a preferred dispute resolution option:

- There was unanimous agreement that the mechanism should have a uniform set of trade standards and be reciprocal, ensuring equal treatment to all involved parties;
- The enforcement mechanism should have mandatory outcomes including the use of sanctions, be able to deal with non-payment issues, be self-funded, flexible and simple;
- Instead of relying heavily on the legal system, the dispute resolution process should be based on active industry participation, and also have provision for the creation of a multinational panel recognized by each country;
- The dispute mechanism must ensure fulfillment of the contract, allow for a judgment to be taken to an existing arbitration or justice system in the respective country, and use a "Confirmation of Sale-like" document to be presented as evidence in arbitration;
- To safeguard the seller and buyer against a breach of contract, it was recognized that the dispute settlement mechanism must be supported by an inspection system and certificate at the final destination point;

- Having an informal dispute resolution component in association with a credible formal component was also deemed desirable;
- Other favorable attributes included a system of good commercial practices and licensing, including the ability to accommodate a broader range of agricultural products (Advisory Committee 1996).

Delegates at the meeting identified options that could serve as transitory mechanisms towards a more preferred option. Three of these options included establishing a private business entity whose rules were based on the PACA/USDA model; establishing a private business that would utilize third party inspection and dispute resolution services combining elements of the Canadian and U.S. systems (i.e. certification by a private agency while government acts as an arbitrator); or simply complementing existing country models with an international system applying PACA standards in all three countries (Advisory Committee 1996).

The key outcomes from the deliberations at Mazatlan highlighted the urgent need for a dispute resolution solution to ensure fair and harmonious settlement of disputes, to enhance produce trade in the region. The options identified during the proceedings on the meeting were deemed complementary and transitional in moving towards the ideal. A detailed report of the outcomes from the Mazatlan Meeting was provided to the NAFTA Committee on Agricultural Trade which subsequently established a work plan for the Advisory Committee with associated milestones. Representatives from each country were granted time to consider the next steps in the process, coordinate domestic system changes with international developments, investigate the elements of the PACA model, and consider ways in which those elements might be achieved in other jurisdictions (Advisory Committee 1996).

IV.4 Second Meeting of the Advisory Committee: October1997, Anaheim, California

At its second meeting, held in Anaheim (California) on October 21-22, 1997, the AC recommended more specific components of the regional mechanism based on the outcomes from the Mazatlan meeting (Advisory Committee 1997). Industry representatives identified the following components and characteristics for such a mechanism:

- A voluntary, tri-national organization, supported by the governments of the three countries, offering membership to all firms in Canada, Mexico, and the U.S. dealing with fresh produce trade;
- Agreement by organization members to abide by mutually recognized trade standards as incorporated in membership by-laws and contracts;
- Alternative dispute resolution through tri-national and/or existing dispute settlement mechanisms (e.g. PACA, the Canadian Board of Arbitration, Compromex);
- Firms refusing to comply with alternative dispute resolution results would be de-listed. De-listing would be widely advertised in trade journals, credit reporting services, member governments, and other appropriate means;
- Mechanisms should be sought in each country to facilitate the enforcement of alternative dispute resolution decisions through the countries' respective legal systems;
- The tri-national mechanism should be administered in an effective, efficient and affordable manner (Advisory Committee 1997).

The Anaheim Meeting was absolutely critical in the process leading up to the creation of the DRC as industry representatives and government officials unanimously signed off and agreed to the major components of a tri-national dispute resolution organization. This marked the establishment of an international agreement between the NAFTA partners (Whitney 2011).

Participants of the Anaheim Meeting recognized the need for establishing a trilateral agreement that would cover issues pertaining to non-payment, international trade contracts and quality standards, and adopting the PACA standards for non-payment. Following the Anaheim Meeting, members of the AC started developing a comprehensive set of standards and guiding principles, using PACA as a template. Various options for funding such a system through an annual membership fee, either flat or differentiated, were also contemplated. Participants at the meeting further concurred that the existing systems needed to be investigated in detail and an international board of directors for the dispute resolution body needed to be instituted (Advisory Committee 1997).

IV.5 Seventh Meeting of the NAFTA Committee on Agricultural Trade: November 20-21, 1997, Washington D.C.

At its seventh meeting, held in Washington D.C. in November 1997, the NAFTA Committee on Agricultural Trade recognized the success of the AC in completing its task of developing consensus recommendations on establishing an industry-driven mechanism for F&V dispute resolution. The strong support of the private sector was also acknowledged and appreciated. At the meeting, the NAFTA Committee requested a time frame to have a mechanism prepared by the end of the first quarter of 1998, with the goal of presenting a final structure to industry representatives by mid-1998. Preliminary discussions on the possible extension of the mechanism to other commodities were also undertaken, but it was agreed that the main focus should remain on fresh F&V. At the end of the meeting, the AC's recommendations from Anaheim were fully approved (NAFTA Committee on Agricultural Trade 1997).

IV.6 Meeting of the NAFTA Government Working Group on the Tri-National Private Commercial Dispute Resolution System: March 9-10, 1998 (Washington D.C.)

At this meeting, representatives of the NAFTA Government Working Group agreed that the U.S. model for dispute resolution could serve as an appropriate basis for a tri-national commercial dispute resolution body in the NAFTA region. They also agreed that an accurate inspection service for assurance of quality and condition was required at destination[5], which could be provided either by already-existing government inspection service providers or private inspection service providers accredited by the tri-national body (NAFTA Government Working Group 1998).

The need for effective enforcement provisions and sanctions to ensure rapid dispute settlement and the establishment of membership criteria were prioritized as the next tasks. Representatives further agreed that the tri-national organization would retain the authority to de-list and subsequently advertise the name of a member company (in trade journals, credit reporting services, member governments and other appropriate means) that failed to comply with any arbitral decision given by the DRC. In addition, failure to comply with an arbitration decision could adversely impact the party's licensing status within existing government systems. It was also recommended that a business plan be devised to facilitate the development of organizational and administrative options for an industry-run alternative dispute settlement mechanism. Legal counsels ensuring that all aspects of the dispute resolution system could function as intended in each of the NAFTA countries were also to be instituted. It was also agreed that widespread industry consultations should be undertaken in each of the three countries

[5] Historically, most commodities in Canada and the U.S. were inspected at shipping points. Overtime, regulatory agencies, particularly in Canada, have moved away from providing inspection services at shipping points. This is because shipping point inspection has become less relevant for dispute resolution. The destination inspection certificate is the single most crucial document furnishing evidence to settle a dispute as most disputes pertain to condition defects rather than permanent defects.

to discuss and finalize a proposed model for effective dispute resolution in the region (Report of the Meeting of NAFTA Government Working Group, 1998). To facilitate industry-government consultations in the respective countries, white papers were developed in the following critical areas:

- Trade Standards (led by Jorge von Bertrab, Mexico)
- Mediation/Arbitration (led by Jim Frazier, U.S.)
- Inspection Services (led by Helen Zohar-Picciano, Canada)
- Enforcement (led by Robert Lazariuk, Canada), and
- Business Plan (led by Robert Carberry, Canada)

The timeline required white papers to be completed and discussed with NAFTA produce industries by the end of May, 1998.

IV.7 Canadian Produce Industry Consultations: November 1998

The NAFTA Committee on Agricultural Trade mandated government officials from the three countries to draft a consultation document, elucidating the components that needed further consideration by the respective industry sectors in finalizing a detailed working model and business plan for the establishment of a tri-national dispute resolution body. This consultation document was completed in April 1998 and individual countries were subsequently asked to scrutinize, discuss, and develop the proposed model, paying greater attention to key issues, including trade standards, mediation and arbitration services, inspection services, enforcement provisions, and a basis in international law that entailed deeper analysis. Successful accomplishment of this task required a structured consultative process, with adequate industry

and government representation from the three NAFTA countries (Agriculture and Agri-Food Canada 1998).

The Canadian Produce Marketing Association (CPMA) and the Canadian Horticultural Council (CHC), together with Agriculture and Agri-Food Canada and the Canadian Food Inspection Agency, led this consultative process. In addition, a steering committee was created in May 1998 to provide overall direction for the project and bolster Canadian involvement.[6] Funded by Agriculture and Agri-Food Canada (with the provision of CAN$800,000 from Minister Vanclief), the Canadian produce industry initiated a series of industry consultations across Canada to raise awareness among key stakeholders, to present the tri-national mechanism options to the latter, and to elicit their feedback (Agriculture and Agri-Food Canada 1998).[7]

These consultations confirmed the general support of the Canadian produce industry for pursuing this industry-led, government-supported initiative and recognition for the proposed PACA-like model. Industry participants, consisting of growers, packers, shippers, wholesalers, brokers, food service distributors and retailers, from various regions across Canada were generally very satisfied with the proceedings of the consultations and with the process of seeking their input, and requested future updates on the project. The next logical step for the Canadian industry was to engage in a series of similar discussions with their Mexican counterparts to create awareness within the Mexican industry regarding the tri-national dispute resolution mechanism (Agriculture and Agri-Food Canada 1998).

[6] Members of the streering committee included Danny Dempster, Stephen Whitney, David Hendrick, Robert Carberry, Greg Borotsik, Helen Zohar-Picciano, Glyn Chancey and Fiona Lundie.
[7] Tri-national Dispute Settlement Workshops where conducted during November 10-19, 1998 in Winnipeg, Manitoba; Saskatoon, Saskatchewan; Burnaby, British Columbia; Calgary, Alberta; Moncton, New Brunswick; Toronto, Ontario; and Montreal, Quebec.

IV.8 Canadian Mission to Mexico: Canada-Mexico Industry-to-Industry Consultations November 27-December 02, 1998

The principal objectives of the Canadian Mission to Mexico were to develop key contacts with the Mexican produce industry and government, strengthen cooperation between Canadian and Mexican produce industries, share the results of the Canadian domestic consultations, and learn about Mexican interests and expectations with respect to a tri-national dispute resolution model (Canadian Produce Marketing Association 1998).

The Canadian Mission identified interest among Mexican growers and exporters in participating in a tri-national dispute settlement system. While the tri-national dispute resolution model was an improvement over the status quo in Canada, the model offered a new mechanism for dispute settlement in Mexico. At the time, it was clear that the major challenge was to adapt the Canadian and Mexican models to the existing PACA system in the U.S. The Canadian-Mexican industry consultations resulted in the development of a migration strategy which is reflected in Table 1 (Canadian Produce Marketing Association 1998). While dispute resolution mechanisms and government-provided inspection services existed in the U.S., under the USDA's Agricultural Marketing Service (PACA USDA Inspection), and to some extent in Canada, under the Canadian Food Inspection Agency, the Board of Arbitration, and the Fresh Fruit and Vegetable Inspection Service, such mechanisms were almost non-existent in Mexico (Whitney 2011). On the other hand, Mexico lacked a system that offered inspection services in the event of a dispute which represented an important barrier for transition to the regional system (Paredes 2010). The key elements of this migration strategy were thus the establishment of harmonized trading practices and standards, the assurance of timely provision of inspection services, and the provision of an effective and efficient dispute-resolution/arbitration mechanism. The Mexican

produce industry further agreed that inspection services could either be provided by the government or by a private agency accredited by the tri-national organization depending on their cost-effectiveness (Paredes 2010).

Table 1: Tri-national Migration Strategy

	Canada	U.S.	Mexico
Today (1998)	Government Inspection Licensing & Arbitration Regulations Board of Arbitration	USDA/AMS Fresh Products Branch Inspection Service (PACA) Trust Laws	Limited private inspection services
Tomorrow	Conform to tri-national standards Canadian inspectors; public or private; accredited by tri-national corporation Tri-National arbitration New York Convention	Conform to PACA equivalent tri-national standards US inspectors; public or private; accredited by tri-national corporation Tri-National arbitration Trust Laws New York Convention	Conform to tri-national standards Mexican inspectors; public or private; accredited by tri-national corporation Tri-National arbitration New York Convention
How to Get There	Build on a tri-national system Seek government support for strengthening enforcement Build retail sector support	Work with Canadian & Mexican industry to develop policies and standards reflective of PACA	Work closely with the US & Canadian team to build understanding of requirements Develop an inspection capacity

Source: Canadian Produce Marketing Association, Report on the Canadian Mission to Mexico (1998)

Since each country had different initial conditions, the migration strategy proposed for each was also different. The Canadian industry promoted the tri-national system in Mexico by building retail sector support and creating widespread awareness about its benefits across

industry participants. The U.S. industry, in turn, led the coordination process with their Canadian and Mexican counterparts to frame trading policies and standards that mirrored those provided under the PACA. Requiring the greatest amount of effort, energy, and resources, the Mexican industry and administration were encouraged to propagate the idea of a tri-national dispute resolution body among Mexican firms, harmonize trading standards, and develop a full-scale inspection capacity with the support of the U.S. and Canadian governments (Canadian Produce Marketing Association 1998).

IV.9 Discussion on the Tri-National Dispute Resolution Model: Canada, Mexico & the U.S., January 19-23, 1999 (Quebec City, Canada)

Following the Canadian and Mexican industry consultations, the CPMA/CHC documented the feedback received during the consultations in the form of a first draft discussion paper. The CPMA/CHC also arranged subsequent meetings, funded by the AAFC's Canadian Adaptation and Rural Development (CARD) Fund, from January 19-23, 1999, in conjunction with CPMA's annual convention in Quebec City (Agriculture and Agri-Food Canada 1999).

The Quebec City meetings offered Canadian and U.S. industry representatives the opportunity to discuss the dispute resolution system in more detail, including its delivery strategy, membership criteria, selection of arbitrators, legal basis for arbitral awards, enforcement mechanisms and trust protection, and budget and corporate governance. The meeting ended with agreement on several fundamental questions related to membership criteria, fees, service delivery pertaining to inspection and arbitration, enforcement mechanisms, and certain aspects of governance. Few issues, such as the approach to selecting the officers and

Board of Directors of the organization, however remained outstanding and required further analysis and deliberation (Agriculture and Agri-Food Canada 1999).

The participants at these meetings were strongly committed to moving the dispute resolution project forward en route to industry agreement on a model, and to obtaining government support for implementation. It was decided that a revised discussion paper which would set out directions more clearly would be drafted and circulated among the attendees. Representatives from the U.S. industry agreed to prepare a model contract for the tri-national corporation, incorporating the issues discussed during the Quebec City meetings for review at a subsequent meeting in San Diego (Hendrick and Whitney 1999).

IV.10 United Fresh Fruit and Vegetable Association Tri-National Dispute Resolution Meeting February 5-7, 1999 (San Diego, California)

Industry representatives from across the three countries next convened in San Diego in February 1999 to shape the action plan in terms of the NAFTA 707 Committee, review further developments following the Quebec City Meeting, and address such issues as the corporation's board size, governance structure, trade standards and model contract. A public workshop titled "Dispute Resolution across Two Borders: A Private Sector Initiative under NAFTA" was held as part of the San Diego Meeting to inform industry of project-related activities and progress on critical issues, and to solicit the industry's perspectives and involvement (USDA 1999).

Following the San Diego Meeting, industry efforts focused on preparing a final draft document for review in each country en route to a meeting in Mexico in April/May 1999 where an industry-wide agreement on a detailed model would be reached, and each of the three countries would begin devising their implementation strategies to identify domestic schemes that would provide the enabling support required. With continued support of the Canadian industry,

Mexican delegates were to outline a dissemination strategy and a buy-in campaign to raise awareness among domestic producers and shippers about the emerging dispute resolution model and convince the industry of the benefits of the model over the next 6-months. At the San Diego Convention, it was decided that five Working Groups would be created to develop the key elements of the corporation, with each Working Group having a lead person and adequate representation from each country. For each Working Group, the goal was to outline a proposal or set of options that were superior in terms of the associated cost, timeliness, and complexity than the existing systems, and conformed to the principles laid out in the dispute resolution model (USDA 1999). The five Working Groups formed at the San Diego Convention were as follows:

i) **By-laws**: to draft a set of by-laws covering all aspects of membership, and the structure of governance and organization (with the exception of fees);

ii) **Standards for Trade based on PACA and Inspection Protocol**: to outline a defined set of trade standards which should incorporate definitions of terms such as F.O.B, determine appropriate grade standards to be applied in a given trade scenario (within-country and between-countries), ascertain the link to regulatory requirements of each country for mandatory grade standards, and set out basic rules which would clarify and simplify policy;

iii) **Mediation, Arbitration, Enforcement Protocols, and Delivery Mechanisms**: to define a PACA-like process and standards of operation, develop options for delivery in each country, determine the suitability of different service providers, research and document current practices and arbitration resources in each country, and thoroughly review the PACA Business Process to improve and streamline the mediation/arbitration process for the tri-national entity. The enforcement provision would specifically address the ability to

get an award paid and revoke a license, and issues pertaining to insolvency, and de-listing and publicity.

iv) **Model Contract for Purchase and Sale**: to develop a standard contract which in the absence of transaction-specific written contracts would represent the default contract to provide the basis for resolution of the dispute and strengthen the means of enforcement; and

v) **Business Plan:** to devise a financial plan to address the start-up and on-going revenues and expenses requirements, to finalize the organization's corporate status and relationship to members, to propose an appropriate fee structure, and to clarify the business case at the level of the individual member in terms of the associated costs, benefits and services, relative to the trade practice of the company (USDA 1999).

Each Working Group was given sixty days to complete the task by mid-April 1999. It was decided that all Working Group outcomes, except those for the Business Plan, were to be distributed by end-April 1999 for review by each country (USDA 1999).

The San Diego Convention was a critical step towards the creation of the DRC as at this meeting Canadian industry representatives were able to convince the U.S. industry to collaborate with them in finalizing the proposed tri-national dispute resolution process and moving towards the implementation phase of the project. Canadian representatives were also successful in convincing their U.S. counterparts that the implementation of the tri-national dispute resolution organization will not affect the PACA in the U.S. in any major way. Having this surety, the U.S. industry extended full support towards quickly moving the process forward (Whitney 2011).

IV.11 Working Group Workshops to Design a Tri-National Dispute Resolution System for the Produce Industry: May-June 1999

The Working Groups participated in two events: a two-day session in Mexico City on May 12-13, 1999 to design their respective part of the dispute resolution model; and a one-day session on June 22, 1999 to prepare a final document on the design and implementation schedule of the new corporation. These meetings were conducted with the assistance of Collaborative Decision Resources (CDR) Associates, a consultant firm with recognized expertise in dispute resolution. Prior to these Working Group meetings, preparatory workshops were held in Mexico City (Mexico) from April 21-22, 1999, to update all industry representatives on the latest developments on the project and to finalize Mexican nominees for the working groups (Canadian Produce Marketing Association 1999). These workshops also offered leaders of the Standards and Inspection Working Group an opportunity to develop their work plan and chart out the future course of action. These Working Group meetings primarily focused on:

- The kinds of disputes that the new corporation would address and resolve;
- The major causes of trans-boundary disputes over produce imports and exports;
- The general types of dispute resolution mechanisms that should be put in place to address, handle, and resolve contested issues;
- An assessment of existing dispute resolution mechanisms in the produce industry and identification of useful components that could be incorporated into the new system;
- The changes in attitudes, approaches, procedures or structures that could be implemented to prevent the emergence of commercial complaints or disputes;
- The design for a dispute resolution system that would combine prevention and intervention components and would clearly indicate the sequence of activities; and

- Implementation issues including the location, staffing, procedures, administration, internal and external service providers, training staff, quality control, and marketing of the new system (Collaborative Decision Resources Associates 1999).

The Working Group leaders reviewed, compared, integrated, and refined the various pieces from the five Working Groups, which were subsequently presented to the full project team for approval of a final draft of the elements of the new system.

IV.12 Canadian Consultations on the Proposed Model for the Tri-National Dispute Resolution Corporation: September 1999

During August 1999, the Tri-National Dispute Resolution Project Team met with industry representatives in seven locations across Canada to present and elicit feedback on the final draft of the policy and operating framework of the proposed Dispute Resolution Corporation. In addition, attendees were also asked for their input on the timing of the repeal of the CFIA licensing and arbitration legislation and membership promotion during fall 1999 (Agriculture and Agri-Food Canada, Summary Report 1999). The highlights of the consultation discussion outcomes are listed below:

- *Governance*: The need for continuity of the Board of Directors and adequate protection for the Board and the Corporation in terms of liability was emphasized.
- *Fee Structure*: A fee structure that was fair, affordable, and would not create disincentives to membership, was devised. It was also suggested that further work be undertaken to define a retail fee structure consistent with the PACA and CFIA.

- *Re-entry after De-listing*: It was agreed that stricter conditions, in the form of bonding as well as disclosure of companies or individuals connected to the de-listed company, should apply to re-entry after de-listing.
- *Scope of Eligible Members*: The inclusion of transportation companies and allowance for "associate members", such as regional produce marketing associations and regional grower organizations, was considered.
- *Standards & Inspection*: The issue of specific grade standards being applicable to a given commodity in a given transaction and of recognition of inspection authorities or other recognized parties was addressed.
- *Mediation & Arbitration*: Consensus was reached regarding publishing the names of companies which use the mediation/arbitration process and including trained industry personnel as mediators/arbitrators. A clear outline of the mediation/arbitration steps involved and the time required for each step, and the scope of mediation/arbitration and the informal services offered by the Corporation was laid out.
- *Financing in Year One*: It was agreed that efforts to seek a capital base by requesting contributions from the three governments and from industry associations must be undertaken.
- *Promotion and Marketing*: Regional seminars to educate and build membership and marketing brochures for use in each country were proposed as integral components of the initial marketing and promotion campaign. In addition, soliciting endorsement of state and provincial associations, creating a corporation web-page to provide information on the corporation's services and allow on-line registration, circulating a final report to all

parties in three countries, and coordinating a North American media blitz were also identified as being critical to promoting the new corporation.

- CFIA proposed an amendment to the Canadian Agricultural Products Act, which would modify its Licensing and Arbitration regulations, to make membership in the DRC more attractive within the Canadian industry (Agriculture and Agri-Food Canada, Summary Report 1999).

The produce industry in all the three countries, led by their associations, committed to expediting the establishment of a working tri-national model, through the intensification of consultation, research and development efforts, both domestically and tri-nationally. At this time, the industry was convinced that the regional model was critical to ameliorating the commercial environment for fruit and vegetable trade in the region. Likewise, at a meeting of the NAFTA Committee on Agricultural Trade held in Canada in March 1999, government officials pledged to continue to extend full support to this initiative and to participate in the working groups formed in February 1999. There was consensus regarding the need for additional consultative and development work in Mexico, given inadequate inspection infrastructure in this country. Consequently, the Canadian private and public sector (with approximately CAN$1 million of financial support from the AAFC) continued to assume an important leadership role in promoting the tri-national model among Mexican industry groups. The World Bank and the USDA also pledged funds to assist Mexico in developing the necessary infrastructure and expertise (Canadian Horticultural Council 1999).

After the five technical Working Groups completed their work in June 1999, industry representatives advanced a comprehensive corporate model for further consideration in July and August, 1999. The NAFTA 707 Committee examined the model and provided input emphasizing

legal aspects in the context of the free trade agreement. Following these internal country consultations, the first Board of Directors Meeting of the Tri-National Dispute Resolution Corporation was held on September 7, 1999 in Washington D.C. With the opening of the Tri-National Corporation Office planned for February 1, 2000, the proposed model was finalized and an implementation plan was developed and presented to the NAFTA Steering Committee for ratification at this meeting (Canadian Horticultural Council 1999). In addition, this first meeting focused on appointment decisions, proposal of names for the tri-national organization, discussion of issues pertaining to start-up funds, corporate structure, marketing and promotion, the inspection program in Mexico and the Canadian regulatory situation; creation of two critical committees to deal with the corporation's financial and membership affairs, approval of corporation's policies and standards, determination of corporation's goals and measureable results, particularly with respect to the quality of service provided, accountability measures for the Board of Directors and CEO, update on each country's consultation process on the final draft document for the tri-national corporation, and drafting a work plan through to summer 2000 (Fruit and Vegetable Dispute Resolution Corporation 1999). An interim Board of Directors was selected to supervise and ensure the timely establishment of the corporation. Under the leadership of the Corporation's first President and Chief Executive Officer, Mr. Stephen Whitney (former Executive Vice-President of the CPMA and former Assistant Executive Vice-President for the CHC), the Board engaged in an aggressive membership recruitment drive in the three countries (Canadian Horticultural Council 1999).

Seeking Legal Opinions on Recognition & Enforceability of the Dispute Resolution Mechanism

It was absolutely necessary that the arbitration agreements and awards issued by the tri-national dispute resolution mechanism be enforceable in all three countries. Without legal enforcement, the legitimacy of the dispute resolution body could be challenged. To ensure the recognition and enforcement of these awards across the three NAFTA countries, the DRC requested detailed legal opinions from leading legal firms in Canada, Mexico, and the U.S. shortly after its creation. These legal opinions were based on the premise that all DRC members would agree in writing to binding arbitration either through a membership contract in which members agree to arbitrate disputes with other members as a condition of membership, or through a written sale contract with a firm that a member engages in business with, or in an agreement to arbitrate in the event that a dispute arises (Whitney 2011). In general, these legal opinions confirmed that the arbitral awards decided by the DRC were legally enforceable in the courts across the three countries. The exact details whereby which these awards were to be enforced however differed to a certain extent in the three countries.

Following the enactment of a federal law, the provisions of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also commonly known as the New York Convention, were enforced in the U.S. in 1970. The New York Convention provided that each state recognized and enforced agreements to arbitrate and arbitral awards. Similarly, federal courts were also required to recognize and enforce such agreements and awards. On account of the New York Convention, any parties that entered into a membership contract in which they agreed to arbitrate generally with other members in the instance of a dispute would be required to arbitrate by a U.S. court, and any resulting award would be confirmed by the court. Likewise, if prior to the occurrence of a dispute the parties entered into a written contract which contained a clause requiring the parties to arbitrate disputes in accord with the rules of the DRC, such

agreements would be enforced, as would any award issued. Finally, if the parties entered into an agreement to arbitrate after a dispute arose, then again both the agreement to arbitrate and any award issued would be enforced in the U.S. courts. Domestic awards would be enforced under different provisions than those governing foreign arbitrations. For within-state arbitration agreements, awards would be enforced according to each state's arbitration award enforcement statutes (McCarron 1999).

The legal opinions confirmed that in Canada arbitral awards issued by the tri-national corporation would be more easily enforceable and subject to considerably less judicial review than would decisions of courts or other administrative authorities that would otherwise have jurisdiction to preside over the relevant disputes. The legal opinions further stated that this would be especially true for foreign or international awards as they are governed by a legal regime particularly favorable to the enforcement of arbitral agreements and awards. In most jurisdictions, the recognition and enforcement of foreign and international awards in Canada is governed by specific legislation which adopts and implements two important international instruments dealing with international commercial arbitration; the New York Convention and the United Nations Commission on International Trade Laws Model Law on International Commercial Arbitration (the UNCITRAL Model Law). Both the New York Convention and the Model Law firmly support the enforcement of arbitration agreements and awards in Canada. They also provide a summary procedure for the recognition and enforcement of awards which restricts and defines the bases for resisting enforcement of awards and, in most cases, reverses the legal burden by requiring the party resisting enforcement to prove that one of the limited grounds for refusal exists (Alvarez 1999).

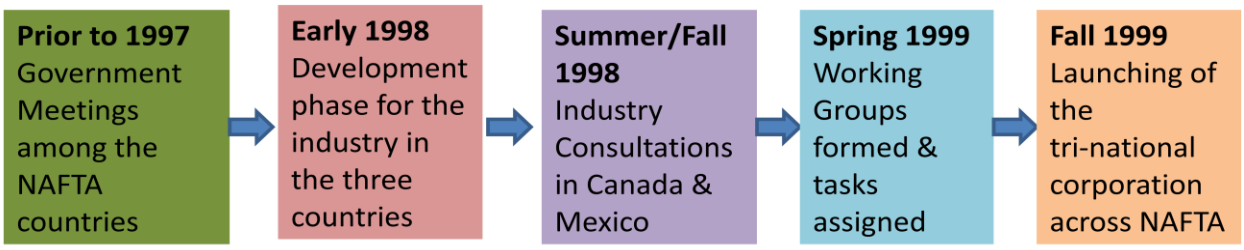
On account of certain constitutional complexities, the procedure for enforcement of domestic arbitral awards in Canada is not as straightforward as for foreign and international awards. In most jurisdictions, other than the federal jurisdiction and Quebec, legislation governing domestic arbitration within Canada allows greater control of the process by the courts and does not establish very clear procedures for enforcement of awards both inter- and intra-provincially. Moreover, there exist marked differences in legislation between jurisdictions, resulting in a more complicated framework for enforcement of awards. Nevertheless, arbitral awards are enforceable between provinces and are typically subject to less judicial scrutiny than judgments (Alvarez 1999).

Legal experts from Canada also acknowledged that the tri-national dispute resolution system would be very effective as it evaded the constitutional problems hampering the development of a legislative or regulatory regime to address the disputes in question. The use of voluntary membership in the tri-national corporation and a mandatory dispute resolution system based on the corporation's standards and regulations established an efficient channel to deal with issues resulting from the Canadian constitutional division of powers (Alvarez 1999).

Legal opinions from Mexico also corroborated that awards made by the tri-national corporation would be subject to the general arbitration regime in Mexico which supports the enforcement of foreign and international awards according to the Mexican legal framework. The Mexican legal framework for commercial arbitration and enforceability of arbitral awards is comprised of the New York Convention, the Inter-American Convention on International Commercial Arbitration of 1975 (the Panama Convention of 1975), the Code of Civil

Procedure[8], and the provisions of the Title Fourth of the Commercial Code[9]. Commercial matters in Mexico are thus subject to the Federal Constitution and the Code. According to the provisions of the Code, unless otherwise agreed to, parties are free to resolve their disputes in whichever way they deem appropriate. This includes arbitration by a third-party, including an arbitral institution such as the tri-national corporation. Furthermore, unless otherwise provided, there is no need for judicial intervention. If, however, judicial intervention is requested, the federal district court or the local court at the place of arbitration is competent to intervene. The Mexican Code recognizes the arbitrations undertaken by the corporation and allows for the possibility of seeking assistance of the relevant federal or local court in arbitral matters (Marquez 1999).

Figure 3: Critical Stages in the Creation of the DRC



Summing up, the process leading to the creation of the DRC can be described as consisting of five crucial stages (see Figure 3). The initial stage (prior to 1997) consisted of meetings among government representatives from the three countries resulting in the creation of the advisory committee on the resolution of private commercial disputes in agricultural trade. In 1997, the advisory committee met twice and developed a basic model for the tri-national dispute resolution mechanism. Through mid and late 1998, industry representatives from Canada and Mexico engaged in a series of consultations to improve and revise the model for the tri-national

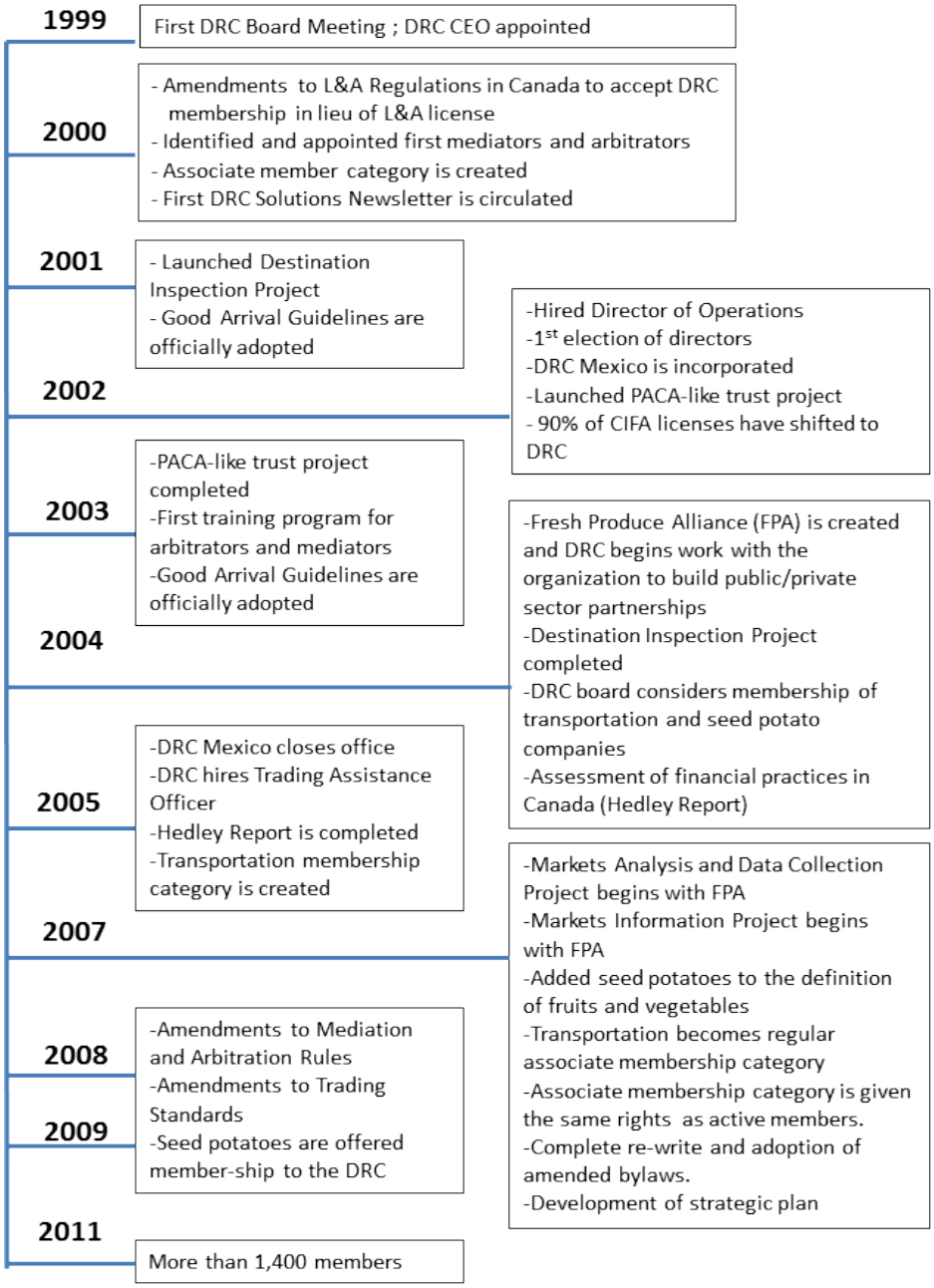
[8] The provisions of the Fourth Book of the Federal Civil Procedure Code on International Cooperation, effective from 1988
[9] Effective from July 1993, the Commercial Code follows the Model Law.

corporation developed by the advisory committee. This process was expedited with the formation of the technical Working Groups in the spring of 1999 which were charged with finalizing the details of the key elements of the tri-national corporation. As the Working Groups completed their tasks, industry representatives collaborated throughout the fall of 1999 to launch the tri-national corporation by early 2000.

V. The Evolution of the DRC: Responding to a Dynamic Industry

The previous chapter outlined the players and processes that led to the creation of the DRC. This chapter describes the evolution of the DRC for the period 2000-2011. It focuses on the central business of the DRC- dispute resolution and mitigation- and the efforts undertaken to make this mechanism relevant and valuable to the produce industry in the U.S., Canada, and Mexico. The primary milestones discussed in this chapter are presented in chronological order in Figure 4. The chapter begins with a brief description of how the DRC's dispute resolution process works, the various stages involved, and the role of DRC staff throughout. Next, it discusses the membership development and marketing efforts undertaken by the DRC in Canada, the United States and Mexico. Third, it describes efforts to expand the scope of membership, including the creation of new membership categories, the extension of membership to additional sub-sectors of the produce industry, and the exploration of association-sponsored membership modalities to make DRC services available to smaller firms. Following this, the chapter then outlines special projects and initiatives undertaken by the DRC to address structural and policy shortcomings that contribute to regional trade disputes.

Figure 4: Chronology of milestones, 1999-2011



Source: Created by Authors based on DRC Records

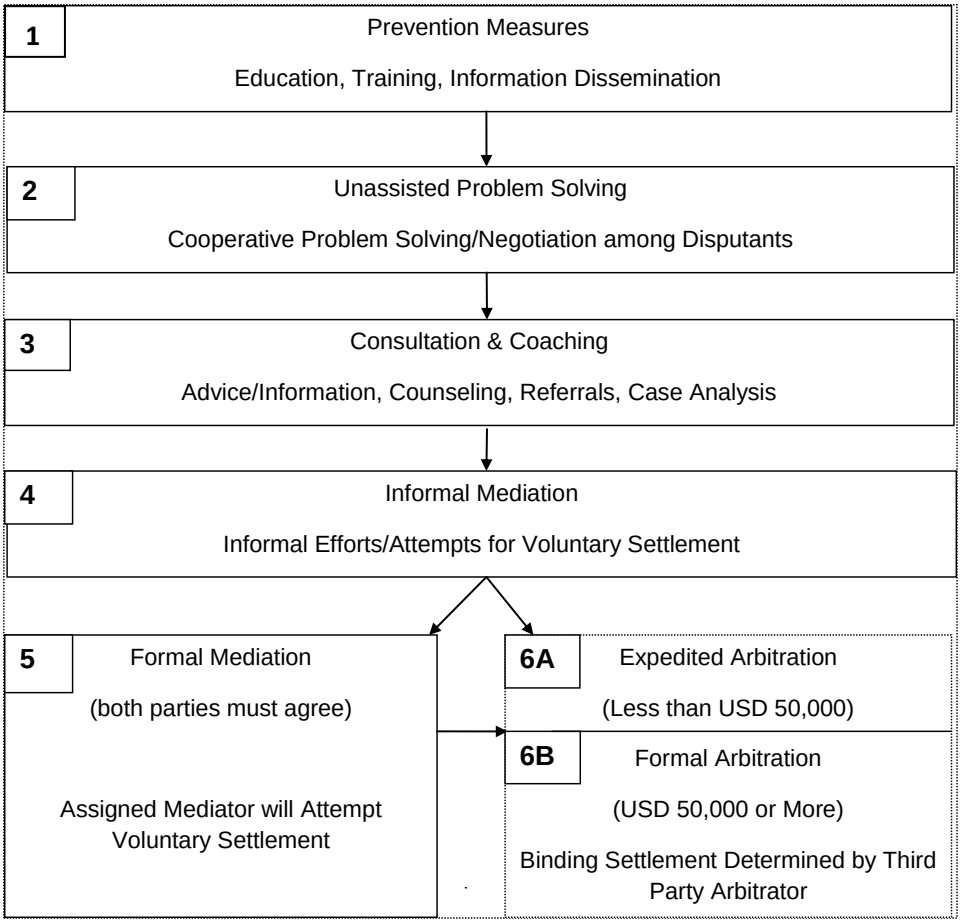
V.1 Core Business of the DRC

Firms that join the DRC adhere to a common set of trading practices and mediation and arbitration procedures. Decisions of the DRC can be registered with and are enforceable in the

courts of the three countries. The primary incentives for participation are the commercial benefit to suppliers, customers and transportation service providers that result from greater assurance of reputable business behavior, and the clarity and efficiency of the resolution mechanisms in the event that disputes arise between buyer and seller.

Dispute resolution includes an array of activities including providing advice, coaching and consulting, as well as the provision of both informal and formal mediation services. When necessary, it also includes the process of final arbitration. In addition to offering a structured process for dispute resolution, the DRC focuses on mitigating disputes through a variety of educational activities such as seminars, newsletters and workshops, among others (Figure 5).

Figure 5: DRC Dispute Resolution Process



V.1.2 Stages in the Dispute Resolution Process

The model is an all-encompassing six stage dispute resolution process, as shown in Figure 5. The process provides both assistance and intervention as needed by members. Services are supplied through DRC staff and contracted third parties like PACA (US Perishable Agriculture Commodities Act).

Prevention Measures - At stage one of the model, members are provided with information about their DRC rights and obligations. Information will be general in nature. However, a number of important issues will be covered, such as the statute of limitations for filing a claim, options for dispute avoidance and/or resolution and the best way to protect oneself. Prevention measures also include a variety of educational opportunities for the membership. Through workshops and trainings, webinars, newsletters, and public seminars, the DRC works to promote better industry education about issues which are involved in the buying and trading fruits and vegetables. This includes helping companies think about the options available when product is received in poor condition, how to interpret inspection certificates, good arrival guidelines, and avenues for dispute settlement, among others (DRC 2011).

Unassisted Problem Solving - At stage two of the model, the parties engage in unassisted negotiations and problem solving between buyer and seller. The focus of unassisted problem solving is to provide general information so that the parties may discuss and resolve the potential dispute themselves. Members will be given advice on how to effectively approach their trading partner. Here, DRC staff will refrain from taking positions or giving too much technical advice. The DRC wishes to encourage and promote bargaining in good faith between the parties, not technical trading.

Coaching and Consultation - At stage three, a physical file will be started and all correspondence and documents shared between the parties will be held in that file. DRC staff will take a more active role in dealing with the parties. Specifics of the case will be discussed at this point; and opinions and settlement offers exchanged between parties. When consulting or coaching, the DRC may advise members on the strengths and weaknesses of the case, and often suggests ways of approaching the relevant trading partner for resolution. During this phase the DRC staff also reminds parties of the Statue of Limitations for the DRC dispute resolution procedure, as well as any pertinent, additional requirements outlined by CFIA or the USDA (DRC 2011). It is important to emphasize the relevance of stages 1-3: according to the leadership, over 85 percent of disputes managed by the DRC are resolved informally through unassisted problem solving, consultation and coaching, and informal mediation (DRC 2011). This highlights the role of the DRC in promoting improved relationships among produce supply chain members in North America.

Informal Mediation - Stage four of the model begins when the voluntary stages have not succeeded in providing a resolution. Informal Mediation is the beginning of specific DRC procedures. It imposes certain filing requirements as well as a twenty-one day timeframe within which a voluntary settlement must be reached. Informal Mediation requires all parties to forward supporting documentation to the DRC. Upon receipt of this documentation, DRC staff helps parties exchange information required to reach resolution of the dispute. When this exchange of information is complete, DRC staff works with both parties to achieve a voluntary settlement. If the parties cannot agree to settle their dispute, a formal mediation or an arbitration option is elected. This stage initiates a formal flow of processes and documents, which is

described in detail in Appendix B. Figure B-1 in the appendix describes these processes in the context of the informal mediation stage.

Formal Mediation - The fifth stage is an option that can be used regardless of the dollar value of the claim. Both parties must agree to use this option and the mediation is carried out by an independent third party mediator who can be selected from a roster maintained by the DRC. If the parties do not agree to use formal mediation or if mediation does not succeed in generating a settlement acceptable to both parties, then either party may proceed with arbitration. Since the inception of the DRC, formal mediation has rarely been used. Rather, Claimants prefer to save money by using informal mediation (which is included in DRC membership fees) or take the claim directly to arbitration, the sixth and final stage of the dispute resolution process. Appendix B describes details of processes, documentation and responsibilities of parties in dispute in the formal mediation stage (Figure B-1).

Arbitration - In circumstances where the dollar value of a claim is less than $50,000 U.S., an *expedited arbitration* takes place where the DRC provides the parties with an accelerated process. While this process places strict time limits on the exchange of information, it is both fair and equitable when compared to the amount in dispute (less than $50,000). In circumstances where the dollar value of the claim is equal to or greater than $50,000, the parties are required to use the formal arbitration process as defined under the Corporation's Formal Arbitration Rules (i.e., *formal arbitration*). However, when both parties and the administrator agree, the expedited arbitration process can still be used for claims greater than $50,000. Once a binding decision has been rendered by the arbitrator, the DRC staff will monitor compliance with the binding decision. In circumstances where there is failure to comply with a decision, the DRC will proceed with de-listing the party failing to pay and will help to facilitate the registering of the

decision with the court. The formal arbitration (expedited and formal) processes and flows are described in detail in Appendix B (Figure B-2).

Whether the process involves formal or expedited arbitration, the DRC members will be able to draw from a roster of knowledgeable mediators/arbitrators that has been established by the DRC. The recruitment, training, and maintenance of trustworthy and knowledgeable arbitrators are of paramount importance to the DRC. It is noteworthy that with funding from Agriculture & Agri-Food Canada, the DRC conducted an extensive arbitrator/mediator training program with CDR and Associates (a mediation and conflict resolution company) in 2004. The majority of current mediators/arbitrators attended the 2004 training session.

V.1.2 Dispute Resolution Stages and the Evolution of the DRC

While the DRC provides dispute resolution services in an effort to assist the produce industry, the organization exists, at a deeper level, to help support and maintain important business relationships between members and within the larger produce industry. This often means helping parties compromise and work together– especially when clear responsibility or blame for a product quality issue is not obvious in produce trading. Especially for product quality disagreements, uncovering the exact reasons and responsibility for diminished quality can be difficult, if not impossible. The fresh produce industry is constantly fighting a battle against natural product deterioration in produce supply chains, which typically involve multiple handlers. As a result, it is often unclear as to the time, place, or the ownership point at which quality diminishes as a result of what may or may not be partner negligence or ineptitude. This lack of clarity in determining responsibility is a key reason why the DRC constantly promotes

amicable, mutual resolution, as reflected in the fact that about 85 percent of the disputes are resolved in stages 2-4 of the process (DRC 2011).

V.2 Membership Development and Marketing Efforts – A Tale of Three Countries

While the DRC core business objectives have remained constant, the composition and needs of the industry have not. Operating within a dynamic, growing industry means constant internal efforts to remain cued in to both member needs and industry shifts in policy or practice. A marketing orientation is critical to the DRC because the revenue stream which sustains DRC operations derives almost entirely from the membership dues it receives from the produce buyers and sellers who voluntarily elect to affiliate with it. Efforts towards coalition building with produce and industry associations, new methods of marketing and outreach, and the creation of new membership categories have each been internal efforts to improve value and provide better provision of core business services to DRC members. This section discusses the successes, failures, and challenges in membership development in Canada, the US, and Mexico.

Beginning in 1999 from a base of zero members, by 2011 the DRC membership has risen to include 1,421 member companies. However, as shown in Table 2, the growth rate has varied substantially across countries (Table 2). Given that the three NAFTA countries began deliberations on equal footing to create the DRC, how did it come to pass that the smallest of the three countries (Canada) would represent over two-thirds of total membership, with the far-larger produce industry of the United States accounting for only a quarter? More importantly, why in Mexico – also a country far larger than Canada both in terms of population and the produce sector– is membership barely nosing out non-NAFTA Chile for third place with only 2 percent of total membership? To address these questions, this section examines the pre-existing produce

dispute resolution systems in each country, the regulatory requirements for licensing, the different approaches adopted by each national government in support of the DRC's development, and the relative capacity to provide the evidentiary materials on which the DRC's dispute resolution process is based. Further, this section discusses the membership development efforts undertaken by the DRC in each of the three countries.

Table 2: DRC Membership by Country, December 2011

COUNTRY	MEMBER COMPANIES	% OF TOTAL MEMBERSHIP
CANADA	1,005	71%
USA	358	25%
MEXICO	22	2%
CHILE	18	1%
OTHER	18	1%
TOTAL	1,421	100%

Source: DRC Annual Reports

V.2.1 Canada

At the time that the DRC entered into operation in 1999, buyers and sellers of fresh produce in Canada had three general alternatives on which to rely for dispute resolution: direct negotiation between disputants; civil complaint in a court of law; or the Licensing & Arbitration system of the Canadian Food Inspection Agency (CFIA).

Each of these three alternatives suffered from limitations which impeded its effectiveness. In the case of direct negotiation, leverage lay in the hands of the buyer, or receiver; the seller, or shipper, had in most cases already incurred the costs of procuring and transporting the product to the market specified by the buyer, while the buyer had virtually no economic exposure at the time the product reached his place of business. As a result, resolution through direct negotiation routinely occurred on terms dictated by the buyer, and provided the seller with little, if any, satisfaction. In the case of legal action, the resolution process was invariably

lengthy and expensive. Moreover, given the technical nature of the issues involved in such disputes, and the near-total reliance on verbal contracts in fresh produce transactions, jurists often struggled to understand the concepts involved in attempting to adjudicate such disputes, and frequently arrived at incorrect decisions and resolutions. The Licensing and Arbitration (L&A) system, specifically put in place to resolve disputes between buyers and sellers of fresh produce in Canada, was generally more even-handed than direct negotiation, and far more knowledgeable than the courts. Unfortunately, the L&A system was only able to address disputes involving grade and condition, lacking jurisdiction to address disputes relating to payment issues (e.g., late payment, partial payment or outright non-payment). In addition, the timelines of the L&A system were such that years could elapse before a dispute might be finally ruled upon.

Given the weaknesses of the three pre-existing dispute resolution systems in Canada, there was a generally favorable predisposition among produce firms in favor of a new system - resembling more closely the PACA system in the United States - which could offer fair and objective outcomes on a timely and cost-effective basis. Once the DRC model was rolled out and explained to produce firms, it immediately captured the attention of the Canadian produce industry. Prior to the creation of the DRC, virtually all buyers and sellers of fresh produce in Canada were required to obtain operating licenses from the L&A system of the Canadian Food Inspection Agency. To support and encourage the development of the DRC, the Canadian government announced to the produce industry in 1999 that membership in the DRC would meet the licensing requirement for legal operation within the industry, on an equal footing with a CFIA operating license. This official sanction from the Canadian government, together with the fact that the DRC promised timely and fair dispute resolution, and charged a membership fee that

was considerably less than the CFIA license fee, triggered a wholesale migration from CFIA licenses in favor of DRC membership. This transition is illustrated in Table 3.

Table 3: Canadian Membership Evolution

Year	In	Out	Net	Growth Rate	Recruitment Rate	Retention Rate	Total Canadian Members
2000							591
2001	174	57	117	20 %	29 %	90 %	708
2002	125	73	52	7 %	18 %	90 %	760
2003	99	75	24	3 %	13 %	90 %	784
2004	97	67	30	4 %	12 %	91 %	814
2005	91	73	18	2 %	11 %	91 %	832
2006	68	82	(14)[a]	(2 %)	8 %	90 %	818
2007	104	54	50	6%	13%	93%	868
2008	106	98	8	1%	12%	89%	876
2009	96	81	15	2%	7%	91%	891
2010	140	99	41	5%	16%	89%	932
2011*	142	75	67	7%	15%	92%	999

Source: DRC Membership Records

[a] Numbers in parenthesis represent negative changes

Building and maintaining close relations with national produce associations, such as the Canadian Produce Marketing Association and the Canadian Horticultural Council, as well as with provincial produce marketing associations and grower organizations across Canada, has played a critical role in the DRC's membership development activities within Canada. The DRC is a regular participant at national and provincial trade shows, and has been frequently invited to join panel discussions on risk mitigation and dispute resolution at educational forums organized by these national and regional associations. The DRC also works closely with regional commodity associations, such as the Prince Edward Island Potato Growers and the Ontario Greenhouse Vegetable Growers, to provide the membership of these groups with information relevant to the successful management of their credit activities, and to put together customized seminars addressing issues of particular concern to any of these regional or commodity groupings.

The DRC has extended marketing communication strategies beyond Canadian fruit and vegetable growers. The DRC has also cultivated close working relations with Canada's major food retailers, both to inform them of the DRC mission, and to garner their support for its membership development activities. Historically, Canadian retailers had felt themselves to be operating at a disadvantage in attempting to work more closely with fruit and vegetable producers, both in Canada and in the United States, as a result of shipper concerns regarding claims and payment practices on the Canadian wholesale markets from which these retailers procured their product. These retailers recognized the discipline which the DRC would be able to enforce in terms of bringing these claims and payment practices into compliance with shipper expectations, and believed that improvements in this area would enhance their credibility as reliable customers. As a result, Canadian retailers generally supported the DRC mission not only by becoming members themselves, but also by encouraging – – and, in some cases, requiring – – their wholesalers and other vendors to become members of the DRC.

The earlier chapters of this report have explored the extent of Canadian government support, particularly from Agriculture and Agri-Food Canada, throughout the formative, pre-operational phase of the Dispute Resolution Corporation. This support has continued throughout the course of the DRC's evolution since 1999, both in the form of direct funding, and in its efforts to bring all of the active participants within the Canadian produce value chain into its regulatory regime. In terms of funding, the government provided the DRC with an initial amount of $170,000 to facilitate the DRC's startup in late 1999. In an effort to increase the DRC's reach into Mexico, and thereby increase the DRC's ability to protect Canadian shippers operating within the Mexican market, the government provided $130,000 to support system upgrades and membership development in Mexico from 1999 through 2003 (this initiative is discussed in more

detail in the evolution of Mexican membership below). In addition the Canadian government provided funding to support a series of studies and activities within Canada designed to enhance the regulatory environment within which the DRC operated, including studies to improve Canada's destination inspection service, a feasibility study for the establishment of a PACA- like trust within Canada, and a formal training program for the DRC's roster of arbitrators and mediators. These initiatives are discussed in detail later in the chapter. Beyond its direct funding support, the Canadian government also enacted several changes to its licensing regulations, in an effort to eliminate loopholes and to improve the universality of compliance with good trading practices throughout Canada. Foremost among these changes were the elimination of the small buyer exemption, which had permitted a significant number of wholesale buyers/resellers to circumvent the need for licenses, and the establishment of a requirement for importers to declare their license details as part of the standard import documentation process. This import documentation requirement, put in place in January of 2011, revealed that many importers had been operating without benefit of licenses, and led to some 60 new member affiliations for the DRC within the first half of 2011.

The DRC support from government and industry in Canada appears to have contributed to solve a domestic problem, improving the resolution of commercial disputes between Canadian produce firms. Table 4 indicates that during the period 2007-2010 about 90 of the disputes filed with the DRC in Canada consisted on complaints brought by Canadian firms against other Canadian firms. Of this 90 percent, about half of them dealt with disputes between members in different provinces and the other half dealt with disputes between members within the same province (Table 4).

Table 4: Type of disputes resolved by the DRC in Canada, 2007-2010

Year	2010	2009	2008	2007
Inter-provincial	208	187	144	55
Intra-provincial	165	145	111	37
Canada vs. USA	37	36	20	8
Canada vs. Mexico	0	0	0	0
Canada vs. Other	4	4	3	0
Total	414	372	278	100

Source: DRC Official Statistics (2010)

Over the past 10 years the corporation had to overcome specific law suits which put at risk the existence of the DRC. These law suits were brought by firms that were required to make payment to a trading partner as a result of DRC arbitration decisions in 2004 and in 2007. The process that ensued was similar in both cases so the focus here is on what happened with the 2004 law suit. The firm did not accept DRC's arbitration decision and consequently filed a law suit in the British Columbia court arguing that the DRC did not have the right to right to suspend their membership and seeking compensatory damages . The DRC prevailed in this law suit, but the firm went ahead a filed another law suit in the Ontario court to overturn the arbitration award. This second law suit created a serious financial problem for the DRC. While the DRC carried insurance cover against the exposure resulting from the first law suit, no Canadian insurer provided services to provide cover against law suits involving interference in a business, which was at the heart of the second law suit (i.e. removal from DRC membership). The DRC prevailed in both law suits, but spent about $250,000 in legal fees in the process. These legal expenses imposed a huge financial burden on the DRC to the point of exposing the corporation to bankruptcy.

This negative experience provides an important lesson, underscoring a critical feature of private, voluntary organizations such as the DRC. While a private organization operating under an international trade agreement is more flexible and can adapt to meet member firm

expectations, it does not have the “deep pockets” that government agencies have in order to face legal challenges. As a direct result of these experiences, the DRC hired legal counsel to review its bylaws and rules with a view of making modifications that would reduce the risk of similar law suits in the future. They also worked with their insurance broker to find insurance coverage for these types of lawsuits and were the first organization in North America to obtain the required coverage. In spite of this negative experience, one advantage of a private organization over a government agency is that it has more flexibility to change its bylaws and avoid similar situations in the future. This poses an important policy question: Is there a role for government to provide a certain level of “insurance coverage” for private institutions who have essentially taken on the role of delivering trade dispute resolution services?

V.2.2 United States

As explained earlier, the US produce industry has relied on the Perishable Agricultural Commodities Act (PACA) Branch of the US Department of Agriculture to resolve disputes between buyers and sellers, and to ensure general compliance with regulated trading practices, since the PACA branch was first created some 80 years ago. Virtually all US-based buyers and sellers of fresh produce are required to hold PACA licenses in order to operate legally within the produce business. Failure to operate according to regulated trading practices, or to honor PACA reparation orders issued in the course of a dispute resolution, can lead to suspension or termination of a company’s PACA license. Licensees are required to pay an annual license fee of $995.00.

PACA licensees have generally been well satisfied with the role played by PACA as enforcer of the "rules of the road" within their sector, and have sought comparable protection for

their sales into Canada and Mexico. Indeed, this desire to duplicate services across the NAFTA region, which were already provided to them by PACA on sales within the United States, was the primary motivation for US participation in the process which led to the formation of the DRC. PACA coverage for all transactions involving buyers in the United States -- regardless whether the sellers are US licensees or unlicensed firms from overseas -- leaves little room for DRC involvement in dispute resolution for disputes arising within the United States. This explains why the number of US firms that are DRC members is less than half the number of Canadian members, even though the produce industry in the United States is substantially larger than in Canada (Table 5). While the number of member US companies is relative low, their high retention rates attest to the value provided by the DRC to US fruit and vegetable supply chains exporting to Canada.

Table 5: Evolution of US Membership, 2000-2011

Year	In	Out	Net	Growth Rate	Recruitment Rate	Retention Rate	Total US Members
2000				-	-	-	166
2001	58	20	38	23%	35%	88%	204
2002	65	20	45	22%	32%	90%	249
2003	50	15	35	14%	20%	94%	285
2004	37	34	3	1%	13%	88%	287
2005	40	29	11	4%	14%	90%	300
2006	42	27	15	5%	14%	91%	317
2007	28	25	3	1%	9%	92%	321
2008	44	32	12	4%	14%	90%	333
2009	37	30	7	2%	11%	91%	340
2010	27	34	(7)[a]	(2%)	8%	90%	333
2011*	37	18	19	6%	11%	95%	352

Source: DRC Membership Records

[a] Numbers in parenthesis represent negative changes

The DRC has proven itself to be quite effective in protecting the interests of US sellers on their transactions with Canadian buyers. This is reflected in the fact that the vast majority of the claims filed by US produce firms involve buyers in Canada (Table 6).

Table 6: Type of disputes resolved by the DRC in the United States, 2007-2010

Year	2010	2009	2008	2007
Interstate	19	17	8	1
Intrastate	8	7	3	1
United States vs. Canada	768	726	591	98
United States vs. Mexico	2	2	1	0
United States vs. Other	5	5	1	0
Total	802	757	604	100

Source: DRC Official Statistics (2010)

It is this effectiveness in Canada which has proven to be the DRC's most compelling sales point in developing memberships within the United States (and in overseas points of origin as well).

Membership development activities in the United States have, from the very outset, relied heavily on DRC's two major partners within the United States: national and regional produce associations and the PACA Branch of the US Department of Agriculture. Just as the national and regional produce associations served as active participants during the origination phase of the DRC, so have they served as active boosters and supporters since the DRC went operational. The United Fresh Produce Association, the Produce Marketing Association, the Western Growers Association, the Florida Fruit and Vegetable Association, the Texas Produce Association, the Georgia Fruit and Vegetable Growers Association and the Fresh Produce Association of the Americas have been particularly active in support of the DRC's recruitment efforts within the US produce industry. Further, many other smaller grower-shipper and commodity organizations across the United States have also contributed their time and effort to this end. Initially, all members of these organizations received direct communications outlining the benefits which would accrue to DRC members, and emphasizing the fact that these benefits would only be available to DRC members. These associations also made room at their annual conventions and/or trade shows for the DRC to present its case, and organized stand-alone seminars for more comprehensive coverage of the DRC's risk mitigation model and procedures.

In spite of these communication efforts, convincing the US produce industry about the rationale to buy a membership met with several hurdles. At the time of the DRC's inception, many actors in the US produce industry continued to believe that the PACA Branch could provide them with dispute resolution services on their sales into Canada and even into Mexico, despite the fact that PACA lacked standing to resolve disputes in either of those two countries. Given that the cost of DRC membership came on top of the cost of a PACA license, it was important to communicate that membership in the DRC provided exclusive benefits to its membership, benefits which were complementary to those provided by PACA. In conveying this message to the US produce trade, the cooperation and support of the PACA Branch was of critical importance. By appearing on the same podium with PACA officials, and making joint presentations regarding the benefits and jurisdictional limitations of each of the two organizations, the newly-formed and relatively unknown DRC was able to benefit from the 80 years of credibility and trust which the PACA branch had established with its license holders. By making it clear that the two organizations were operating in coordination with one another, and not in competition, the challenge of explaining what the DRC intended to do, and where it intended to do it, was made significantly easier.

The support of Canadian retailers and foodservice operators was as valuable for development of US membership as for Canadian memberships. Several key companies (The Produce People, Metro, Loblaw's and Sysco, among others) agreed to share their vendor lists, and to encourage any non-members to affiliate, with the DRC. In many instances, US-based vendors found this gentle encouragement from their key Canadian customers to be irresistible.

Assistance from the US Department of Agriculture to the DRC during the initial years of its operations also contributed to the success of the DRC's membership development activities in

the United States. The USDA's Foreign Agricultural Service contributed almost $600,000 of Targeted Export Assistance (TEA) funds to US membership development activities, reasoning that membership in the DRC would lead to increased trade flows to Canada and Mexico on the part of US grower/shippers. The DRC applied these funds to its in-field education and communications activities within the United States, as described earlier in this section. The USDA also provided some $130,000 toward the training and development of a destination inspection service within Mexico, based once again on the argument that the existence of such a service, coupled with the dispute resolution system which would use this inspection service in the course of its arbitration and mediation procedures, would further enhance produce trade flows from the United States to Mexico. Unfortunately, the returns to these marketing and education investments made in Mexico by the US Department of Agriculture did not produce the expected outcomes. DRC role in resolving disputes involving sales to buyers in Mexico has never achieved the scope which was originally conceived during its formative stages, as explained in detail below. USDA funding for DRC membership development in the United States ended in late 2007. Since then all membership development activities in the United States have been financed by funds generated internally by the DRC.

V.2.3 Mexico

Unlike the situations described above in Canada and in the United States, the Mexican produce industry in 1999 had no officially-sanctioned inspection service and no tradition of alternative dispute resolution within the sector. Historically, the principal tool for avoiding disputes between produce buyers and sellers in Mexico lay in selling to, or buying from, individuals or companies with whom one had many years, if not generations, of direct personal experience. In the same

vein, disputes – when they did arise – were settled through personal negotiation, without recourse to the legal system or any other form of third-party adjudication. Although Mexican produce exporters occasionally relied on PACA or CFIA assistance in settling disputes involving sales to customers in the United States or in Canada, there was no comparable mechanism for resolving disputes between buyers and sellers on the domestic Mexican market, nor any apparent inclination within the sector toward establishing such a mechanism.

Unlike the Canadian and American delegations which participated in the development of the DRC model, the leadership of the Mexican delegation was drawn not from the Ministry of Agriculture, but rather from the Ministry of Commerce and Investment. At the time, the Mexican Ministry of Agriculture and Mexican produce professionals were not enthusiastic about the potential of a formal mechanism for dispute resolution in the fruit and vegetable sector. Thus Mexican government officials and produce industry association executives faced a far more difficult challenge in the area of membership development once the DRC was formally inaugurated.

In Mexico, promoters of the DRC first needed to explain the advantages of mediation and arbitration as dispute resolution tools. They then needed to convince potential members that the DRC system would operate more equitably and efficiently than the time-honored person-to-person system currently in vogue. They next needed to assure potential members that a third-party inspection system, which had already existed for many years in both Canada and the United States, and which constituted a fundamental element in determining the merits of each dispute, could be credibly implemented in Mexico. Finally, promoters needed to explain why this system should be paid for by private membership contributions rather than by government subsidies. Thus, to promote the DRC in Mexico, government and industry had to overcome more

difficult hurdles than they Canadian and US counterparts. In fact, successfully addressing these four challenges has, over the past 10 years, proven to be beyond the grasp of DRC promoters – – both from the government and from the private sector – – within Mexico.

The single most important promotional push from the Mexican Ministry of Agriculture consisted of providing produce companies with free memberships in the DRC in 2003 and 2004. While this provided a temporary boost in membership over this period (see table 7), the inability to address the issues cited above led to an immediate decline in membership once the subsidy for payment of membership dues was removed late in 2004. From a peak of 211 Mexican members in 2004, active membership declined dramatically over the next two years, finally settling into a range of 20 –25 active members, which remains the level of Mexican affiliation today.

Table 7: Evolution of Mexican Membership, 2000-2011

Year	In	Out	Net	Growth Rate	Recruitment Rate	Retention Rate	Total Mexican Members
2000	7	0	7				7
2001	6	2	4	57 %	86 %	71 %	11
2002	24	4	20	182 %	118 %	64 %	31
2003	152	1	151	487 %	390 %	97 %	182
2004	72	43	29	16 %	40 %	76 %	211
2005	17	170	(153)[a]	(72%)	8 %	19 %	58
2006	18	31	(13)	(22 %)	31 %	47 %	45
2007	9	16	(7)	(16 %)	20 %	64 %	38
2008	1	15	(14)	(37 %)	3 %	60 %	24
2009	0	1	(1)	(4 %)	-	96 %	23
2010	7	5	2	9 %	30 %	78 %	25
2011*	4	6	(2)	(8 %)	16 %	76 %	23

Source: Various DRC Marketing Plans (2003-2011)
[a] Numbers in parenthesis represent negative changes

The governments and the produce industries of United States and Canada launched several initiatives to grow the DRC in Mexico, motivated by the need to protect the firms from these countries selling produce to Mexican buyers. When the DRC headquarters was established in Ottawa in 1999, the decision was made to hire one full-time employee to represent the DRC in

Mexico. Since there were no Mexican members - and thus no Mexican income - at that point, the Canadian government undertook to provide startup capital until such time as Mexican membership could be developed to the point where membership dues there would be sufficient to provide funding for the Mexican representation office. This arrangement remained in effect until late 2001, at which time the Mexican Ministry of Agriculture decided to accelerate the process by providing direct subsidies to several major produce associations which their association members could then use to take out memberships in the DRC in Mexico. In order for these subsidies to be distributed to the associations, Mexican law required the establishment of a freestanding corporate structure for the DRC within Mexico with its own management and Board of Directors, independent of the Ottawa headquarters. Over the four year period from 2001 to 2005, the Mexican government dispersed a total of $1,700,000 to fund the office and staff of the DRC-Mexico operation, as well as the membership subsidy program.

However well-intentioned this subsidy program may have been, and however positive its immediate effect in boosting the Mexican membership roster, its long-term effects proved to be negative on several fronts. First of all, it removed the need for the DRC to explain and justify its value proposition to the Mexican industry. Second, it made it unnecessary for Mexican companies to give any serious consideration to the advantages they might derive from membership in such an organization. Third, it relieved the Mexican government of any immediate obligation to address the numerous obstacles (many of them structural) which prevented the DRC system from serving as a worthwhile tool for the Mexican produce industry. Included among these obstacles were lack of a timely and credible inspection service, lack of grade and quality standards for produce commodities, absence of any national system to encourage compliance with good commercial practices and standards within the sector, and

absence of any provision for the enforcement of such practices and standards. Finally, once Mexican produce companies realized that the government was providing them with DRC membership free of cost they came to expect that the government would continue to fund membership indefinitely.

Several efforts attempted to overcome these structural deficiencies in the Mexican system over the past 10 years. For instance, in an effort to address the absence of a destination inspection service within Mexico, the Mexican Ministry of Agriculture (SAGARPA), with funding assistance of more than $100,000 from the US Department of Agriculture, embarked on a training program for seven government produce inspectors during the period 2002-2004. Once these inspectors had participated in a rigorous program at the USDA training center in Maryland, the plan called for them to return to Mexico to train a larger group of inspectors who would then be deployed to the principal produce terminal markets across Mexico. While the initial cadre of inspectors successfully completed its training in the United States, SAGARPA funding for the second round of inspector training in Mexico was canceled. The original group of trainees was then reassigned to other responsibilities within the Ministry, or hired for quality control positions by private sector companies. This effort in developing human capital for inspection services was therefore unable to achieve its goal.

Once the Mexican government decided, in late 2004, that the time had come to shift the cost of membership in the DRC from SAGARPA to the private sector associations and individual companies within the produce industry, none of the aforementioned obstacles to sustained membership had been adequately addressed, much less resolved. Without a reliable inspection system in place, without a clear understanding of the benefits which arbitration and mediation could bring to dispute resolution on transactions both within Mexico and across the

NAFTA region, the great majority of Mexican members chose to ignore their renewal notices, and simply discontinued their membership in the DRC. Ultimately, this left DRC membership in Mexico by 2008 at barely 10% of the peak level it had established in 2004. Most of the Mexican DRC members today are firms that export produce to the Canadian market, given that those exporting to the United States already receive protection from the PACA (Table 8). Neither SAGARPA nor the DRC has been able to re-invigorate the Mexican membership since then.

Table 8: Type of disputes resolved by the DRC in the Mexico, 2007-2010

Year	2010	2009	2008	2007
Interstate	1	1	1	5
Intrastate	0	0	0	0
Mexico vs. Canada	30	27	18	76
Mexico vs. USA	11	11	7	14
Mexico vs. Other	1	1	1	5
Total	43	40	27	100

Source: DRC Official Statistics (2010)

V.3. Expanding the Scope of Membership

The DRC has sought ways to increase its relevance to the ever-changing North American produce industry over the past 10 years. It has engaged in a variety of initiatives in collaboration with a wide array of industry associations in the fruit and vegetable supply chain. These initiatives have led to the creation of new membership categories, the extension of membership to additional sub-sectors of the produce industry and the exploration of association-sponsored membership modalities to make DRC services available to smaller firms. This section discusses the achievements and challenges that the DRC has faced in the development of such initiatives.

V.3.1 Creating the Associate Membership Category

At the inception of the DRC, membership in the corporation was reserved for buyers, sellers, growers, packers, shippers, produce brokers, wholesalers, fresh processors, food service

distributors, retailers, and commission merchants of fresh fruits and vegetables whose place of business was in Canada, the United States or Mexico. In response to growing and important trading relationships with firms that were outside the NAFTA region, an Associate Member category was created by the DRC in 2000. This extended DRC membership to parties located outside North America who traded with North American firms within US, Canadian, or Mexican markets.

The primary reason for the creation of this category was to ensure that DRC members in North America had coverage when dealing with firms from outside the region. Once the DRC began operations it became apparent that not covering these transactions was a material problem especially for Canadian buyers, given that this country imported produce from many countries. After creating the Associate member category, the DRC had to make substantial efforts to show the value of membership for those Canadian companies trading with firms outside of North America. A substantial number of these firms preferred maintaining a CFIA license over joining the DRC. The reasons for favoring a CFIA license were that many companies 1) did not believe a DRC membership gave them the right to import produce from outside of North America and 2) generally understood that the CFIA could help them on disputes with firms from outside of North America while the DRC membership could not.

The services provided to Associate members have evolved over time. Many of the Associate members would prefer to use the DRC when solving disputes with non-DRC members in North America, because of the DRC's expertise in handling produce disputes, instead of alternative arbitration mechanisms such as the PACA branch. However, under DRC by-laws, Associate members (unlike Regular members) could only bring disputes before the DRC when dealing with Regular members. When Associate members were added, they were specifically

excluded from bringing disputes with other Associate members or non-DRC members before the DRC. In 2006, a Notice of Motion was approved to give Associate members the right to use the DRC in disputes with other Associate members and with non-DRC members for any transactions related to produce grown or shipped into North America. The rationale of this change was that providing Associate members with these additional rights may help build membership in the DRC. This decision had minimal or modest impacts on membership as most Canadian buyers are already DRC members and most US receivers are governed by PACA and less likely to be DRC members. Further, Associate members are being counseled to put arbitration clauses in all of their contracts with clients in North America who are not DRC members. This change was expected to provide an incentive for Mexican receivers to join the DRC rather than sign such agreements, but the impact has been modest. Today, the 36 non NAFTA DRC members are all in the Associate category.

V.3.2 Extending Membership to Transportation Service Providers

Over 95 percent of all fresh fruits and vegetable shipments across North America are transported by truck. While there had always been seasonal problems when it was difficult to find enough trucks to move the volumes of fresh produce available, the industry grew increasingly concerned in 2004 that this shortage of truck availability was developing into a chronic problem for the industry. In part this was due to a decline in the number of new drivers entering the trucking industry, as a result of low wages, long hours, increases in restrictions on schedules, and good job opportunities for unskilled labor elsewhere. While these disincentives were weighing on the overall availability of trucks, irrespective of cargo class, the produce industry found itself at the bottom of the pecking order, due to the need for additional investment in specialized refrigerated

equipment, liability issues stemming from the perishable nature of the cargo, tight windows for pick-ups and deliveries, frequent and lengthy delays in getting loaded, and generally bad treatment at the hands of shippers and receivers.

At that time, many produce associations, including PMA, CPMA and UFPA, set out to develop ways of making produce loads more "carrier-friendly". The DRC felt this might represent an opportunity to expand its membership base by developing a comprehensive set of dispute resolution guidelines and arbitration practices to resolve disputes between carriers and their clients – both shippers and receivers. In so doing, the DRC would be filling a void left by PACA and CFIA, which lacked both rules and interest for addressing transportation disputes within the produce industry.

The DRC conducted a survey of 100 companies that provided transportation services to the produce industry in North America, and there was an overwhelmingly positive response to the concept of providing binding dispute resolution services based on mutually agreed rules and standards. The DRC then spent considerable resources developing transportation standards and dispute resolution rules specifically designed to resolve transportation disputes. These guidelines were intended to allowed inspectors to accurately ascertain the extent of damage caused to produce cargo due to a failure to observe standardized transportation regulations. Standardizing and popularizing these regulations would support the DRC's core business of dispute resolution by enabling a data collection process that would identify culpability more clearly.

Once the DRC's transportation services were ready for implementation, the DRC worked to establish contacts with a wide range of transportation groups including the American Trucking Association (ATA), the Transportation Intermediaries' Association (TIA), and the Owner-Operator-Independent Drivers' Association (OOIDA). Despite favorable initial responses to the

DRC's survey and from these organizations, however, the number of companies that actually paid to become members of the DRC has been relatively small. As of the end of 2011, there were only some 34 DRC transportation members worldwide.

V.3.3 Extending Membership to Seed Potato Growers

Seed potato production is an important sector in North America. In 2008, the DRC changed its rules to include this sector after realizing that seed potato companies, particularly in Canada, did not have access to DRC-like systems for dispute resolution. An analysis conducted by the DRC late in 2007 documented that the DRC was not handling seed potatoes in the same fashion as the PACA did. The reason is that the DRC defined fresh fruits and vegetables to include all fresh and chilled fruits and vegetables, fresh cuts, edible fungi and herbs, but excluded any fresh fruit and vegetable which is frozen or sold for seed. Thus no services were available from the DRC for any transactions involving seed potatoes.

The PACA, for its part, provided certain types coverage for seed potato transactions. The PACA defines fresh fruits and fresh vegetables to include all produce in fresh form generally considered as perishable fruits and vegetables and makes no reference to the exclusion of seed potatoes. Therefore sellers of seed potatoes (or any type of seed that is in a fresh form) in the United States can use PACA's complaint resolution in specific cases, including seed potatoes sold to a grower or anyone else who is licensed by or subject to PACA essentially up to the point where they are planted. The DRC changed its definitions so that it could provide the same services as those offered by the PACA in the United States. This adaptation further harmonized DRC's coverage with that of the PACA, without exposing the DRC to any risks associated with subsequent problems that may arise following seed potato planting.

V.3.4 Pilot Programs to Extend Membership to Collective Organizations

The degree to which the DRC can be successful depends to a very large degree on its ability to increase the number of members and maintain high retention rates. As a membership based organization, the DRC must provide value in order to attract and keep members. The value proposition is different for the different players in the industry and the DRC has recognized that a "one size fits all" membership fee structure is not conducive to building membership within certain groups, particularly smaller dealers and the grower community. Consequently, since 2007 the DRC has been exploring strategies to offer its services to regional grower associations typically formed by smaller growers for whom individual membership fees may be otherwise too onerous. As a result, the DRC explored an association-sponsored membership approach. The DRC has used this approach to develop pilot programs with the Prince Edward Island Potato Board (PEIPB), the Ontario Greenhouse Vegetable Growers (OGVG) and the Toronto Wholesale Produce Association (TWPA).

In the case of the PEIPB and the OGVG these organizations used authorities they have under provincial legislation to require parties who they license as "dealers" to market potatoes or greenhouse crops to become DRC members. In the case of PEIPB a tiered fee was established for the dealers based volumes marketed. This ensured that anyone licensed to market products regulated by these organizations had access to an effective dispute resolution mechanism. Then through a combination of their rules and those of the DRC memberships were provided at a discounted fee to growers who market their crops through these dealers. To ensure fairness to all members the DRC introduced a "Gate Fee" to initiate a dispute involving any member who had not paid a full membership fee. The gate fees apply for services that are normally provided at no

additional cost to a full paying member. Again to ensure equity the combination of the tiered fee and the gate fees will never exceed a full membership fee. This approach provided full coverage for the producers and dealers of the subject goods. Dealers were covered for all of their sales to receivers in Canada, most of whom are DRC members and growers were covered for any sales to these licensed dealers.

The TWPA is an association of 21 wholesalers who are tenants on the Toronto Food Terminal, charged with invoicing and collecting invoices between the members and its clients. While the association has the authority to "cut off" any client from doing business on the market that has not paid its current invoices, it does not have the power to resolve disputes between members and clients. The establishment of the DRC removed the need for the TWPA to get involved in a dispute between any of its members and its clients where both parties were DRC members. However, it left unresolved the issue of disputes between its members and their clients who were not nor ever likely to become DRC members (e.g. jobbers, small and local retailers, etc.). In 2008, it was clear to the TWPA Board that the association should not be involved in disputes and therefore was seeking an affordable and expedited dispute resolution model to resolve disputes. This presented the DRC with a different opportunity to pilot test an association-sponsored membership with a group that differs from the PEIPB and the OGVG. Consequently, the DRC developed a program with the TWPA which is structured along the following lines. Members of the TWPA are required to be DRC members, which most already were. The TWPA then amended its contracts with all clients (especially targeted to those that were not DRC members) stipulating use of the DRC and its rules to settle any and all disputes. In this case membership fees were not discounted for the wholesaler members or for any of the "clients" as it was unlikely any of them would join. Again a fee schedule was developed for

services and a specific process was designed for handling complaints with the TWPA office playing a central role.

These pilot programs have been well received by participant firms and have encouraged the DRC to look for other opportunities. The association-sponsored membership may be an effective strategy to increase membership and to improve the value of DRC activities to the industry at large. However, the DRC needs to address concerns regarding the fairness of this membership modality relative to its regular membership.

V.4 Addressing Structural and Policy Shortcomings that Contribute to Disputes

The basic policy and structures for dispute resolution in the United States has been modified over the years both by PACA and by the produce industry in order to make them better suited to deal with trade irritants and disputes. Despite several initiatives by the DRC to create comparable structures and policies in Mexico, they have all been ultimately unsuccessful. In Canada, however, the story is quite different and far more positive, as shown in this section.

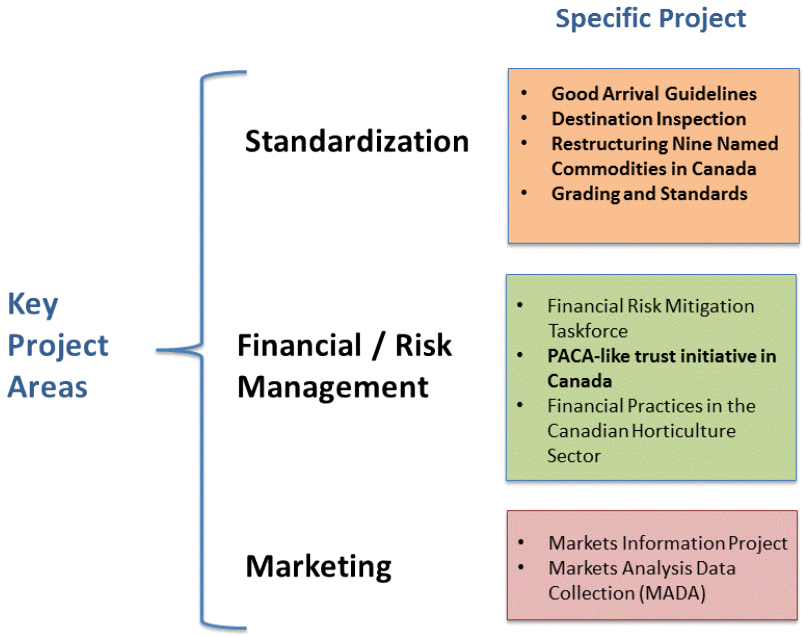
In furtherance of its core business of providing trading assistance and dispute resolution services to members, the DRC has been actively involved in working primarily with the Canadian government and industry associations to identify and resolve structural issues that contribute to trade irritants and disputes. The challenges facing both industry and government include:

- a policy framework which supports fair and ethical business practices
- promoting the economic viability of legitimate Canadian businesses and industry self-reliance
- mitigating business and market risks
- promoting Canada's reputation nationally and internationally
- meeting Canada's international trading obligations

- maintaining reciprocity with USDA PACA
- strengthening industry/government partnerships
- maintaining grades, trading standards, and a strong regulatory framework for enforcement purposes
- strengthening licensing provisions, dispute settlement mechanisms and inspection services
- managing operational costs and fees for government services

To this end, the DRC engaged in a portfolio of projects primarily in Canada with partner organizations and government support (Figure 6).

Figure 6: DRC's Key Project Areas and Initiatives in Canada



Bolded texts designates a project where the DRC took on a leadership role.

Source: Authors, 2011

These initiatives can be grouped into three main categories: standardization, financial / risk management and marketing. In the figure, projects in bold represent those that were led by the DRC, while other listed projects represent collaborative endeavors led by the Fresh Produce

Alliance (FPA).[10] The FPA was established to identify and consolidate multi-stakeholder issues which are cross-sector in nature, validate potential solutions and facilitate the necessary action to generate change. As such, it brings together the Canadian Produce Marketing Association, the Canadian Horticultural Council and the DRC in collaboration to fabricate an improved business climate for the fresh produce industry.

V.4.1 Standardization Initiatives

a. Good Arrival Guidelines and Good Inspection Guideline - These were the first initiatives to address structural shortcomings in the North American fruit and vegetable supply chain. With regard to grade and condition of product, the trading partners typically agree to specific standards prior to shipment, on the condition that such standards are in compliance with an applicable minimum grade and condition standard established by the importing or exporting country. In the absence of an agreement on grades, the calculation of conformance to contract will default to a set of 'industry accepted' guidelines. Prior to the establishment of the DRC, the industry used one set of Good Delivery Guidelines developed by PACA for sales made in the US, and a separate set of approximately the same number of guidelines developed by the Board of Arbitration for sales made in Canada. Mexico, for its part, did not have (nor does it now have) such guidelines.

Lack of consensus and misaligned expectations on good arrival quality constitute a fundamental reason for trade disputes. When the DRC was established, one of its first tasks was the creation of its own Good Arrival Guidelines in 2001 to serve as the default standards when

[10] The Fresh Produce Alliance (FPA) is an alliance between the Canadian Produce Marketing Association, the Canadian Horticulture Council, and the DRC to identify and consolidate multi-stakeholder issues and improve the business climate in Canada and within the North American marketplace www.freshproducealliance.com

either an independent contract did not exist or when guidance on generally accepted industry standards was needed. It did so by building on the existing mechanisms and eliminating duplication and conflicting guidelines between the Canadian and the US practices. These guidelines have become a standard for trade across North America.

Another early task for the DRC was the establishment of its Good Inspection Guidelines in 1999. These Guidelines prescribed policies, standards and elements for the provision of destination inspection services, and were based on the Destination Inspection Services provided by USDA and CFIA. The DRC dispute resolution model is evidence-based, with about 70 percent of all disputes being related to product quality the availability of a credible destination inspection service is of paramount importance. These two initiatives have proved of value to the industry and have substantially contributed to the fact that about 85 percent of the disputes that are filed with the DRC are resolved amicably in stages 1-3 of the dispute resolution process.

b. Destination Inspection - A well-functioning, timely and affordable destination inspection service is critical for effective dispute resolution. Historically, inspection services have been offered by the Fresh Products Branch of USDA/AMS in the U.S., and the CFIA in Canada. Prior to 2004, approximately 350,000 loads of highly perishable fresh produce arrived from foreign and domestic markets in Canada each year. About 15,500 destination inspections were performed by the CFIA on an annual basis. During the late 1990s, CFIA began directing more resources to food safety and plant and animal health issues, indicating a strong desire to move this service provision to the private sector and completely exit the inspection business (Zohar-Picciano 2011). In cooperation with the U.S. and Canadian governments, the DRC undertook a project to develop and implement a regional destination inspection program built upon the lessons learned and achievements of the CFIA system. Along with input and advice

from the PACA destination inspection system, the DRC helped support the Canadian government to initiate a standalone, industry-sponsored inspection program that could offer inspection services at destination points across the U.S. and Canada (Whitney 2011). The following is a recounting of the stages and processes that were undertaken by the DRC to launch such a program.

After an initial stage of assessing needs and industry and country requirements, the DRC began charting out a business model and program implementation plan. Initially, the DRC extended alternative delivery options for destination inspection services and generated a detailed business model that outlined the parameters for success as well as potential pitfalls[11]. This model consolidated and modified the existing services in the U.S and Canada by focusing on streamlining the management framework, strengthening training and oversight, and providing a more transparent cost structure. During July 2004, a working group involving industry and government agencies was established to develop a detailed business plan and create an implementation strategy by the end of the year. The objective of the new program attempted to ensure:

- Credibility of service,
- Recognition by the USDA for PACA equivalency purposes,
- Cost-competitive and financially viable,
- Acceptable across the North American produce industry, and
- A standardized system of destination inspection standards and practices (FPA 2005).

After the modeling and planning process was completed, the final step was to roll out the program and to begin Canada-wide implementation (McInerney 2011; Whitney 2011). The

[11] The business model for the Destination Inspection Services project was approved on October 27, 2004 (McKenzie 2011).

program was phased in over a three-year period. Fees incurred throughout this period and full cost recovery after the initial roll out phase would ensure that the organization could evolve over time in response to growing industry demand (FPA 2005).

c. The Nine-named Commodities - There are 30 commodities for which Canadian Grade Standards have been established under the Fresh Fruit and Vegetable Regulations pursuant to the Canada Agriculture Products Act (CAP Act). The grade standards for these 30 commodities are mandatory and they establish the minimum requirements for import and inter-provincial trade[12]. Within these 30 commodities, there were nine (apples, beets, cabbage, carrots, onions, parsnips, pears, potatoes and rutabagas) for which Statutory Destination Tolerances were established (both permanent and condition defects apply against the grade at destination). Condition defects do not apply against the grade for the remaining twenty-one commodities. If any of the nine named commodities failed to meet the minimum condition tolerances upon inspection at destination they were put under detention by the federal inspectors.

The "Nine-Named Commodities" were intended to promote the marketing of quality produce within the Canadian marketplace. However, over time, the Nine Named requirements proved to have a negative effect, because some Canadian buyers were increasingly using this regulation as a tool to manipulate their shippers. Unscrupulous receivers in Canada could take advantage of these provisions by threatening to call federal inspections on shipments with the implied threat of detention. The net result was lower quality products in the market, lower returns to shippers, and price distortion. Further, the increasing use of non-CFIA inspection services made inspection credibility an issue. The DRC recognized the need to amend this regulation and worked with the Canadian industry through the Canadian Horticultural Council and the Canadian Produce Marketing Association to raise awareness about the evident

[12] The grade standard for strawberries is voluntary.

limitations of these regulations and to obtain the necessary support to implement the necessary regulatory changes in 2003. This regulatory modification was welcomed by key industry stakeholders including receivers, shippers and transportation firms, each of whom were now more confident in the Canadian trading climate. The revision did not change any other requirements, such as permanent grade defects, labeling, and packaging requirements. Standards can be effective at leveling the playing field, ensuring quality, and normalizing expectations, but not when they can easily be manipulated. To this end, the DRC has been working to help support harmonizing standards when necessary, and eliminating regulations when they negatively impact trade (DRC 2002).

d. Grades and Standards - In 2004 a project was launched by the Fresh Produce Alliance (FPA) to harmonize Canadian and US grade standards and inspection procedures for 31 commodities where both countries had developed different grades. The rationale for this initiative was to provide a common, and simpler trading language; facilitate dispute resolution; minimize potential disputes due to confusion about language; facilitate and improve the training of inspectors; and strengthen the reciprocal understandings between Canada and the United States. At the end of this project, which spanned four years of analysis and stakeholder consultations, the industry was presented with the following five options for each commodity:

- Maintain a compulsory Canadian grade standard in Fresh Fruit & Vegetable regulations (and their corresponding inspection procedures) amended to harmonize with the US standard as closely as possible;
- Maintain a Canadian grade standard in Fresh Fruit & Vegetable regulations (and their corresponding inspection procedures) changed to replicate the US standard;

- Maintain a Canadian grade standard in Fresh Fruit & Vegetable regulations but remove the mandatory requirements in the regulations and have it revert to a voluntary grade standard, i.e. a given grade standard may or may not be used for interprovincial or international trade. However, if used on packaging, the product must meet the grade declared; if the product does not meet the standard, the grade name must be removed from the packaging in order for the product to be marketed.
- De-regulate to remove grade from Fresh Fruit & Vegetable regulations and rely completely on existent US standard for trade purposes.
- De-regulate to remove grade from Fresh Fruit & Vegetable regulations but maintain a national grade standard for trade purposes but "housed" elsewhere (e.g., DRC, CFIA, or Canadian General Standards Board).

At the conclusion of the project in 2008, the FPA presented the CFIA with a request to make approximately 750 amendments to existing Canadian grade standards. The recommendations included such aspects as dropping a number of Canadian standards in favor of the US standards (e.g. for cranberries and rhubarb); harmonizing a number of grade standards with those of the US and making them voluntary; harmonizing a number of grade standards with those of the US but keeping them compulsory; and investigating the potential of setting the standards up in referenced document versus maintaining them in regulation.

Given the magnitude of the recommendations and the related impact on resources it was agreed by the FPA and CFIA that dumping these into the normal regulatory amendment process would overload the system. The task of finding a solution to this dilemma was assigned to an industry-government policy committee which to date has not devised a strategy to implement these trade policy recommendations.

V.4.2 Marketing Initiatives

a. Horticulture Market Information Project - A sizeable number of disputes occur due to inaccurate, ill-timed, or absent information. In general, good market information system assists buyers and sellers in ascertaining a fair price for a predetermined grade of produce and facilitates agreement on a contract. Accurate and timely market information is also critical in dispute resolution after a disagreement has occurred. Consider the instance of a product shipment rejection by a receiver. If a shipment is rejected by a receiver upon arrival due to disagreement over grade or quality, the shipper often has the option of requesting that the receiver (or often, a third party) tries to sell that load in the local market for the best available price. Often, the shipper may not feel that the final price fetched for that shipment is fair. The shipper may choose to file a dispute whereby the DRC determines whether or not the load was, in fact, sold at a fair market price value. In this circumstance, up-to-date and unbiased information on prices, supply, quality, and market conditions enables the DRC to make such an assessment.

While the USDA regularly collects and organizes data on wholesale and retail prices for fresh produce in terminal markets in the U.S, (i.e., USDA's Market News[13]), such data has not been readily available for the Canadian industry. Although the CFIA had been collecting wholesale price information in the past, it stopped gathering such data when the department shifted focus towards food safety and animal and plant health. In 2007, the DRC (as part of the Fresh Produce Alliance), received funds from Agriculture and Agri-food Canada (AAFC) to begin a project to collect data on average prices for principle fresh produce commodities in major Canadian markets, including terminal and wholesale markets in Toronto, Montreal, Vancouver, and Calgary. A partnership consisting of the DRC, the FPA, and the Canadian

[13] See the USDA's market news site at: www.ams.usda.gov/AMSv1.0/marketnews

Produce Marketing Association worked to aggregate regional data and information for NAFTA trading with the following objectives:

- to address immediate gaps and challenges in the horticultural markets information system;
- to test the longer term viability of an industry data collection system through pilot projects;
- to identify and build consensus around the design of an enhanced horticultural markets information system;
- to provide education and training on markets information collection methods to project partners; and
- to build awareness of markets information as a competitive market decision-making tool across the value chain.

Described as *The Markets Information Project*, the DRC and many industry partners believed this work carried great potential for facilitating the dispute resolution process in Canada. However, the project was suspended in 2009 due to a lack of funding (McKenzie 2011).

b. Market Analysis Data Collection (MADC) Project - As mentioned, inadequate statistical information about the Canadian marketplace rendered it difficult for industry and government to develop long-term, strategic responses to the various challenges faced by the Canadian fresh produce sector. A new project called the *Market Analysis Data Collection (MADC)* project, attempted to develop a comprehensive data management system for the Canadian fresh produce sector. Through this project, the FPA aimed to create a robust national data collection and analysis system that would enable firms to make strategic decisions, identify new trends and opportunities, and plan for future growth. Such a system would also allow the

industry to accurately measure and evaluate instances of unethical business practices and fraudulent activity. Members of the produce industry value chain, including producers, marketers, wholesalers, importers, processors, retailers, and food service providers, as well as the Canadian federal and provincial government agencies were all identified as primary beneficiaries of the MADC project. Unfortunately the recommendations emanating from this project were never acted on due to a lack of funding.

V.4.3 Financial / Risk Management Activities

a. Financial Practices of the Canadian Horticultural Sector - In 2005, an assessment of the financial practices in the Canadian horticulture sector was undertaken by the FPA in an effort to bolster the credibility and feasibility of successfully implementing the NAFTA trade agreement. The integration of the Canadian fresh produce industry with the U.S. and Mexican markets had placed new and different pressures on local producers and handlers of fresh fruits and vegetables. An increase in the numbers and complexity of growers and dealers in Canada made it difficult for individuals and businesses to obtain commercial contracts and access necessary finance. Failure to perform proper credit checks and a lack of government support in encouraging lending and credit access, together with a climate of high business and financial risk, resulted in frequent bankruptcies and monetary losses throughout the Canadian horticulture sector (Hedley 2005).

Under the supervision of Dr. Douglas Hedley, the FPA conducted a detailed financial analysis of the Canadian fresh produce industry with the prime objective of understanding the frequency and severity of fraudulent businesses practices as well as instances of corporate insolvency and bankruptcy. As one of the outcomes of the Hedley Report, the project generated

recommendations to eliminate unethical business practices and minimize associated losses. This assessment was based on a comprehensive industry scan which included interviews with key government officials and industry stakeholders. In addition, the team reviewed and evaluated current regulations and held meetings with enforcement agencies and monitoring organizations to further understand instances of bankruptcy and fraud. A survey of Canadian produce firms was also undertaken to gather information regarding companies' financial and business practices (Hedley 2005).

Based on the findings of this analysis, the Hedley Report compiled a list of recommendations, which included conducting a Market Analysis Data Collection (MADA) project and the development of mechanisms to offset financial losses such as PACA-like trust provisions, as will be explained below. These recommendations focused on ways to reinforce ethical business practices among industry participants through increased regulation and monitoring by federal and provincial governments. The report also gave detailed suggestions for licensing and establishing clear codes of conduct. The Hedley Report also suggested possible ways to ensure transparency between buyers and sellers by integrating mechanisms and procedures that could better define product ownership and responsibility. Finally, the report advocated for a greater awareness within the industry about the consequences of elevated business risk, and possible opportunities for risk mitigation. This included performing better due diligence at the outset of a transaction and exploring possible options for insurance against partial or non-payment (Hedley 2005).

b. PACA-like Trust Provisions - In the United States, the Perishable Agricultural Commodities Act (PACA) licenses buyers of produce to ensure that those who sell produce receive payment for their products. At the same time it has established legislation establishing

specific trust provision which protects a produce seller when a buyer fails to pay. Under the PACA trust, the seller is granted preferential access to all funds (e.g. inventory, cash and receivables) of buyers who declare bankruptcy. That is, produce debt is settled first in case of bankruptcy. This is very important to produce sellers, because companies declared in bankruptcy often have liabilities to multiple entities other than the produce seller. The PACA Trust was established in 1984 and had worked quite well over the years. This type of protection has not been available to Canadian produce firms. This is an important shortcoming in the legislation because such provisions contribute to reducing the amount of unethical practice in the produce sector.

At the time the DRC started operations, it applied for funding from Agriculture and Agri-Food Canada to contract for a study examining and documenting the legal feasibility of creating a PACA-Like Trust in Canada. The study started late in 2002 and was completed in early 2003. It was conducted by Edward Belobaba, and the final report essentially stated that from a legal perspective a PACA-like trust could be implemented in at least two manners. Regardless of the implementation strategy, the trust provisions would make it illegal for a buyer to claim the product load as an asset of the firm until the seller had been fully paid for the shipment. In the case of a buyer bankruptcy, the seller could claim itself as a creditor and enforce payment through the court system. The DRC welcomed the study because it was (and currently is) interested in finding a tool to mitigate the risks associated with bankruptcy and insolvency, which the DRC could not address (McInerney; Whitney 2011). The DRC objective again was to develop integrated tools for an integrated market, based on the premise that it has worked very well in the United States.

The report was presented to industry and government in the spring of 2003 and did not get the necessary support from government because it was proposing major changes to legislation at both the federal and provincial levels. However, the study was instrumental in that government commissioned a series of additional studies (e.g., the Buckingham study) which interestingly confirmed the benefits of the Belobaba examination. In short, the various technical studies concluded the legality of creating a PACA-like trust in Canada; however, its implementation presented major political and policy challenges that stalled the creation of the trust at that time.

c. Financial Risk Mitigation Taskforce and Advancing the PACA-like Provisions - The next chapter on the PACA-like trust came in 2006 when Douglas Hedley completed the Financial Practices Study for the Fresh Produce Alliance and identified the need for a risk mitigation tool to address bankruptcy and insolvency losses. He found that the fresh fruit and vegetable sector at the wholesale level in Canada had four times as many bankruptcies as did the same sector across all of agriculture and 10 times as many bankruptcies as those sectors of agriculture that were very highly structured and regulated (e.g. poultry, eggs, milk, western grains). He recommended looking at a number of options like the PACA Trust and insurance regimes.

The FPA presented Hedley's report to the Federal, Provincial, and Territorial (FPT) Policy Assistant Deputy Ministers Committee in the spring of 2006. They committed to the establishment of a federal, provincial, territorial task force to review all of the recommendations in the report, including the trust. The task force was established and it undertook its own assessment of the financial practices within the sector and the recommendations that had been presented. It solicited input from industry as well as from a number of other federal departments

and made its report to the Committee in the spring of 2008. While the FPT task force agreed with many of the Hedley Report recommendations, it did not agree that there were notable losses from bankruptcies and insolvencies. This was based on its own analysis of bankruptcy and insolvency data (a simple calculation of total losses compared to the value of the sector) and a survey of Canadian firms involved the fresh produce sector.

The Fresh Produce Alliance task force took issue with this analysis and continued to push for a more comprehensive and collaborative effort to document the problem and to find a solution. The FPT Assistant Deputy Ministers Committee finally agreed and in the spring of 2010 another FPT task force was created to handle the matter. Unlike the first task force, the new one had representation from industry as well as from the federal and provincial governments. It has met on several occasions and is currently undertaking another study to look at options to mitigate risks associated with bankruptcy and other non-payment situations in the produce industry. The options include insurance and bonding regimes as well as the specific features that exist within the PACA Trust model in the United States. Interestingly, the whole subject of the need for a risk mitigation tool for the fresh fruit and vegetable market in Canada is now one of the items that have been agreed to under the Canada-United States Regulatory Cooperation Council that was launched by President Obama and Prime Minister Harper in 2011. The US produce industry and their government had made it very clear they want to see Canada provide similar coverage to their exporters to Canada as they provide to Canadian exporters to the United States.

VI. Key Lessons from the Origins and Evolution of the DRC

The DRC experience reveals important lessons regarding the role, advantages and limitations of privately-run trade dispute resolution mechanisms for perishable products in the context of free

trade agreements. Such lessons can be drawn from both the tri-national process that led to its creation (1996-2000) and over the course of its evolution (2000-2011).

VI.1 Lessons from the Origins Phase (1996-2000)

The tri-national process leading to the creation of the DRC was led by the regional produce industry and facilitated by the NAFTA countries' governments. This tri-national process was based on extensive consultations and deliberations that resulted in an agreement over a model for the tri-national dispute resolution mechanism. The process that led to the DRC thus sheds light on some important lessons regarding the establishment of regional mechanisms for dispute resolution in the context of free trade agreements, particularly in the case of trade in perishable products.

The tri-lateral, consultative process focused on a problem that was affecting businesses interested in expanding regional produce trade. The primary reason for creating the DRC was to ensure that the participants in fresh produce trade in the NAFTA region would abide by fair and ethical trading practices, submit to mediation or arbitration of disputes in accord with standard rules and procedures, and demonstrate a strong commitment towards a fair and efficient mechanism of dispute resolution. The establishment of the DRC was therefore deemed instrumental in facilitating produce transactions among the three NAFTA countries as it offered a level playing field to all stakeholders engaged in fresh produce trade (Whitney 2011). The creation of the DRC was also expected to improve the trading environment in Canada by overcoming the deficiencies of the Canadian Licensing and Arbitration Program (Carberry 2010). This tri-national initiative also generated expectations for the development of an institutional infrastructure for fresh produce inspection in Mexico, and for improved

collaboration between the Mexican industry and its U.S. and Canadian counterparts in harmonizing quality standards and training Mexico's inspection staff (Paredes 2010). The consensus established across the three countries regarding a common set of trading rules was also crucial in boosting the confidence of US traders and allowing them to freely engage in regional trade through access to a dispute resolution mechanism in Canada and Mexico that was very similar to the PACA (McInerney 2010).

The commitment and support from governments of the three countries was a critical element in the process that led to the creation of the DRC. With substantial financial, personnel, and technical assistance from Agriculture and Agri-Food Canada, the Canadian industry facilitated the formation of the DRC by bringing together industry representatives from across the NAFTA countries, and allowing them to participate in a lengthy series of dialogues and discussions to develop a suitable working model for the tri-national dispute resolution organization. Although the creation of the DRC was an industry-led process, the support, cooperation, and commitment of the Canadian and the U.S. governments, in the form of funding and technical expertise, was indispensable. Government sponsorship was also crucial in legitimizing the outcomes of a process involving intensive industry collaboration (McInerney 2010; McKenzie 2010).

The process leading to the creation of the DRC reveals that meaningful dialogue and discussion encompassing groups that represent all key industry stakeholders facilitates the identification of mutually-beneficial, cost-efficient, and sustainable solutions to long-standing trade barriers. This case shows that once an industry-wide consensus is achieved through extensive consultation and deliberation among market participants, a solution can be identified and implemented with the financial support and the technical assistance of the government. In

the case of the DRC, the common interest of the regional produce industry was recognized early in the process; and subsequently, industry and government representatives embraced the task of charting out an effective framework for a dispute resolution organization for fresh produce within North America (Chancey 2010).

Another element that contributed to the success of this process was that the governments of the three countries trusted in the ability of the produce industry to identify appropriate solutions to solve a critical problem. While the U.S. and Canadian governments consistently backed the process of dialogue and interaction between major stakeholders, representatives from the industry set aside their differences and worked closely and diligently for the common good of the industry. Based largely on mutual trust and goodwill, the process resulting in the establishment of the DRC brought industry participants together, and allowed them to recognize their ability to collectively resolve their issues in a cordial and efficient manner.

VI.1 Lessons from the Evolution Phase (2000-2011)

The evolution of the DRC in the past ten years reveals accomplishments and some disappointments regarding its impact on alleviating trade irritants and solving trade disputes in the NAFTA region. The evolution also illustrates the hurdles that a privately-run dispute resolution mechanism may encounter in delivering its services and maintaining its relevance to members.

Perhaps the most salient success of the DRC has been its contribution to a better produce trade environment in Canada, both for domestic transactions as well as international transactions involving a Canadian importing firm. This is the reason why the majority of Canadian firms prefer to hold a DRC membership over a CFIA license. There is no doubt that the DRC success

in Canada is associated with the weaknesses of the pre-DRC dispute resolution systems in place. Further, Canadian firms embraced the DRC because it resembled the PACA system, which had proven successful in the United States for many years. However, these two features of the DRC were necessary but not sufficient to the success of the DRC in Canada. There were at least three other features discussed in this study that contributed to having a strong and stable Canadian DRC membership:

- The DRC has worked closely with all members of the supply chain, including food retailers and the so-often ignored small growers, to garner their support and expand the membership. For example, retailers were instrumental in educating their suppliers about the value of a DRC membership.
- The Canadian government has been a strong supporter of the DRC throughout the past decade in two fundamental ways: 1) by providing resources to investigate deficiencies in the Canadian system and 2) by enacting changes in the regulatory framework to improve the compliance with good trading practices based on DRC recommendations.
- Because DRC membership is voluntary, the DRC has continuously sought ways to increase its value to the produce industry and to increase the scope of the membership. As a result, the DRC has modified its bylaws to create new membership categories, to extend membership to important sectors such as transportation service providers and seed potato growers, and to experiment with association-sponsored memberships to service smaller firms and growers. A governmental agency may lack the flexibility to adapt its rules to the changing needs of the industry.

The DRC experience in Canada also highlights certain unexpected financial risks arising from public-private partnerships in which a private organization takes responsibility for tasks

traditionally conducted by governmental agencies. This is the case of the law suits that put at risk the very existence of the DRC as discussed earlier. The Canadian government was unable to cover the legal costs of a private organization such as the DRC, even when the organization was engaged in providing services typically delivered by the public sector.. Had the DRC declared bankruptcy during this process, the government would have had to step in and administer the dispute-resolution mechanism. The lesson is that careful thought should be given to liability issues when government designates private entities to deliver programs traditionally delivered by the public system, such as the dispute resolution system in Canada.

Unlike DRC's accomplishments in Canada, the outcomes of multiple privately- and publicly-led initiatives to create a better produce trading environment and to develop DRC membership in Mexico have been largely disappointing. Only a very small number of Mexican firms, mostly exporting to Canada, are DRC members today. Mexican firms exporting to the U.S. are already protected by the PACA and do not have incentives to hold a DRC membership. In perspective, it is possible that public and private DRC promoters in the United States and Canada underestimated how difficult it would be to develop the necessary infrastructure for a reliable dispute resolution system in Mexico. Prior to the DRC, the produce industry in that country had no inspection service, lacked unified grades and standards for a number of products, and had no functioning trade dispute system. Moreover, the promoters may have not fully considered the business culture in Mexico. That culture has traditionally favored informal approaches to solve disputes for many years.

The approach of the Mexican Ministry of Agriculture to promote the DRC – subsidizing the membership for Mexican produce firms – proved to be inappropriate. This approach did not address the root of the problem in that country: the lack of human and physical infrastructure to

operate a formal, effective dispute resolution system. Garnering support from the Mexican Government to develop a reliable inspection system and convincing the domestic produce industry of the benefits from belonging to an effective formal trade dispute system remains one of the primary challenges to have a truly tri-national, unified dispute resolution systems in the NAFTA region.

In the United States, for its part, DRC is relevant only to produce firms that seek PACA-like dispute resolution services when exporting to Canada. The DRC's effectiveness in Canada has been responsible for the steady increase in U.S. membership over the past 10 years, driven primarily by increased produce exports to Canada. However, efforts to increase the scope of DRC membership among U.S. firms have had only modest impacts. The industry has been highly satisfied with the protection services provided by the PACA, on the one hand. On the other hand, U.S. produce firms exporting to Mexico may be wary about the failures of multiple membership expansion initiatives conducted in that country. The DRC has never intended to substitute, but rather complement, the protection provided by the PACA to U.S. firms. This focus has yielded beneficial collaborations between the DRC and PACA in solving trade disputes, particularly those involving Canadian and U.S. firms.

This study shows that the DRC has made substantial positive impact to eliminate trade irritants and to effectively solve trade disputes in the NAFTA region. It has proven to be a flexible organization able to adapt to the changing dynamics of the produce industry, guided by a relentless focus on providing value to its membership. Today, the DRC has more than 1,400 members and it has successfully resolved over 1,300 disputes over 2000-2010, for an approximate value of $33 million. These accomplishments attest for the substantial positive effects of the DRC on produce trade in the NAFTA regions. Yet, the DRC is still far from

becoming a truly tri-national organization and achieving a harmonized dispute resolution framework throughout the region. Achieving this goal requires renewed private-public partnerships involving all three countries, with particular initiative from the Mexican public and private sector representatives.

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APPENDICES

APPENDIX A: PARTICIPANTS IN MEETINGS LEADING TO THE CREATION OF THE F&V DISPUTE RESOULTION CORPORATION

Table A-1: Participants of the First Meeting of the Advisory Committee (Mazatlan, Mexico), February 17-18, 1997

Names	Organization
US Attendees	
Alan R. Middaugh	National Potato Council
Daniel J. Coogan	Soto, Martin & Koogan, P.C.
Donald H. Arhens	Twin Garden Farms
Gary Ball	Gary Ball Inc.
Jerold W. Ahrens	Agricultural Investment Associates, Inc.
Joseph G. Procacci	Procacci Brothers Sales Corporation
Kenneth C. Clayton	USDA, AMS/F&V Programs PACA Branch
L. Patrick Hanemann	Majestic Valley Produce
Lee Riley Powell	USDA, AMS
Leonard F. Timm	The Red Book/Vance Publishing
Matthew M. McInerney	Western Growers Association
Michael J. Machado	17th District of California
Reginald L. Brown	Florida Fruit & Vegetable Association
Richard J. Kinney	Florida Citrus Packers
Richard N. Matoian	California Grape & Tree Fruit League
Robert C. Keeney	USDA, AMS/F&V Prog. PAC Br.
Robert L. Meyer	Meyer Tomatoes
Scottie J. Butler	Florida Farm Bureau Federation
Thomas A. Leming	USDA, AMS/F&V Prog. PAC Br.
Canadian Attendees	
Robert Carberry	Canadian Food Inspection Agency
Danny Dempster	CPMA/CHC
David Byer	Agriculture & Agri-Food Canada
Glenn Baty	Serca Food Service
Glyn Chancey	Agriculture & Agri-Food Canada
Greg Gowryluk	M.J. Gowryluk & Sons, Ltd.
Helen Zohar-Picciano	Agriculture & Agri-Food Canada
Stephen Whitney	CPMA/CHC
Terry Norman	Agriculture & Agri-Food Canada
Mexican Attendees	
Humberto Jasso Torres	SECOFI

Source: Advisory Committee on Private Commercial Disputes Regarding Agricultural Goods (1997)

Table A-2: Participants of the Second Meeting of the Advisory Committee (Anaheim, California), October 21-22, 1997

Names	Organization
US Attendees	
Alan R. Middaugh	National Potato Council
Donald H. Ahrens	Twin Garden Farms
Enrique E. Figueroa	USDA, AMS
Jerold W. Ahrens	Agricultural Investment Associates, Inc.
Kenneth C. Clayton	USDA, AMS/F&V Programs PACA Branch
Daniel J. Coogan	Soto, Martin & Koogan, P.C.
Joseph G. Procacci	Procacci Brothers Sales Corporation
L. Patrick Hanemann	Majestic Valley Produce
Leonard F. Timm	The Red Book/Vance Publishing
Matthew M. McInerney	Western Growers Association
Michael J. Machado	17th District of California
Reginald L. Brown	Florida Fruit & Vegetable Association
Richard J. Kinney	Florida Citrus Packers
Robert C. Keeney	USDA, AMS/F&V Prog. PAC Br.
Robert L. Meyer	Meyer Tomatoes
Scottie J. Butler	Florida Farm Bureau Federation
Thomas A. Leming	USDA, AMS/F&V Prog. PAC Br.
Canadian Attendees	
Leo Baribeau	Star Produce Ltd.
Donald Keenan	N.B. Shippers Association
Douglas Powell	CPMA
Mark McComb	Canadian Food Inspection Agency
Robert Carberry	Canadian Food Inspection Agency
Danny Dempster	CHC/CPMA
David Byer	Agriculture & Agri-Food Canada
Glenn Baty	Serca Food Service
Glyn Chancey	Agriculture & Agri-Food Canada
Greg Gowryluk	M.J. Gowryluk & Sons, Ltd.
Helen Zohar-Picciano	Canadian Food Inspection Agency
Stephen Whitney	CPMA/CHC
Mexican Attendees	
Humberto Jasso Torres	SECOFI
Arnoldo Moreno Camou	Secretary of Agriculture, Livestock & Rural Development
Eduardo Coppel Lemmen	Local Agricultural Producers Associations of Table Grapes of Sonora
Anuro Cobian Lopez	National Forestry Commission (CONAFOR)

Andres Piedra Ibarra	National Confederation of Livestock Mexico (CNOG)
Amadeo Ibarra Hallal	National Association of Manufacturers of Oils and Fats (ANIAM)
Enrique Dominguez Lucero	Mexican Pork Council
Mario Haroldo Robles	Sinaloa Growers of Mexico
Arturo Guajardo Estrada	Commission for the Protection of Foreign Commerce of Mexico (COMPROMEX)
Mario Sosa Uribe	SAGAR
Jorge von Bertrab	SECOFI

Source: NAFTA Committee on Agricultural Trade (1997)

Table A-3: Participants of the Seventh Meeting of the NAFTA Committee on Agricultural Trade, November 20-21, 1997

Names	Organization
US Attendees	
Audrae Erickson	Office of the US Trade Representative
Carol Goodloe	USDA, Foreign Agriculture Service, International Trade Policy
Dan Conable	USDA, Foreign Agriculture Service
Dave Priester	USDA, AMS
David Edwards	Department of State, US Embassy, Mexico City
Enrique E. Figueroa	USDA, AMS
Jeffrey Margolick	Office of the US Trade Representative
John Link	USDA, Economic Research Service
John Melle	Office of the US Trade Representative
Kenneth C. Clayton	USDA, AMS/F&V Programs PACA Branch
Larry Deaton	USDA, Foreign Agriculture Service, International Trade Policy
Mike Koplovsky	Office of the US Trade Representative
Norval Francis	Foreign Agriculture Service, US Embassy, Mexico City
Patricia Sheikh	USDA, Foreign Agriculture Service, International Trade Policy
Renee Schwartz	USDA, Foreign Agriculture Service, International Trade Policy
Robert C. Keeney	USDA, AMS
Scan Darragh	Office of the US Trade Representative
Susan Garro	Department of State
Canadian Attendees	
Robert Carberry	Canadian Food Inspection Agency
Terry Norman	Agriculture Canada
Marvin Hildebrand	Canadian Embassy
William Hewett	Canadian Embassy
Mexican Attendees	
Mario Sosa Uribe	SAGAR
Jorge von Bertrab	SECOFI
Humberto Jasso Torres	SECOFI

Source: NAFTA Committee on Agricultural Trade (1997)

Table A-4: Participants of the Meeting of the NAFTA Government Working Group on Tri-National Private Commercial Dispute Resolution System (Washington D.C.), March 9-10, 1998

Names	Organization
US Attendees	
Jim Frazier	USDA, AMS/F&V Prog. PAC Br.
Kenneth C. Clayton	USDA, AMS/F&V Programs PACA Branch
Leslie Wowk	USDA, AMS/F&V Programs PACA Branch
Robert C. Keeney	USDA, AMS/F&V Programs PACA Branch
Tom Leming	USDA, AMS/F&V Programs PACA Branch
Canadian Attendees	
Fred Gorrell	Canadian Food Inspection Agency
Glyn Chancey	Agriculture & Agri-Food Canada
Helen Zohar-Picciano	Canadian Food Inspection Agency
Robert Carberry	Canadian Food Inspection Agency
Robert Lazariuk	Agriculture & Agri-Food Canada
Mexican Attendees	
Constantino Figueroa	Bancomext (Compromex)
Jorge von Bertrab	SECOFI
Jose Samano	Bancomext (Compromex)
Mario Sosa Uribe	SAGAR

Source: NAFTA Government Working Group (1998)

Table A-5: Participants of the Canadian Mission to Mexico: Canada-Mexico Industry-to-Industry Consultations, November 27-December 02, 1998

Names	Organization
David Hendrick	CPMA/CHC
Richard King	B.C. Fruit Packers
Rick Wallis	David Oppenheimer & Associates
Glenn Baty	Serca Food Service
Judy Chong	Wing Chong Farms
Martin Desrochers	Hydro Serres Mirabel
Brenda Simmons	PEI Potato Board
Fred Gorrell	Canadian Food Inspection Agency
Glyn Chancey	Agriculture & Agri-Food Canada
Monty Doyle	CPMA/CHC

Source: Canadian Produce Marketing Association (1998)

Table A-6: Participants of the Quebec City Meeting (Quebec City, Canada), January 19-23, 1999

Names	Organization
US Attendees	
Jim Carr	Blue Book
John McClung	United Fresh Fruit & Vegetable Association
Kenneth C. Clayton	USDA, AMS/F&V Programs PACA Branch
Lorne Goldman	Lorne Goldman (representing WGA)
Reggie Brown	Florida Fruit & Vegetable Association
Stephen McCarron	McCarron & Associates
Canadian Attendees	
Robert Carberry	Canadian Food Inspection Agency
David Hendrick	CPMA/CHC
Don Rhyno	Atlantic Wholesalers
Fiona Lundie	Agriculture & Agri-Food Canada
Glyn Chancey	Agriculture & Agri-Food Canada
Guy Lafreniere	Agriculture & Agri-Food Canada
Helen Zohar-Picciano	Canadian Food Inspection Agency
Judy Chong	Wing Chong Farms
Leo Baribeau	Star Produce Limited
Martin Desrochers	Hydro-Serre Mirabel
Michael Mazur	Ontario Fruit & Vegetable Association
Monty Doyle	CPMA/CHC
Peter Brackenridge	Canadian Food Inspection Agency
Ricardo del Castillo	Canadian Embassy-Mexico City
Rick Wallis	David Oppenheimer & Associates
Stephen Whitney	CPMA/CHC
Susan Frost	Canadian Food Inspection Agency
Mexican Attendees	
Gerardo Lopez	SAGAR
Jorge von Bertrab	SECOFI
Juan Antonio Villareal	CAN
Victor del Angel	SAGAR

Source: Agriculture and Agri-Food Canada (1999)

Table A-7: Participants of Canadian Consultations on the Proposed Model for the Tri-National Dispute Resolution Corporation (across Canada)

August 1999; Winnipeg Meeting (Winnipeg, Manitoba), August 16, 1999

Name	Organization
Dave Jefferies	Peak of the Market
David Hendrick	CPMA/CHC
Don Kroeker	Peak of the Market
Fred Gorrell	CFIA
John Itzke	CPMA/CHC
John Kuhl	SMPC
Ken Krochenski	Peak of the Market
Larry McIntosh	Peak of the Market
Monty Doyle	CPMA/CHC
R. Ross	STELLA Produce
Ron Hemmersbach	Peak of the Market
Roy Vinke	The Grocery People
Samy Pelerin	CPMA/CHC
Stephen McCarron	McCarron & Associates
Stephen Whitney	CPMA/CHC
Tom Wyryha	B.C. Tree Fruits

Toronto Meeting (Mississauga, Ontario), August 17, 1999

Name	Organization
Allan Brown	Morris Brown & Sons
Bruce Nicholas	Ontario Food Terminal Bd.
Chuck Dentelbeck	OPMA
David Hendrick	CPMA/CHC
Fred Gorrell	CFIA
Gary Lloyd	Loblaw Co.
Ian McKenzie	Ontario Apple Comm.
Jim Diodati	Ontario Produce Companies
John A. Goodall	C.H. Robinson Co.
John Brayuannis	B.C. Tree Fruits
Judy Chong	Wing Chong Farm Co.
Lesley Moran	Morris Brown & Sons
Mary Fitzgerald	Chiquita
Michael Mazur	OFVGA
Motny Doyle	CPMA/CHC
Samy Pelerin	CPMA/CHC
Scott Tudor	Sobeys Inc.
Stephen McCarron	McCarron & Associates
Stephen Whitney	CPMA/CHC

Atlantic Meeting (Moncton, New Brunswick), August 26, 1999

Name	Organization
Brenda Simmons	P.E.I. Potato Board
David Hendrick	CPMA/CHC
David Savage	N.B. Shippers Association
Dela Erith	N.S. Fruit Growers' Association
Donald Keenan	N.B. Shippers Association
Ivan Noonan	P.E.I. Potato Board
Marvin MacDonald	O'Leary Farmers Co-op P.E.I.
Patton MacDonald	N.B. Potato Agency
Paul Eyking	Atlantic Fresh Produce Association
Rollin Andrew	AAFC
Ron Turner	Kings Produce N.S.
Stephen McCarron	McCarron & Associates
Stephen Whitney	CPMA/CHC

Vancouver Meeting (Burnaby, British Columbia), August 31, 1999

Name	Organization
Adrian Abbott	B.C. Tree Fruits Limited
Andy Smith	B.C. Hot House Foods Inc.
Art Kurri	E&A International
Bob McKilligan	BCPMA
Christina Hilliard	CFIA
David Hendrick	CPMA/CHC
Ernie Deaust	All Seasons Mushrooms
Greg Gauthier	B.C. Tree Fruits Limited
James Adamson	Mark T. Adamson Co. Ltd.
Jim Alcock	B.C. Blueberry Council
Jim Steel	Thrifty Foods Limited
Jocyline Ho	Van- Whole Produce Ltd.
John Hall	Overwamga Food Group
John Sears	B.C. Tree Fruits
Kevin Doran	B.C. Hot House Foods Inc.
Michael Mockler	Thrifty Foods
Neville Israel	Sun Rich Fresh Foods Inc.
Peter Austin	B.C. Tree Fruits Limited
Richard King	Okanagan Federated Shippers
Rick Austin	B.C. Tree Fruits Limited
Rick Gilmour	Lower Mainland Vegetable Distributors
Rick Wallis	David Oppenheimer & Associates
Stephen McCarron	McCarron & Associates
Stephen Whitney	CPMA/CHC
Tom Wong	BCPMA Advisor

Calgary Meeting (Calgary, Alberta), September 1, 1999

Name	Organization
Alan Stuart	Bassano Growers/Potato Growers of Alberta
Alex Stadig	Serca Foodservice
Anne Wong	Yees Fine Foods
Brent Lloyd	C.H. Robinson Co. (Canada) Ltd.
Brian Hampton	The Produce People Ltd.
Craig MacKenzie	C.H. Robinson Co. (Canada) Ltd.
Curt Pettimger	Western Grocers
Darryl Tamagi	Bridge Brand
David Hendrick	CPMA/CHC
Garry Doraty	Western Grocers
Garry Wagner	Texas Sweet Citrus
Glenn Baty	Serca Food Service
Jim Deines	Money's Mushrooms Co.
Mike Dube	Krown Produce
Paulette Stolar	Food Processing
Stephen McCarron	McCarron & Associates
Stephen Whitney	CPMA/CHC
Stewart Vang	Faye Clack Marketing
Tom Shindruk	Pak-Wel Produce Ltd.

Saskatoon Meeting (Saskatoon, Saskatchewan), September 1, 1999

Name	Organization
David Hendrick	CPMA/CHC
Deric Karolat	Star Produce
Howard Willems	CFIA
Jim Sparks	Star Produce
John Woronuik	CFIA
Laurie Wagner	Marin's Produce
Leo Baribeau	Star Produce Ltd.
Mike Furi	The Grocery People
Paul Slobodzion	LID Co.
Prentice Dent	The Grocery People Ltd.
Stephen McCarron	McCarron & Associates
Stephen Whitney	CPMA/CHC

Source: Agriculture and Agri-Food Canada, Summary Report (1999).

Table A-8: Members of the Working Groups

Working Group I: Model Contract

Names	Organization
US Contacts	
Stephen McCarron*	McCarron & Associates
Chuck Carl	The Packer Publications/Red Book Credit Services
Jim Carr	Blue Book
Robert C. Keeney	USDA, Fruit & Vegetable Programs
Canadian Contacts	
Stephen Whitney	CPMA/CHC
Rick Wallace	David Oppenheimer & Associates
Ian McKenzie	Ontario Produce Marketing Association
Mexican Contacts	
Juan Carlos Villarreal	Confedracion Mexicana de Productores de Café
Carlos Vejar	Subsecretaria de Negociaciones Com.

Note: * represents Working Group Leader

Working Group II: By-Laws

Names	Organization
US Contacts	
Bill Weeks	Texas Produce Association of the Americas
Fred Webber	Produce Reporter Co/The Blue Book
Dave Durkin	Olsson, Frank & Weeda
Canadian Contacts	
Stephen Whitney	CPMA/CHC
Leo Baribeau*	Star Produce Ltd.
Martin Desrochers	Hydro Serre Mirabel Inc.
Helen Zohar-Picciano	Canadian Food Inspection Agency
Michael Mazur	Ontario Fruit & Vegetable Growers
Leo Arsenault	Uniglobe
Mexican Contacts	
Julio Escandon Palomino	EXIMCO
Juan Carlos Villarreal	Confedracion Mexicano de Productores de Café
Alfonso Rodea	ANTAD

Note: * represents Working Group Leader

Working Group III: Standards & Inspection

Names	Organization
US Contacts	
John McClung	United Fresh Fruit & Vegetable Association
Stephen McCarron	McCarron & Associates
Lee Frankel	Fresh Produce Association of the Americas
Canadian Contacts	
Stephen Whitney	CPMA/CHC
Leo Arseneault	Uniglobe
Alain Pare	Metro Richelieu
Ken Bruce	Canadian Food Inspection Agency
Robert Allard	Conseil Quebecois de L'Horticulture
Mexican Contacts	
Jorge von Bertrab	SECOFI
Mario Haroldo Robles	Sinaloa Growers of Mexico
Miguel Angel Garcia Paredes	CNA

Note: * represents Working Group Leader

Working Group IV: Mediation & Arbitration

Names	Organization
US Contacts	
Matt McInerney*	Western Growers Association
Fred Webber	Produce Reporter Co/The Blue Book
Stephen McCarron	McCarron & Associates
Pat Hanneman	Majestic Valley Produce
Kerry Brown	
Canadian Contacts	
Stephen Whitney	CPMA/CHC
Glen Baty	Serca Foodservice
Judy Chong	Wing Chong Farms
Glyn Chancey	Agriculture & Agri-Food Canada
Mexican Contacts	
Carlos Vejar	Subsecretaria de Negociaciones Com.
Enrique Dominguez Lucero	Mexican Pork Council

Note: * represents Working Group Leader

Working Group V: Business Plan

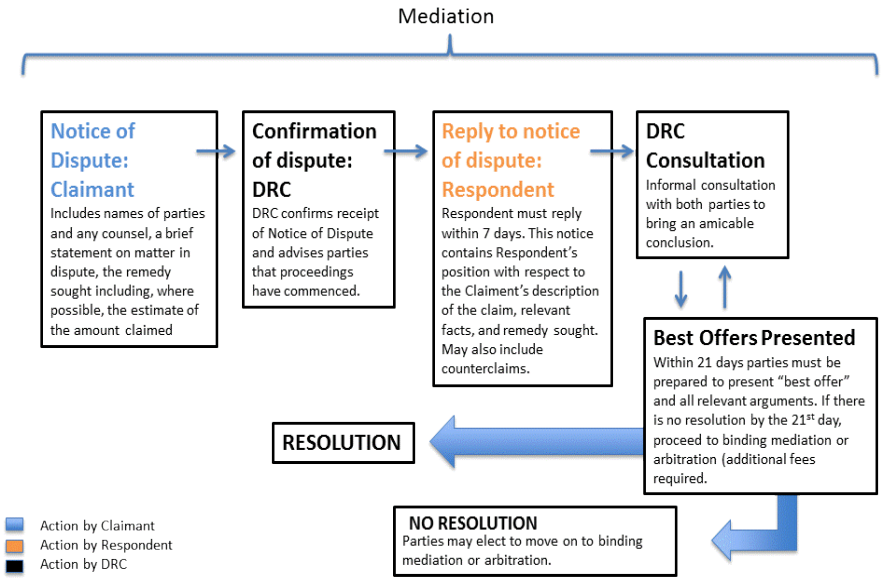
Names	Organization
US Contacts	
Reggie Brown	Florida Fruit & Vegetable Association
Fred Webber	Produce Reporter Co/The Blue Book
Matt McInerney	Western Growers Association
John McClung	United Fresh Fruit & Vegetable Association
Kenneth C. Clayton	USDA, AMS/F&V Programs PACA Branch
Canadian Contacts	
Stephen Whitney	CPMA/CHC
Richard King	Okanagan Federated Shippers
David Hendrick*	CPMA/CHC
Peter Brackenridge	Canadian Food Inspection Agency
Mexican Contacts	
Roman Gomez	Frutas Lorelay SA de CV
Jaime Almonte	SAGAR
Julio Escandon Palomino	EXIMCO

Note: * represents Working Group Leader
Source: U.S. Department of Agriculture (1999)

APPENDIX B: MEDIATION AND ARBITRATION PROCESSES AND FLOWS

A dispute that progresses beyond Stages 1 to 3 of the dispute resolution process moves to the informal/formal mediation stage. A dispute that progresses to this stage requires the filing of a Notice of Dispute (NOD). The filing of a NOD stops the clock on the nine-month statute of limitations and requires that the DRC opens an official file and issue a Confirmation of Receipt of the NOD thereby signifying the commencement of proceedings. The Respondent must provide a Reply to the NOD, within seven days of receiving the Confirmation. The DRC begins by helping parties exchange necessary information, including guidance for voluntary settlement. The DRC also informs parties of their rights and responsibilities, including the need for the Respondent to raise any counterclaims he/she may have. The parties have 21 days from the time of the NOD confirmation to conclude a voluntary settlement. Should they not reach an amicable solution or should the Respondent fail to respond within this timeframe then the Claimant has the right to move the process to the arbitration stage. Figure B-1 describes the mediation process, the paperwork, and subsequent responsibilities of the DRC, the Claimant, and the Respondent.

Figure B-1: DRC Process Flow for Mediation



As shown in Figure B-1, the DRC takes on an active, negotiating role between the two parties. This includes helping share paperwork and eliciting evidence as needed. Evidence may include inspection and quality tracking documents like temperature readings from trucks during

transit, warehouse temperature readings and receiving and loading documentation, among others. After supporting evidence and claims are shared, the DRC assists both sides with formulating a "best offer," which includes commitments to make or compromise on monetary reparations. Typically, the informal consultation process cannot last longer than 21 days (except when the parties are likely to reach resolution, as mentioned above), and both parties are urged to present their best offer within this three-week period. The process of dispute resolution, until this point, is fully covered by membership fees. To move beyond formal mediation and on to arbitration, one of the parties (normally the Claimant) must file for the advancement (DRC 2009). Once a dispute progresses beyond the informal mediation stage, additional fees such as filing fees and mediator and arbitrator fees apply (DRC 2009).

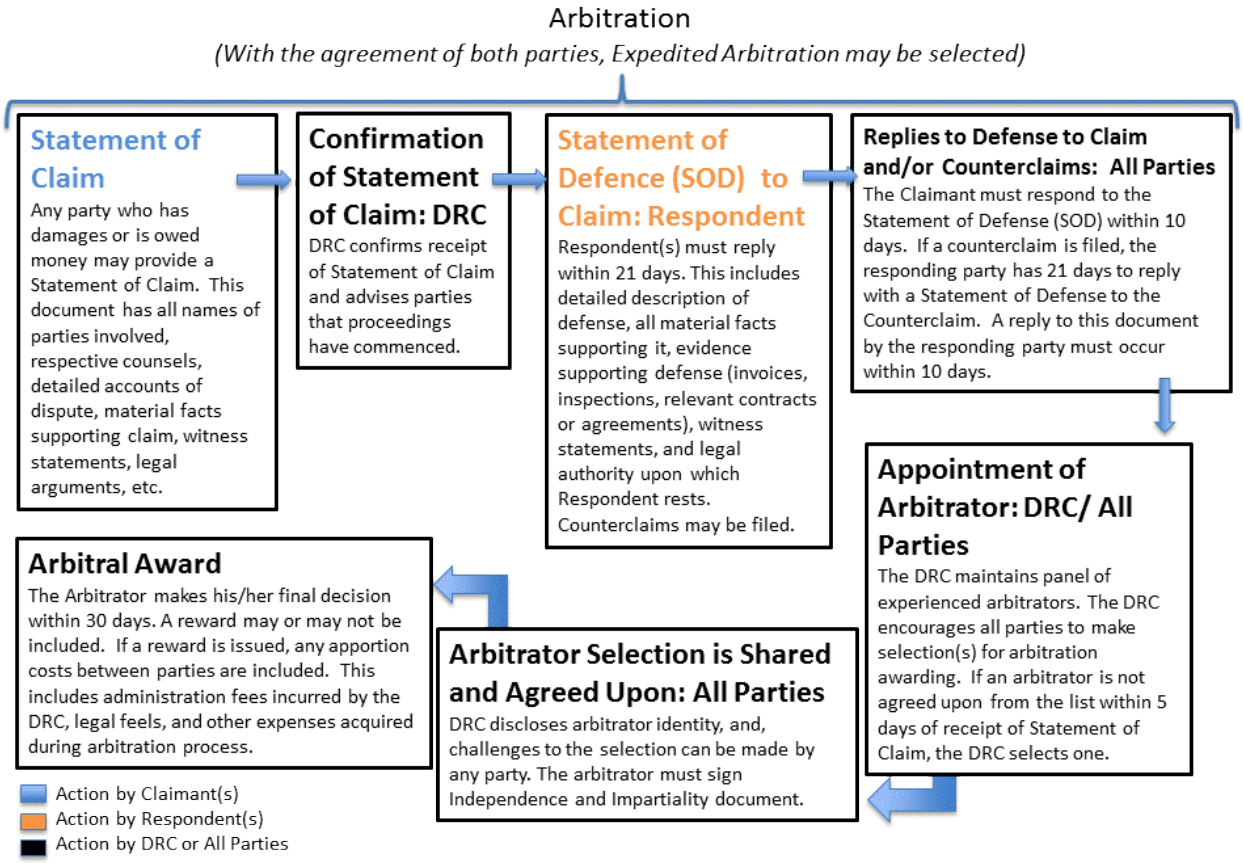
The difference between formal and informal mediation is a defined time process. Since the inception of the DRC, formal mediation has rarely been used. Rather, Claimants prefer to reduce their costs by using informal mediation (which is included in DRC membership fees) or take the claim directly to arbitration. Arbitration represents the minority of cases handled by the DRC due to the extensive coaching, advising, and informal mediation work between parties that occur during Stages 1-3 (DRC, 2011). Arbitration and mediation processes are enumerated within the Corporation's Mediation Rules.

If the claim is less than $50,000 then the dispute is eligible for Expedited Arbitration. For claims that are less than $15,000 a set fee of $600 is paid by the Claimant to cover the full cost of the arbitration, including arbitrator fees and administrative costs. This fee can be reimbursed to the Claimant if he/she is awarded a settlement and makes the reimbursement request. For claims from $15,000 to less than $50,000 a set administrative fee of $700 applies as well as separate fees charged by the arbitrator (Webber 2011; Whitney 2011). For claims of $50,000 or more the Parties must use Formal Arbitration Procedures, which include the provision for hearings. Administrative fees are based on a sliding scale and arbitrator fees are negotiated separately because these claims are more complex and warrant more time for an arbitrator to make a decision.

A filing of the Statement of Claim (Expedited) or a Notice of Arbitration (Formal) triggers the Expedited and Formal Arbitration process (See Figure B-2). Here, the names of all the parties are recorded, along with the necessary contact information details, witness statements, legal claims, and any and all applicable, supporting evidence for or against the claim (e.g.,

invoices and inspection reports). The Statement or Notice provides a place for the Claimant to agree that he/she will be bounded by final arbitration and award procedures. Once the DRC confirms receipt of the Statement or the Notice the Respondent is required to provide a written Statement of Defense within 21 (expedited) or 30 days (formal) of receipt of that confirmation. The Respondent may elect to issue a Counterclaim, if he/she raised it during the informal process, which must be responded to by the Claimant. The DRC maintains a Multinational Panel of Arbitrators experienced in resolving produce disputes. At the beginning of an arbitration procedure, the DRC communicates with the parties to the arbitration asking them to make their selection(s). Unless the parties agree to the selection of a particular Arbitrator, the DRC shall, within five days of receipt of the Statement of Claim, appoint an Arbitrator from its Panel of Arbitrators.

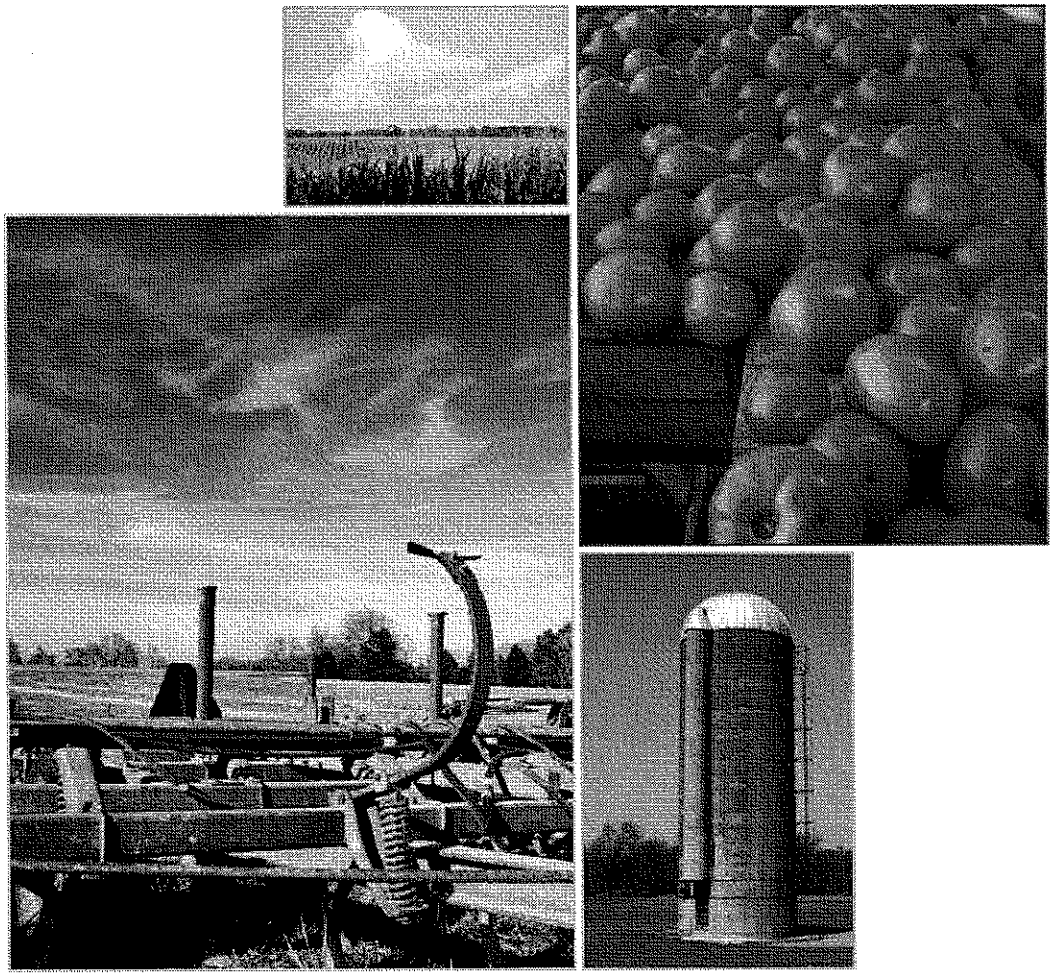
Figure B-2: DRC Process Flow for Arbitration



Upon appointment of the Arbitrator, the DRC shall disclose the identity of the arbitrator to the parties and provide the parties with a summary of the Arbitrator's qualifications and biographical data The DRC releases the arbitrator's qualifications and biographical data to each party, as well as a Statement of Independence and Impartiality signed by the arbitrator. If the arbitration appointment is challenged, the challenging party must provide sufficient evidence to the DRC. If the challenged Arbitrator agrees to withdraw or the other parties to the arbitration agree to the challenge, the challenged Arbitrator shall withdraw from the arbitration. In neither case shall the validity of the grounds for challenge be implied. Where the challenged Arbitrator does not withdraw, the DRC shall decide the challenge.

CANADA'S ROAD TO PACA:
HURDLES AND PATHWAYS

Final Report



Prepared for:
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Canada-United States
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I. INTRODUCTION AND OVERVIEW

Since North American Free Trade Agreement (NAFTA), trade in fresh produce has increased between the United States (U.S.) and Canada exponentially.[1] Despite this Agreement's successes, the U.S. and Canadian economies still contain inefficiencies as a result of differences in our legal systems. In particular, the two countries afford produce sellers different levels of rights to claim produce assets in the event that after delivery the purchase does not pay for the goods. The U.S. affords interstate and foreign produce sellers significant rights in these scenarios. In Canada, similar protections do not exist. As a result, international and interprovincial produce sellers are discouraged from selling their goods into Canadian markets. In order to remedy this problem, legislative protections must be enacted in Canada.

The success of U.S. efforts to protect produce sellers is the result of the *Perishable Agricultural Commodities Act* (PACA), which provides certain protections that mitigate the unique risks faced by the sellers in such transactions.[2] Administered by the Agricultural Marketing Service's (AMS), the Act covers the sale of perishable agricultural commodities in interstate and foreign commerce to dealers, brokers, and commission merchants.[3] This Act has been successful in protecting produce sellers' rights. Representatives from the fruit and vegetable industry have estimated that more than $1 billion has been collected as a direct result of the PACA Trust provisions. According to Executive Vice President of the Western Growers Association and PACA expert Matt McInerney, "The PACA Trust delivered on its promise to protect farmers . . . Every dollar that's preserved in the PACA Trust is being brought back to the farm so that [farmers] can battle another day. It makes the difference between [farmers] having a profitable year, or being around to continue to produce a food product for the American consumer."[4]

In February 2011, the U.S. President and Canadian Prime Minster jointly announced the creation of the Regulatory Cooperation Council (RCC).[5] The RCC was tasked with finding and harmonizing discordant laws and regulations in Canada and the U.S. that hinder growth. Of the areas included were protections afforded to produce traders.[6] To this end, the U.S. Department of Agriculture and Agriculture Canada (collectively, "Parties") initiated talks to harmonize these laws. As part of that effort, the Parties have focused on using PACA as a model for Canadian legislation. In order to achieve this goal, however, the Parties must understand the regulatory, legislative, cultural, and political differences that will impact whether such a law can be passed in Canada.

For one, Canada and the U.S. operate under different constitutional constraints. In the U.S., the Supreme Court has granted the federal government extensive authority under the Commerce Clause to regulate commerce, even in instances where it occurs solely intrastate so long as the transaction might somehow impact interstate trade. In Canada, while the Supreme Court has gone far toward extending federal authority through the Trade and Commerce clause, other constraints on federal power render the federal government's ability to enact PACA-like legislation somewhat more complicated. In particular, the way the Canadian Constitution divides federal and provincial powers has led to significant disputes over where these authorities begin and end. As this Report illustrates, the federal government in all likelihood does

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[1] Free Trade Agreement Helped U.S. Farmers, Newswise.com, http://newswise.com/articles/view/541349/ (last visited July 11, 2012); *see also* Appendix G.

[2] Perishable Agricultural Commodities Act, 7 USC §499e et seq.

[3] Statutory trust under Perishable Agricultural Commodities Act, 128 A.L.R. Fed. 303, 1 (1995).

[4] Karla Whalen, *In PACA we Trust*, BluePrints: The Produce Professionals' Quarterly Journal, March 2010, at 2, *available at* http://www.ams.usda.gov/AMSv1.0/getfile?DocName=STELPRDC5087564.

[5] *Joint Statement by President Obama and Prime Minister Harper of Canada on Regulatory Cooperation* (Feb. 4, 2011), *available at* http://www.whitehouse.gov/the-press-office/2011/02/04/joint-statement-president-obama-and-prime-minister-harper-canada-regul-0.

[6] *Id.*

have the authority to enact a federal PACA-like law under its Bankruptcy and Trade and Commerce powers. But doing so without provincial coordination may expose the government to a constitutional challenge. And while the federal government is likely to prevail in such a challenge, that outcome is anything but certain. In the end, the result may depend on how a court views the law's primary purpose. The law is likely to be upheld if the primary purpose is generally viewed as facilitating trade flow, by incidentally regulating trust and contract law. Strengthening such an outcome would be evidence that a federal law is necessary while provincially such a law would not work. Conversely, the law is doomed if the primary purpose is viewed intraprovincially, such as facilitating better remedies in contract disputes, and the protections are achievable by just a few provincial enactments.

Additionally, the governments must be cognizant of the existing protections afforded to produce traders in Canada. As this Report illustrates, Canadian federal and provincial protections for produce sellers are minimal. This lack of legislation explains why for years international and interprovincial produce sellers have disproportionately incurred these risks while intraprovincial sellers have not. These points also buttress the need for a federal law, which, as mentioned in the prior paragraph, will be necessary to prevail in a constitutional challenge. Additionally, knowing the extent of these protections is important so as to avoid potential conflicts when drafting a federal law.

Lastly, in order to successfully implement PACA-like protections in Canada, the Parties must understand technically what will be involved in enacting such a law. This starts with an understanding of the Canadian legislative system and how it operates. To this end, the Parties must know which politicians, committees, and cabinets will need to support such a law. But the analysis cannot end there. Rather, the Parties must also be aware of the special interest groups and political Parties that are likely to react strongly to such a law.

The purpose of this Report is to explain how these and other factors might facilitate and challenge the Parties' efforts to enact a federal PACA-like law in Canada. The USDA presented five issues for this Report to address. These issues relate to the underlying question of what factors might hinder the enactment of a PACA-like law in Canada. In order to best address these five issues within that context, this Report is structured in the following manner. First, this Report outlines some of Canada's constitutional divisions of power, how they compare to the U.S. Constitution, and how these differences may impact legislative goals. Second, this Report will explain the existing legal protections in Canada for produce traders in comparison to the PACA and why these protections fall short. This section will also examine areas of conflict that might arise between these laws a federal PACA-like law. Next, this Report will provide possible Amendments that would create a PACA-like trust in Canada. Additionally, this section includes information on provincial coordination in the creation of a PACA-like law in Canada.

II. SHORT ANSWERS

The USDA presented the following issues for analysis in this report. However, this report adopts a different format in an effort to answer the underlying questions that these issues present, such as what existing protections for produce traders are available under Canadian law and what conflicts might arise in adopting PACA like legislation in Canada.

A. Provide a suggestions/recommendation of legislative language amendment to the federal Canadian *Bankruptcy and Insolvency Act* (BIA) and the *Canadian Agricultural Products Act* (CAPA) to effectuate protection for produce traders (internal Canadian and U.S. exporters to Canada).

- It seems possible that federal amendments to the BIA and CAPA could create a PACA-like regime in Canadian law. In order to achieve this, a federally mandated, "deemed" trust is essential.

B. Prepare a description of the Canadian Process to Amend the BIA and related Regulations; both statutory and political.

- Constitutional, legislative and political considerations in Canada will likely require coordination between the provinces and the federal government in order to enact a true PACA-like regime. Also, it is important to gain the support of agriculture and commerce interest groups that have been highly influential in lobbying for specific changes in Canadian law.

C. Conduct a survey of Provincial Statutes and Regulations Related to fresh and frozen produce and comparison of such. Provinces to be studied are: Ontario, British Columbia, Quebec, Manitoba, Alberta, and Prince Edward Island.[7]

- Although the provinces have enacted numerous laws to protect the farming industry in their jurisdiction, the applicability of these laws is limited to trade within the province of enactment (intra-provincial trade). Thus, no significant statutory conflicts exist.

1. Provide an explanation of linkages between Canadian Federal and Canadian Provincial Statutes and Regulations regarding produce traders rights, responsibilities, and enforcement for bad actors.

- The linkages that exist occur because of the structure of Canada's *Constitution*, which outlines specific legislative power for the federal and provincial governments. Although most jurisdictional powers are enumerated in distinct ways, these powers often conflict. Moreover, the power to make agricultural law falls to both the federal and provincial government. That said, most courts analyze facts involving federal laws in agriculture via the trade and commerce clause.

E. Prepare a description of how U.S. shippers can protect themselves with Canadian Produce Statutes in current form and what amendments are needed to effectuate such protection.

- Current protection in Canadian law, including measures in CAPA and a private dispute resolution mechanism, do not provide the same level of protection as PACA. Amendments to the CAPA should address the creation of stronger protections for international and interprovincial shippers who sell perishable products to buyers in Canada.

[7] Note that this section has focused on identifying existing protections for produce traders in Canadian law as well as areas of law that might pose conflict to a federal enactment.

III. CONSTITUTIONAL CONFLICTS

This section explores the constitutional conflicts that may create problems in passing PACA like legislation in Canada. As this section illustrates, the Canadian federal government likely has the authority under the Bankruptcy and Trade and Commerce clauses to enact federal PACA-like legislation in bankruptcy, nonpayment, and slow-payment matters. Canada's supremacy clause would grant the federal government the power to regulate in areas that are otherwise provincial but only if the primary purpose of the law is to regulate federal matters and the intraprovincial aspects are incidental to those goals. Regarding a federal PACA-like law, if the federal government properly passes the law under its Bankruptcy or Trade and Commerce powers, such that it primarily attempts to facilitate trade flow and bankruptcy proceedings, then the law would be valid even if it involved incidental intraprovincial issues such as trust and contract law.[8] Even still, the government may expose itself to constitutional challenges. While the government is likely to prevail in these challenges, Canadian case law suggests that this outcome is not certain. In order to avoid such risks, the government could work with the provinces to pass coordinated legislation.

Part IV of the *Constitution*,[9] sections 91 through 95, outlines the distribution of legislative powers. Canada is a federal state with powers distinctly divided between the federal-state government and the individual provinces. For instance, the Constitution grants the federal government exclusive jurisdiction over Bankruptcy matters as well as Trade and Commerce issues. Meanwhile, the provinces receive authority over contracts and trust law. Despite these apparent distinctions, these jurisdictions have historically come into conflict. Moreover, in some areas of law, such as agriculture, conflict is almost guaranteed because the Constitution grants joint authority.

Several specific constitutional sections are discussed in this section. For reference, these sections include:

- Section 91 of the *Constitution*, from which the federal government derives its power that includes all that not enumerated to the provinces;
- Section 92, which enumerates to the provinces jurisdiction and governing power separate from the powers of the federal government;
- Section, which grants legislative authority over agriculture issues to both the federal and provincial governments; and
- Judicial determinations about the federal and provincial governments' legislative responsibilities for agriculture.

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[8] *See* Edward P. Belobaba, *Establishing a PACA-Like Trust in Canada* 15-16 (Dec. 18, 2003); *see also* PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA 648 (Scarborough, ON: Carswell 5 ed. 2007) and Canadian Asbestos Services Ltd. V. Bank of Montreal (1992), 11 OR (3rd) 353, a decision of the Ontario Court (General Division) (holding that the deemed trust provisions of the *Federal Income Tax Act,* the *Canada Pension Plan Act* and the *Employment Insurance Act* were constitutionally valid).

[9] The *Constitution of Canada, 1982* is made up of two documents: the *Constitution, 1867* and the *Charter of Rights and Freedoms* (referred to simply as "the *Charter*"). Although both documents make up the 1982 document, use of the term "Constitution" throughout this document will refer only to the *Constitution, 1867* unless otherwise stated. Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.) [hereinafter *Constitution 1982*]; Constitution Act, 1867, 30 & 31 Vict., c. 3 (U.K.) [hereinafter *Constitution 1867*]; Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982 *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.) [hereinafter *Charter*].

This section begins with Part A, in which the distinct federal powers that would relate to a PACA-like law in Canada are explained: Bankruptcy as well as Trade and Commerce. Part B of this section analyzes the powers specifically enumerated to the provinces. These powers include agricultural lands, general business and sales practices, property (including trusts), and insurance matters of personal property, such as contracts, the sale of goods, and trusts. Part C of this section analyzes areas of concurrent jurisdiction, using agriculture law as a model.

A. Distinct Federal Powers

The powers of the Canadian federal government are primarily found in section 91 of the *Constitution.*[10] Among these powers includes the regulation of trade and commerce; bankruptcy and insolvency; and patents.[11] Because section 91 is interpreted as the primary source of power for the federal government, it is often used to interpret other, more ambiguous, sections of the *Constitution* where there is a division of powers such. This is particularly relevant to the regulation of agriculture, as discussed below.[12]

Canada's federal power has waxed and waned throughout history. At the original drafting of the Constitution, this power was high. Unlike the U.S., section 91 of Canada's Constitution grants provinces limited enumerated powers and the federal government the residual authority.[13] However, the Privy Council quickly eviscerated federal authority. It was not until recently that Canada's Supreme Court began expanding the federal government's authority again. Even still, this authority has not expanded to similar scope as that found in the U.S. through the Commerce Clause. Thus, the federal government can regulate trade flow through mechanisms like contracts, trusts, and marketing if the latter is incidental to the former. Today, Canadian constitutional scholar Peter Hogg notes that this power has also been interpreted as a grant to the federal government authority over matters in the national public interest.[14]

i. Bankruptcy and Insolvency

Through section 91 (21), the Canadian federal government has the authority to create legislation over bankruptcy and insolvency.[15] Canada's Supreme Court has interpreted this power to remedy the technical situation of being insolvent. But it does not extend to the period before the declaration of insolvency, which remains a provincial matter (see discussion below, "Property and Civil Rights"). The Supreme Court has held that provincial legislation cannot reorder the priorities of creditors in a bankruptcy.[16]

Canadian insolvency legislation involves two major statutes: the *Bankruptcy and Insolvency Act*[17] (BIA) and the *Canadian Companies Creditors Act*[18] (CCAA). In Canada, The BIA operates similar to Chapter 7, Title 11 of the U.S. Code whereas the CCAA is a "debtor-in-possession" reorganization statute, similar to Chapter 11, Title 11. The main difference between the statutes is that the BIA sets out a structured

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[10] *Id.* s 91.
[11] *Id.* s 91 (2), (21), (22).
[12] ROBERT S. FULLER AND DONALD E. BUCKINGHAM, AGRICULTURE LAW IN CANADA 144 (Toronto: Butterworths, 1999).
[13] Section 91 states: " It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada [...]" Constitution 1867, *supra* note 9, s 91; Occurring shortly after the U.S. Civil War, drafters of Canada's 1867 Constitution took note that in the U.S. states were constitutionally afforded the more powerful residual rights whereas the federal government had limited enumerated powers.
[14] HOGG, *supra* note 8 ch. 17 at 1-2.
[15] Constitution 1867, *supra* note 9, at 91 (21).
[16] Husky Oil Operations Ltd v. Minister of National Revenue, [1995] 3 SCR 453
[17] Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 [hereinafter BIA].
[18] Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

process for the bankrupt individual or company, whereas the CCAA is a more flexible tool used to promote reorganizations. This contrast has been characterized as a "rules-based approach" contained in the BIA versus a "principle-based approach" contained in the CCAA.[19]

ii. Trade and Commerce Power

Section 91 (2) of the *Constitution* grants the Canadian federal government the power to regulate trade and commerce.[20] Despite this clause's broad language Canada's courts have narrowed its power.[21] Recently, the Canadian courts have somewhat expanded federal authority in this area. Nonetheless, the Canadian federal government still enjoys less authority through this clause than its U.S. counterpart.

The Trade and Commerce clause includes two types of authority: (1) international / interprovincial trade and (2) general trade.[22] The former involves transactions crossing provincial lines. The latter involves federal regulation that covers all commerce without distinction in order to meet a national goal. A Canadian PACA-like law likely falls under the first branch.[23] In this branch, the Supreme Court of Canada has expanded federal powers, particularly when laws focus on the general trade flow of products that characteristically flow across provincial lines.[24] These have included production quotas, trade bans or quotas, and compulsory federal purchasing of exported goods. Conversely, if the law involves industries that are local in nature, like agriculture, the outcome is more complex.

Courts have looked at numerous factors in determining the scope of the federal government's authority in trade and commerce, including whether the:

- law's main object and purpose is federal, with intraprovincial aspects being incidental;
- law's intraprovincial coverage is offered on voluntary basis;
- law's focus is on regulating trade flow generally, rather than the transactions;
- law does not seek to regulate a single industry;
- industry being regulated is national in scope;
- good being regulated is one that is largely traded interprovincially or internationally;
- law specifically covers an international or interprovincial transaction;
- the provinces, individually or jointly, would be constitutionally or practically incapable of enacting such a legislation; or
- a failure to include one or more provinces in such an enactment would jeopardize the successful operation of that legislation across the country.[25]

In early years, the Privy Council narrowed the Trade and Commerce Clause.[26] But this changed once Canada's Supreme Court assumed the role of highest court.[27] Thereafter, the courts upheld federal laws

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[19] *Id.*

[20] Constitution 1867, *supra* note 9, s 91 (2).

[21] HOGG, *supra* note 8, at ch 20-1; for a comparison of Canada's narrow Commerce Clause to the U.S.' broad clause, *see* SMITH, THE COMMERCE POWER IN CANADA AND THE UNITED STATES (1963); MACKINNON, COMPARATIVE FEDERALISM (1964).

[22] Citizens' Insurance Co. v. Parsons (1881), 7 App. Cas. 96.

[23] *See* Belobaba, *supra* note 8, at 10.

[24] *Id.*; *see also* Murphy v. CPR (1958) SCR 626; Regina v. Klassen (1959) 20 D.L.R.(2nd) 406 (Man. C.A.); HOGG, *supra* note 8, at 21-16.

[25] General Motors of Canada Limited v. City National Leasing, [1989] 1 S.C.R. 641 (Can.).

[26] *See, e.g.*, The King v. Eastern Terminal Elevator Co. (1925), S.C.R. 434 (striking down a federal law regulating the grain trade, even though nearly all grain was sold for export in Canada, because the law regulated local operations by requiring grain elevator licenses); A.-G. B.C. v. A-G. Can. (Natural Products Marketing) (1937), A.C. 377 (striking down a federal law that established marketing schemes for those natural products whose principal

that sought to generally impact interprovincial trade markets. In *Murphy v. CPR* (1958), the Supreme Court of Canada upheld a federal law that required growers to sell their grain to the federal government if destined for markets outside the province of production.[28] The purpose of the law was to stabilize markets by pooling the proceeds and equalizing them amongst farmers.[29] An intraprovincial aspect of the law was also later upheld by the Manitoba Court of Appeals in *R. v. Klassen*. That portion imposed a quota system on producers through the regulation of elevators and mills in order to ensure equal access to the interprovincial and export markets.[30] Moreover, this part also applied to the local processing and sale of their grain, so that farmers could not obtain an unfair advantage by selling excess product locally in exchange for flour, seed, or feed.[31]

The *Klassen* ruling was mirrored by Canada's Supreme Court in *Caloil v. A.-G. Can.* (1971).[32] Therein, a federal law prohibiting the transportation or sale of oil west of the Ottawa Valley was upheld, even though it touched numerous intraprovincial transactions. According to the Court, the intraprovincial issues were "an incident in the administration of an extra-provincial marketing scheme" and as "an integral part of the control of imports in the furtherance of an extra-provincial trade policy."[33] Some have also suggested that this case illustrates how the federal government receives greater deference when the product regulated is interprovincial in character.

While these cases illustrate an expansion of federal power in trade and commerce, it would be misguided to assume that this means that the clause rises to the U.S. Commerce clause. Rather, other cases illustrate that the federal government must be careful when enacting legislation under the Trade and Commerce clause to focus as much as possible on trade flows. For instance, in *Labatt Breweries v. A.-G. Can.* (1979), the Canadian Supreme Court struck down a federal law that regulated the production process of beer.[34] The government's rationale for the law's federal scope was that in Canada beer manufacturing was national, highly concentrated, and dominated by three large firms.[35] But the Court found the law invalid because it regulated a single trade or industry.[36] Moreover, the Court found that the breweries in question had manufacturing plants in every province, which meant that they produced beer for sale within the province.[37] Thus, even though the firm marketed and advertised nationally, the law did not fall within the federal interprovincial trade power.[38]

One way the federal government has avoided constitutional problems in otherwise problematic laws has been coordinate with provinces. As explained below, this is most often seen in regards to the concurrent jurisdiction over agriculture. For instance, in *Re Agriculture Products Marketing Act* (1978), the federal government attempted to impose significant regulations on the egg industry.[39] The law significantly

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market was outside the province of production because the law could potentially regulate intraprovincial transactions); Can. Federation of Agriculture v. A-G. Que. (Margarine) (1951), A.C. 179 (striking a law that sought to protect the entire Canadian dairy industry by prohibiting the manufacturing, sale, or possession of margarine because the law covered transactions that could potentially be completed within a province).

[27] *See* HOGG, *supra* note 8, ch. 20-5.

[28] Murphy v. CPR (1958), SCR 626.

[29] *Id.*

[30] R. v. Kassen (1959), 20 D.L.R. (2d) 406 (Man. C.A.).

[31] *Id.*

[32] [1971] S.C.R. 543.

[33] *Id.* at 551. It is important to note that this decision was widely supported among the justices on the court.

[34] [1980] 1 S.C.R. 844, 866.

[35] *Id.*

[36] *Id.*

[37] *Id.* at 839.

[38] *Id.*

[39] [1978] 2 S.C.R. 1198.

regulated details of egg production without regard to whether the eggs were intended for international trade. Moreover, nearly 90% of the eggs produced in Canada at that time were sold inside the province. Even still, the Court did not strike down the law but praised the centerpiece of the act, a federal-provincial cooperative scheme.[40] The court has taken this position as well regarding regulations over chicken farmers.[41]

B. Provincial Powers

Provincial powers are primarily found in section 92 of the *Constitution*.[42] Canada's courts have deferred to the provinces in matters concerning property and civil rights, as well as issues that are local or private in nature.[43] It is not a coincidence, therefore, that these are also among the most widely rights exercised by provinces.[44] Courts have broadly interpreted these provisions to grant provinces statutory authority over areas such as insurance,[45] marketing,[46] and consumer protections generally, including relating to the sale of goods. All these areas are likely to be relevant to a PACA like law in Canada. Thus, despite the fact that residual powers reside in the federal government via section 91 and no similar power exists at the provincial level, the provinces maintain involvement in commercial matters.

i. Commodities of Commerce in General Business

Regulation for the commodities of commerce is a provincial power pursuant to section 92 (13), involving property and civil rights, and 92 (16), involving matters of a local nature.[47] Business in general is considered a provincial matter where the federal government is not given explicit governing powers over particular industries, or in situations where the courts have not determined industries to be in the general national interest.[48] In legislative action for agriculture this has included the creation of provincial legislation for contract, trust, and property law.

Civil rights for constitutional purposes include private law as it governs the relationships between individual entities, as opposed to laws that govern relationships between a party and government.[49]

ii. Contracts and the Sale of Goods

The provinces of Canada are responsible for the governance of contractual relationships between private parties. This is consistent with the development of contract law through the common law: as the provinces through 92 (14) are given the jurisdiction over the administration of justice, including the creation of courts, it follows that court created legal developments in the common law would also be within the powers of the provinces.[50]

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[40] *Id.* at 1296.
[41] Federation des producteurs v. Pelland (2005), 1 S.C.R. 292.
[42] Constitution 1867, *supra* note 9, s. 92.
[43] Hogg, *supra* note 8 at ch 17, ch 21 at 1-2.
[44] Constitution 1867, *supra* note 9, s. 92 (13), (16).
[45] Citizens Insurance Co. of Canada v. Parsons, [1881] 7 App. Cas. 96 (P.C.).
[46] Shannon v. Lower Mainland Dairy Products Board, [1938] A.C. 708.
[47] Constitution 1867, *supra* note 9, s. 92 (13) and 92 (16).
[48] HOGG, *supra* note 8, at ch 21 8-9.
[49] Citizens Insurance Co. of Canada, 7 App. Cas. 96 (PC); *see also* HOGG, *supra* note 8, at 2. Hogg notes that the notion of "civil rights" in the 18th and 19th century is different than the idea of "civil liberties" that developed in the 20th century.
[50] *Constitution* 1867, *supra* note 9, s 92 (14).

Because provinces have jurisdiction over contracts and matters related to the legal arrangements between private parties, the provinces are able to exert authority over many forms of commercial relationships. In particular, the provinces have individually enacted laws dealing with consumer-business relations including: the *Sale of Goods Act*, the *Personal Property Security Act*, *Consumer Protection Act*, and *Business Corporations Act*.[51]

Sale of Goods Act

The *Ontario Sale of Goods Act*[52] governs the formation of contracts and the processes for recovery in the event a non-bankrupt buyer breaches a contractual agreement. In addition, this Act allows the seller to place a lien on securable property.[53] However, the lien is lost when the buyer gains possession.[54] If the unpaid seller retains possession and gives notice to the buyer of the intention to resell, the buyer must pay within a reasonable time or risk rescission of the contract. Furthermore, the seller can recover damages for breach of contract.[55]

While the *Ontario Sale of Goods Act* covers contracts made orally and in writing,[56] it is always recommended that produce dealers and producers record their agreements in writing to ensure a fair result should a conflict arise. It is the duty of the buyer to pay and the seller to deliver the goods.[57] These should occur concurrently, but if the buyer defaults there is little the unpaid seller can do outside of taking legal action through litigation. Suing for breach of contract may be a slow solution, especially if possession has been relinquished. Therefore, sellers may protect themselves by requesting payment prior to shipment of goods or using an independent third party to hold money in escrow.[58]

The cross-jurisdictional authority of the *Ontario Sale of Goods Act* and the federal *Bankruptcy and Insolvency Act (BIA)* may create problems in slow- or no-pay situations. When the buyer gains possession and the seller loses his lien according to provincial law, can the federal government intervene and revert the result in favor of the seller in a slow payment situation? Clearly, the answer is yes in bankruptcy scenarios because the federal government's power over bankruptcy matters is secure. A federal law will trump a provincial law but only if the federal government has authority in the matter.[59] But if the federal PACA like law cannot rest on some primary federal authority, there is a potential gap between the *Sale of Goods Act* and the *Bankruptcy and Insolvency Act*in slow-pay situations.

International Law and Provincial Contract Jurisdiction

The Canadian federal government has authority to enter into treaties.[60] But if a treaty involves significant matters of provincial authority under section 92 then concurrent provincial legislation is necessary.[61] In

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[51] Examples listed here are from Ontario, but other provinces have similar legislation: Sale of Goods Act, RSO 1990, c S 1; Personal Property Security Act RSO 1990, c P 10; Consumer Protection Act, RSO 2002 Reg 17/05 and Business Corporations Act, RSO 1990, c B 16.
[52] Ontario Sale of Goods Act, R.S.O. 1990, c S.1.
[53] *Id.* s. 38(1)(a).
[54] *Id.* s. 41.1.
[55] *Id.* s. 46(3).
[56] *Id.* s. 4.
[57] *Id.* s. 26 and 27.
[58] Phone Interview with Professor Jason Neyers, Faculty of Law, Western Ontario (July 2012).
[59] Constitution 1867, *supra* note 9. s. 52.
[60] Constitution 1867, *supra* note 9. s. 152. Technically, this original provision does not grant the federal government treaty powers. The power has evolved through complicated series of historical events. *See* HOGG, *supra* note 8, ch. 11, 11-12.

Canada, as the provinces maintain control over contracts; any international agreements or treaties related to this realm must be enacted not only in federal but also in provincial law. An example of this concept in application can be found in the *United Nations Convention on Contracts for the International Sale of Goods,*[62] to which Canada is a signatory. Judicial decisions have determined that the federal government of Canada has the constitutional authority to conclude international treaties, but the federal government cannot force the provinces to conform to treaties on matters that were beyond federal jurisdiction. As such, the provinces of Canada also had to individually enact legislation adopting the convention.[63] Thus, there exists a federal statute providing ratification for the *Convention,*[64] and each province has enacted a statute that adopts the terms of the treaty into provincial law.[65] Further, the provincial enactment of the *Convention* prevails over other provincial law governing related international sale issues.[66] The *Convention* therefore provides insight into the type of cooperation, and bi-jurisdictional legislation-which may be needed to enact a PACA-like regime in Canada.

Potential Effects of Contracts for PACA-like Laws in Canada

The PACA enacts measures that involve slow- and no- pay situations. If these measures were emulated in Canadian law, it is possible that these situations could come under provincial authority over breaches of contract if the law were not sufficiently couched in some other federal authority. As previously stated, the provinces retain jurisdiction over commercial relationships until a party declares bankruptcy.[67] When an entity declares bankruptcy, then federal authority would govern relations under the BIA.[68] The federal government itself, in the creation of agreements that are substantively commercial in nature, can be subject to provincial contract law.[69]

iii. Matters Involving Trusts

The provinces generally govern trust law, as trusts are a form of property. Jurisdiction over trust law falls to the provinces in Canada under section 92 (13) of the *Constitution.*[70] The legal development of trusts stretches back to the Court of Chancery in England, making trusts equitable obligations at common law.[71] Therefore, while federal trusts have been created, by-in-large, trusts remain within the jurisdiction of the provinces.

If a purchaser holds property in trust, the property is not part of the estate upon bankruptcy and therefore not divisible among the bankrupt's creditors.[72] As result, the beneficiary of a trust is usually able to fully

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[61] S. 132; Attorney-General of Canada v. Attorney-General of Ontario (Labour Conventions), [1937] A.C. 326, 349; for a discussion of this case's rule, *see* Hogg, *supra* note 8, ch. 11, 11-13.

[62] *United Nations Convention on Contracts for the International Sale of Goods,* 11 April 1980, S.Treaty Document Number 98-9 (1984), UN Document Number A/CONF 97/19, 1489 UNTS 3.

[63] Attorney-General of Canada v. Attorney-General of Ontario (Labour Conventions), [1937] A.C. 326, 349.

[64] International Sale of Goods Contracts Convention Act, R.S.C. 1991, c. 13.

[65] *See, e.g.*, International Sale of Goods Act, R.S.O. 1990, c I 10; International Sale of Goods Act, R.S.B.C. 1996, c 236; The International Sale of Goods Act, C.C.S.M. c S11; An Act Respecting the United Nations Convention on Contracts for the International Sale of Goods, R.S.Q. 1991, c C-67.01.

[66] In Ontario, *see* Ontario Sale of Goods Act, R.S.O. 1990, c S.1, s 5.

[67] Robinson v. Countrywide Factors Ltd, [1978] 1 S.C.R. 753, at 803-805 (Can.).

[68] BIA, c B-3.

[69] Nigel Bankes, C. D. Hunt, and J. O. Saunders, "Energy and Natural Resources: The Canadian Constitutional Framework" *Case Studies in the Division of Powers* (Toronto: University of Toronto Press, 1986), prepared for the Royal Commission on the Economic Union and Development Prospects for Canada, at 81.

[70] Constitution 1867, supra note 9, s 92 (13).

[71] PHILIP H. PETTIT, EQUITY AND THE LAW OF TRUSTS 23 (London: Butterworths 6 ed. 1989).

[72] BIA, c. B-3. s. 67(1)(a).

recover the property. The protection provided by a trust operates differently than a security interest. A security interest purports to give rights to a creditor such as seizure in order to enable recovery. But a trust provides an equitable proprietary interest in the assets themselves. Despite these differences, the result during insolvency is the same since trustees and secured creditors are first in line when assets are liquidated and distributed.

Trusts can be created in contract, however, the solution is inadequate in the ordinary course of business because Canadian law requires that the trust satisfy the common law requirements or it is "collapsed" upon bankruptcy. The common law requirements of a trust are known as the three certainties: intention, subject matter, and object. The subject matter requirement necessitates that the property being held in a trust remain clearly indefinable and separate from other property held by the individual. In the case of monies or account receivable this would require a separate account instead of an intermingled fund. If a buyer of goods does intermingle a fund, which often occurs in produce trading, the beneficiary has claim for breach of trust against the trustee, which can be used to recover those assets. But the remedy only gives rise to an unsecured claim that is worth little in an insolvency situation. These facts keep a trust established by contract from providing adequate financial protection in ordinary commercial circumstances.

A limited exception to the above outlined provincial authority is a deemed trust, where federal jurisdiction may intervene. Legislation can prevent the destruction of trusts when assets are intermingled. A statute can "deem" that property be held separate and apart, thereby artificially preventing the mixing and comingling of assets. The trust assets are then recoverable in bankruptcy by the beneficiary. A provision allowing a beneficiary of a trust to pursue trust assets even after commingling is known as a tracing provision.[73]

Deemed trusts in Canada usually create special priority for the crown. The three most prominent deemed trusts include s. 227 of the *Income Tax Act*[74] (*ITA*), s. 86 of the *Employment Insurance Act*[75], and s. 23 of the *Canada Pension Plan.*[76] All three trusts are created in favor of the government in that they take deductions from employee's to be held for the government. Crown deemed trusts operate differently than other deemed trusts during insolvency; the BIA collapses the trust except those parts involving source deductions.[77] There are also deemed trusts created in Canada for groups other than the government, namely pensioners, at the provincial level.[78] Greater discussion of the benefits of deemed trusts to create a similar trust power to that found in PACA will be discussed below.

iv. Personal Property Security Act

The Provincial *Personal Property Security Act*[79] attempts to regularize the use and enforcement of security agreements involving personal property.[80] However, while this act does support the produce industry, it provides little support for produce traders. It applies to most transactions (but a notable exception is a deemed trust).[81] A security interest in the debtor's property is taken by the secured party as

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[73] FRANCIS LAMER, PRIORITY OF CROWN CLAIMS IN INSOLVENCY at ch. 23 (Scarborough, Ont; Carswell, looseleaf 1996).
[74] Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.) s. 227(4).
[75] Employment Insurance Act, R.S.C. 1996, c. 23 s. 86.
[76] Canada Pension Plan, R.S.C. 1985, c C-8 s. 23.
[77] BIA, s. 69(2); *see also* British Columbia v. Henfrey Samson Belair Ltd, [1989] 2 S.C.R. 24 (Can.).
[78] *See* Pension Benefit Act, R.S.O. 1990, c P8.
[79] Personal Property Security Act, R.S.O. 1990, c P.10. For the purposes of this report one provincial statute (that of Ontario) will be examined, but similar legislation has been created in all of the individual provinces.
[80] FULLER, *supra* note 12, at 88.
[81] Personal Property Security Act, R.S.O. 1990, c P.10, s 4(1)(b).

collateral to ensure the repayment of a loan. By leveraging their personal property in this way, farmers are able to obtain credit to buy farm machinery, crops, livestock and farm equipment.[82] The PPSA protects the buyer where the buyer is a good faith buyer, for value, without any notice to defect in the title of the goods.

Section 32 provides a special priority for secured creditors who extend credit to farmers for the purpose of producing their crops. For example, if the value given by the creditor is used to buy fertilizer, the creditor will enjoy priority because of the fertilizer's contribution to the production of the crops.[83] While this section contributes to the farming industry in a positive way, it affords no protection for the crop producer or seller. However, since a farmer is at liberty to make a *bona fide* sale of produce in the ordinary course of business, title to the produce is conferred to the buyer despite the security interest held by the creditor.[84] This is because growing crops can be treated as chattels while growing for the purposes of the *Sale of Goods Act* and can be the subject of contracts of sale at or after harvesting.

v. The Execution Act

When an individual is bankrupt, there are certain assets that are exempted from seizure by creditors. These related to the individual's survival necessities. As stipulated in s. 2 (1) of Ontario's *Execution Act,*[85] for farmers the exemptions include farming equipment, livestock, and seeds. Not included are the produce assets that a famer-buyer has obtained upon delivery. This means that a produce seller could still seize produce assets in the event of buyer's bankruptcy. However, it also means that the buyer's creditors can seize the seller's produce assets for unpaid debts. The current form of subsection (1) will be repealed on an unspecified future date. The substituted provision will make no direct reference to farmers:

Execution Act
Exemptions (1) The following personal property of a debtor that is not a corporation is, at the option of the debtor, exempt from forced seizure or sale by any process at law or in equity: 1. Necessary clothing of the debtor and the debtor's dependants. 2. Household furnishings and appliances that are of a value not exceeding the prescribed amount. 3. Tools and other personal property of the debtor, not exceeding the prescribed amount in value, that are used by the debtor to earn income from the debtor's occupation. 4. One motor vehicle that is of a value not exceeding the prescribed amount. 5. Personal property prescribed by the regulations that is of a value not exceeding the prescribed amount. 2010, c. 16, Sched. 2, s. 3 (6). Personal property exceeding exempted value (1.1) Despite paragraphs 2, 3, 4 and 5 of subsection (1), if the value of the personal property exceeds the

[82] FULLER, *supra* note 12.
[83] J.R. SANDRELLI AND C.N. MATTHEWS, STATUTORY CONSIDERATIONS WHEN DEALING WITH AGRICULTURAL INSOLVENCIES 11 (2005).
[84] Nourse v. Canadian Canners Limited, [1935] O.R. 361(CA).
[85] Execution Act, R.S.O. 1990, c E.24.

prescribed amount for the property, the property is subject to seizure and sale under this Act. 2010, c. 16, Sched. 2, s. 3 (6).

There is no specific provision that exempts a buyer's goods from seizure. As a result, unpaid sellers are not precluded from repossessing goods from a bankrupt buyer.

C. Concurrent Powers: Agricultural Law

The power over agriculture is not found in sections 91 or 92 of the *Constitution*. Instead section 95[86] grants joint jurisdiction over agriculture and immigration by both the provincial and federal governments. Even though agriculture is a joint power, most court cases involving the regulation of agricultural produce have been analyzed within sections 91 and 92. Even still, according to Canadian agricultural law scholars Robert Fuller and Donald Buckingham, this concurrent provision has led to a great deal of debate and litigation about which specific aspects of agriculture transactions are controlled by the provinces, and which aspects are proscribed to the federal state.[87] Canada's early years were marked with strict restrictions on both the federal and provincial governments regarding the unilateral regulation of agricultural law. While those restrictions have loosened, the law is still uncertain.

i. Court Interpretations of Section 95

In Canada, the Privy Council and Canada's Supreme Court have interpreted the scope of agricultural law through official opinions and "reference question cases."[88] Generally speaking, courts have divided authority by granting the federal government power over the actual growing of crops or tending to animal and the provinces over the marketing and other commercial acts relating to farm products. As some scholars have put it, the federal government regulates "inside the farm gate" and the provinces "outside."[89] Lastly, the federal government has maintained some authority to regulate the trade flows of international and interprovincial produce.[90]

Early on, the Court struggled to divide authority in agriculture law. In *King v Eastern Terminal Elevator Co.*, the Court narrowed federal authority. Therein, the question was the validity of a federal law that stabilized the grain trade, three-fourths of which was interprovincial. In its analysis, the Court found that the law fell within s. 91, the trade and commerce clause, rather than s. 95, agricultural, because it sought

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[86] Constitution 1867, *supra* note 9, s.95.

> In each Province the Legislature may make Laws in relation to Agriculture in the Province, and to Immigration into the Province; and it is hereby declared that the Parliament of Canada may from Time to Time make Laws in relation to Agriculture in all or any of the Provinces, and to Immigration into all or any of the Provinces; and any Law of the Legislature of a Province relative to Agriculture or to Immigration shall have effect in and for the Province as long and as far only as it is not repugnant to any Act of the Parliament of Canada.

[87] FULLER, *supra* note 12, at 142.

[88] Prior to 1939, Canada's highest court was the Privy Council of the U.K. and thereafter the Supreme Court. HOGG, *supra* note 8, ch 8 at 18-19; *see also* Attorney-General of Ontario v. Attorney-General of Canada (Reference Appeal) [1912] A.C. 571. "Reference Cases" are issues submitted by the federal or provincial governments for advisory opinion and are not legally binding, though governments have adhered to these opinions as if they were.

[89] FULLER, *supra* note 12, at 144.

[90] Murphy v. C.P.R. [1958] S.C.R. 626 (upholding federal law requiring compulsory sale to the federal government on export oriented grain for pooling and price stabilization); R. v. Klassen (1959) 20 D.L.R. (2d) 406 (Man. C.a.)(upholding a federal law that established a quota system on producers—enforced through grain elevators and mills—to ensure equal access to interprovincial and export market since it also applied to local processing and sale in that it prevented local producers from selling excess produce in exchange for feed, seed, or flour.). It is unclear to what extent the Supreme Court would extent the ruling in *R. v. Klassen*. While the Court has upheld similar laws, they have not involved agricultural goods. *See* Caloil v. A-G. Can. [1971] S.C.R. 543, 551.

to regulate goods in commerce rather than agricultural processes.[91] To that end, the federal government's authority over trade was not based on the geographic destination of the goods alone.[92] In this instance, the law was invalid because it fastened on intraprovincial local operations by regulating grain elevators in its licensing scheme.[93] Similarly, despite the federal government's treaty authority, it must seek provincial enactments if there the subject matter significantly falls within provincial issues.[94] Meanwhile, the Court also restricted provincial authority over agriculture in *Lawson v. Interior Tree Fruit & Vegetable Committee of Direction*. Therein, the Privy Council found invalid a provincial law regulating the marketing of fruit trees, regardless of destination. In reaching this decision, the Court found that the law encroached on federal trade and commerce powers by catching produce that might be shipped and sold outside the province.[95]

After the Supreme Court of Canada took over the Privy Council's role as Canada's highest court the federal government strengthened its authority in agricultural issues. This started with *Ont. Farm Products Marketing Re*, where the Court noted in dicta that there might be situations when the federal government could regulate intraprovincial matters incidental to a federal objective.[96] Then came *Murphy v. C.P.R.*[97] Therein, the Court upheld a portion of a federal law that created the compulsory purchase of any grain exported outside a province in order to pool and distribute grain revenues to stabilize the market. This demonstrated that the federal government could regulate the export of produce for a national purpose.[98] Lastly, the Supreme Court ruling in *Dominion Stores v. The Queen* cast doubt on how far federal authority has actually come in this realm. Therein, the Court held that a federal law that set national grade names and standards was unconstitutional because it involved intraprovincial transactions.[99] One distinction may have been that the law attempted to regulate how products were sold rather than the actual flow of those products in commerce. However, it is also not clear what authority this case carries. It has been criticized by constitutional scholars like Peter Hogg and even second guessed by the Justices in the written opinion.[100]

Despite these confusions, courts have consistently favored federal legislation that was enacted in coordination with the provinces. Federal authority over marketing legislation, previously the explicit arena of the provinces,[101] was given the approval of the courts in *Reference re: Agricultural Products Marketing Act (Canada)*[102] despite its intraprovincial coverage over an industry that was 90% intraprovincial. As companion provincial legislation was enacted alongside federal legislation, the

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[91] King v. Eastern Terminal Elevator Co. [1925] 3 D.L.R. 1.
[92] *Id.* at 457; Can. Federation of Agriculture v. A.-G. Que. [1951] A.C. 179 (finding the regulation of margarine to be over goods, rather agriculture).
[93] *Id.*; *see also* A.-G. B.C. v. A.-G. Can. (Natural Products Marketing) [1937] A.C. 377 (striking law that focused on exported goods); Can. Federation of Agriculture v. A.-G. Que. [1951] A.C. 179.
[94] Attorney-General of Canada, [1937] AC 326.
[95] Lawson v. Interior Tree Fruit and Vegetable Committee of Direction, [1931] S.C.R. 357.
[96] Ontario Farm Products Marketing Reference [1957] S.C.R. 198.
[97] Murphy v. C.P.R. [1958] S.C.R. 626.
[98] This rule was also upheld in a Manitoba court of appeals. R. v. Klassen (1959) 20 D.L.R. (2d) 406 (Man. C.a.). Some have suggested that decision like Caloil, wherein the court upheld a federal law regulating the interpronvical trade of oil, strengthens this rule. Caloil v. A-G. Can. [1971] S.C.R. 543, 551; *see* LASKIN, CANADIAN CONSTITUTIONAL LAW 476; *see also* Montana Mustard Seed Co. v. Continental Grain Co. [1974] 49 D.L.R. (3d) 72 (Sask. C.A.), affirmed [1976] 2 W.W.R. 768 (S.C.C.) (did not address constitutional question).
[99] [1980] 1 S.C.R. 844, 846.
[100] *Id.* at 866 ("I say no more than to point out that these apples clearly form no part of the process of agriculture once they have entered the commercial marketing conduits and therefore I believe the fate of these proceedings in no way turns upon the availability of s. 95").
[101] Reference re Natural Products Marketing Act, 1934 [1937] AC 377.
[102] Reference: re Agricultural Products Marketing Act (Canada), [1978] 2 SCR 1198.

Supreme Court lauded praise on the governments for their cooperative efforts to create a system of support for agricultural producers.[103]

ii. Court Interpretations of Legislation

In order to interpret where the lines of jurisdiction between the federal and provincial government should be drawn on matters of agriculture law, the courts have often referred to sections 91 and 92 in order to interpret section 95.[104] In doing so the "pith and substance"[105] of agricultural laws are assessed by the courts in light of the powers given the governments under the *Constitution.*[106]

For example, on matters related to agricultural trade that is interprovincial (and thereby national in scope) or international, the federal government is the leading body to create laws and regulations governing this sector. As provinces retain control over local matters, intraprovincial trade is left to the provinces. As it is rare that one agricultural commodity is produced exclusively for either international and interprovincial, or intraprovincial trade, federal and provincial laws sometimes regulate the same products in related ways for separate markets.[107] This, in turn, often necessitates federal-provincial cooperation related to agricultural law.

iii. Legislation Related to Agriculture

This section includes several pieces of significant legislation that exemplify, and elaborate on, jurisdiction for the provinces and federal governments.

Joint Legislation

As found in the *Reference re: Agricultural Product Marketing Act (Canada)* case discussed above, there have been instances of cooperative efforts between the provinces and the federal government. This has happened in a number of areas including marketing legislation, grading, and financial aid for producer-farmers. Note that provincial legislation will be reviewed here, but further detail about many of the provincial *Acts* can be found in the discussion of provincial laws below.

Marketing

The ability of the federal government to create laws related to the marketing of agricultural products is available where the marketing schemes are restricted to interprovincial and international trade, as consistent with the constitutional power over trade and commerce. The provinces control intraprovincial marketing in this sector. In instances of provincial laws creating marketing legislation involving exports or imports into a province, the Supreme Court of Canada has struck such laws as unconstitutional.[108] The courts have allowed limited jurisdictional encroachment by governments.[109] It is possible, therefore, to see a chain of continuity in terms of the treatment of producers between provincial and federal agricultural marketing laws.

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[103] *Id.* at 1296.
[104] FULLER, *supra* note 12, at 144.
[105] *See* HOGG, *supra* note 8, ch 15 at 18. Hogg notes that identifying the "pith and substance" of a law is essential to determining which head of power (federal or provincial) has jurisdiction over the matter. This is an essential first step of analysis in all litigation involving constitutional issues.
[106] *Id.*
[107] *Id.* at 146; For more on this point, *see* discussion on produce marketing laws below.
[108] Lawson v. Interior Tree Fruit and Vegetable Committee of Direction, [1931] S.C.R. 357 (Can.).
[109] Reference: re Agricultural Products Marketing Act (Canada), [1978] 2 SCR 1198.

Federally, the legislation governing marketing programs is the *Agricultural Marketing Programs Act.*[110] Although the *Act* has a number of provisions governing the marketing of agricultural products two central programs for the purposes of the parties' interests are the Advance Payments Program set out in part I and the Price Pooling Program in part II.[111] The federal Advance Payments Program assists farmers by guaranteeing the repayment of advances made to them by loaning companies as a means of improving cash flow.[112] This federal loan guarantee program facilitates credit to producers up to $400,000 in cash advances for producers allowing them to meet short-term financial obligations including cash flow needs.[113] The federal government will pay the interest on the first $100,000 of the cash advance for each production period.[114] In order to obtain a loan the producer must be the member of a recognized producer organization.[115]

The federal Price Pooling Program, as the name implies, guarantees prices for agricultural goods among marketing boards and associated producers regardless of fluctuations in the market.[116] Like the Advance Payments Program, the objective of this program is to improve cash flow to farmers, as the price guarantee can be used as a security against which producers may obtain credit.[117] The program also effectively extends the season for the sale of produce as prices are guaranteed.[118] The *Act* also gives the government of Canada the ability to purchase, import, or sell agricultural goods.[119]

Provincial acts related to marketing, by contrast, provide the government the ability to create marketing boards for specific types of produce.[120] It is through these boards that many of the agricultural programs at the federal and provincial level are administered. According to statistics available from the government of Ontario, approximately 60% of value of all agricultural products produced in the province is marketed through one of Ontario's twenty-one marketing boards, making these provincially created marketing boards a powerful ally to producers.[121]

Grading

The grading of products bound for interprovincial or international trade is governed by the *Canada Agricultural Products Act.*[122] In the federal *Act*, section 32 gives the Minister the ability to: create regulations related to product grades, grant licenses for those carrying out operations governed under the *Act*, and inspect registered establishments for purposes of assessing hygiene and maintenance.[123] Under

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[110] Agricultural Marketing Programs Act, R.S.C. 1997, c 20.
[111] *Id.* ss.4-25, 26-30.
[112] AGRICULTURE AND AGRI-FOODS CANADA, AGRICULTURAL MARKETING PROGRAMS ACT (AMPA) ADVANCE PAYMENTS PROGRAM (APP): ADMINISTRATIVE GUIDELINES 8 (Ottawa: Agriculture and Agri-Foods Canada, 2007).
[113] *Id.*
[114] Department of Agriculture and Agri-Foods Canada, *Programs and Services: Advance Payments Program*, http://www4.agr.gc.ca/AAFC-AAC/display-afficher.do?id=1290176119212&lang=eng (last visited July 11, 2012).
[115] *Id.* Examples for Ontario include: ACC Farmers Financial, Ontario Cattleman's Association.
[116] Department of Agriculture and Agri-Foods Canada, *Programs and Services: Price Pooling Program*http://www4.agr.gc.ca/AAFC-AAC/display-afficher.do?id=1289934791790&lang=eng(last visited July 11, 2012).
[117] *Id.*
[118] *Id.*
[119] Agricultural Marketing Programs Act, R.S.C. 1997, c 20, s 31.
[120] *See* Farm Products Marketing Act, R.S.O. 1990, c F 9.
[121]Ministry of Agriculture, Food and Rural Affairs (Ontario), *Farm Products Marketing Commission: Agricultural Marketing Boards in Ontario*, http://www.omafra.gov.on.ca/english/farmproducts/factsheets/ag_market.htm (last visited July 11, 2012).
[122] Canada Agricultural Products Act, R.S.C., 1985, c 20 (4th Supp).
[123] *Id.* s. 32.

the *Act* are a series of regulations related to the grading of particular products.[124] Enforcement of provisions allows inspection officers to seize goods[125] and stop the importation of goods contravening the *Act.*[126]

Grading legislation produced by the provinces governs only intraprovincial trade in agricultural products.[127] As producers are often unsure as to the destination of their crops at the time of production, some provincial grading standards conform to those set out in the *Canada Agricultural Products Act* only with limited modifications.[128]

Financial Aid

The means of financial aid available to producers beyond the federal *Agricultural Marketing Programs Act* are extensive and may involve provincial partnerships and contributions. At the federal level a number of acts support agricultural producers financially: *Canadian Agricultural Loans Act,*[129] *Farm Credit Canada Act,*[130] *Farm Debt Mediation Act,*[131] and *Farm Income Protection Act.*[132] Of these only the *Farm Income Protection Act* is cross-jurisdiction legislation with the provinces, only it will be discussed here. Other *Acts* related to the financing of agriculture will be discussed below in the Federal legislation section.

The federal *Farm Income Protection Act* authorizes agreements between the government of Canada and the provinces to protect the income of producers of agricultural products. This may take the form of either stabilization banking accounts or insurance.[133] As this *Act* involves both banking (a federal matter) and insurance (a provincial matter) cooperative agreements between the governments were established. These partnerships between the provinces and federal government generally allow: 1) for crop and revenue insurance and 2) farmers to contribute a percentage of their net sales to an account where both levels of government match contributions to a pre-determined limit.[134] In this second account model for assistance, money may be withdrawn where either a stabilization trigger or minimum income trigger occurs for the farmer.[135] Regulations created under the *Act* may apply benefits to the producers of particular types of produce or the produce of a particular province.[136]

At the provincial level, several individual provinces have statutes which create partnerships with the federal government. In some provinces, two or more acts create this partnership: one act gives the provinces the ability to contribute funds to stabilization accounts while another creates an agency or Crown corporation to administer the financial contributions.[137] In Alberta, the legislation is the *Farm*

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[124] *See* Fresh Fruit and Vegetable Regulations, C.R.C., c. 285.
[125] Canada Agricultural Products Act, R.S.C., 1985, c 20 (4th Supp),.ss 24-29.
[126] *Id.* ss. 24-29.
[127] *See* Agricultural Produce Grading Act, R.S.B.C. 1996, c 11, s 2.
[128] *See* Fruit and Vegetable Regulation B.C. Reg. 100/78, s 1. Also some provinces such as Manitoba do not have Produce Grading Legislation and defer to the federal standards.
[129] Canadian Agricultural Loans Act, R.S.C. 1985, c 25 (3rd Supp).
[130] Farm Credit Canada Act, R.S.C. 1993, c 14.
[131] Farm Debt Mediation Act, R.S.C. 1997, c 21.
[132] Farm Income Protection Act, R.S.C. 1991, c 22.
[133] *Id.* s 4 (1).
[134] SAM MCCULLOUGH, THE LEGAL STRUCTURE OF FARM SAFETY NET PROGRAMS, *in* LAW AGRICULTURE AND THE FARM CRISIS, (Donald E. Buckingham & Ken Norman eds,, 1992).
[135] *Id.* at 50.
[136] *See* British Columbia Prune-plum Stabilization Regulations, 1983, SOR/85-1035 *and* Greenhouse Cucumber Stabilization Regulations, 1982, SOR/84-22.
[137] This is the case in Alberta.

Credit Stability Act[138] and the *Agriculture Financial Services Act.*[139] In British Columbia there is the *Farm Income Insurance Act.*[140] In Manitoba, there exists *The Farm Income Assurance Plans Act.*[141] In Ontario, the legislation is *Crop Insurance Act (Ontario).*[142] In Quebec, there exists *An Act Respecting Farm Income Stabilization Insurance.*[143] Lastly, in Prince Edward Island the legislation is called the *Agricultural Insurance Act.*[144]

Exclusive Federal Legislation over Agriculture

Legislation that is solely of federal jurisdiction has dealt with mainly international trade and agricultural issues of a national interest. This has included a series of *Acts* related to financial arrangements, international trade, as well as product standards and safety.

Financial Aid for Agriculture

As matters related to banking[145] and bankruptcy[146] fall under the jurisdiction of the federal government, so too does agricultural legislation that relates to these financial arrangements.

Of the federal legislation in this area perhaps the most financially significant is the *Canadian Agricultural Loans Act*, which provides loans to qualified farmers and cooperatives where 95% of the loan repayment is guaranteed by the federal government.[147] In this program up to $500,000 in loans can be accessed for building or land improvement, and $350,000 for all other purposes, with the maximum aggregate loan restricted to $500,000 to any one borrower.

The federal *Farm Credit Canada Act* established the Crown-corporation (i.e., a federal government controlled corporation) of Farm Credit Canada (FCC). This corporation exists to provide greater financial resources and services to farmers in Canada, and has the power to make or guarantee loans as well as take a security interest in agricultural-sector borrowers.[148] Through the *Act* the FCC may also offer venture capital financing, create lending programs aimed at particular constituencies (e.g., the Accelerator Loan for young farmers), and develop loan programs to help producers with associated agriculture investments (e.g., Energy Loan to assist farmers interested in converting to self-sufficient energy production).[149]

The federal *Farm Debt Mediation Act* gives insolvent farmers the ability to stay proceedings in the event that a creditor wants to realize a security.[150] Mediators may then meet with approved farmers and

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[138] Farm Credit Stability Act, R.S.A. 2000, c F-6
[139] Agriculture Financial Services Act, R.S.A. 2000, c A-12.
[140] Farm Income Insurance Act, R.S.B.C. 1996, c 130.
[141] The Farm Income Assurance Plans Act, C.C.S.M. c F30.
[142] Crop Insurance Act (Ontario), 1996, R.S.O. 1996, c 17, Sched C.
[143] An Act Respecting Farm Income Stabilization Insurance, R.S.Q. 2001, c A-31.
[144] Agricultural Insurance Act, R.S.P.E.I. 1988, c A-8.2.
[145] Constitution 1867, *supra* note 9, s.91 (15).
[146] *Id.* s.91 (21).
[147] Department of Agriculture and Agri-Foods, *Guide: Canadian Agricultural Loans Act*, http://www4.agr.gc.ca/AAFC-AAC/display-afficher.do?id=1288035482429&lang=eng (last visited July 11, 2012).
[148] Farm Credit Canada Act, R.S.C. 1993, c 14s 4.
[149] Farm Credit Canada, *Our History*, http://www.fcc-fac.ca/en/aboutus/profile/history_e.asp (last visited July 11, 2012).
[150] Farm Debt Mediation Act, R.S.C. 1997, c 21, s 5 (1) (a).

creditors to develop a mutually accepted agreement.[151] During a stay of proceedings creditors may not enforce a remedy or continue proceedings against the farmer.[152]

International and Trade Law for Agriculture

The federal government's power to govern trade and commerce under the *Constitution* includes the ability to conclude treaties and international trade arrangements.[153] Laws relating to international trade for agricultural products are largely found in legislation regulating trade practices generally. For example, regulations made under the *Export and Import Permits Act*[154] contain limits to the amount of trade specific agricultural products.[155] Canadian farmers have used both this *Act* and associated regulations under the *Canadian Agricultural Products Act* to block imports of produce that were deemed to have a negative impact on the overall Canadian market.[156] A series of laws dealing with injurious or unfair competition law also apply to the international trade of agricultural products.[157]

Other statutes dealing with product standards and safety directly related to agricultural practices include: the *Seeds Act*[158] and the *Plant Protection Act.*[159] These latter two *Acts* prohibit the importing and exporting of certain plants and soil products.

Product Standards and Safety

The jurisdiction of the federal government over food safety and standards is not spelled out as a particular constitutional power, but was developed through the courts' interpretation of the federal government's trade and commerce power.[160] As Peter Hogg notes, these constitutional powers to regulate food product standards may be upheld as long as "that power . . . extend[s] to the mandatory prescription of nation-wide standards for the manufacture of foods and drugs."[161] The main piece of legislation governing this area of federal authority is the *Canadian Agricultural Products Act* (see discussion above). However other statutes dealing with standards and safety include: *Fertilizers Act*,[162] *Feeds Act*,[163] *Pest Control Products Act*,[164] and the *Food and Drugs Act*.[165]

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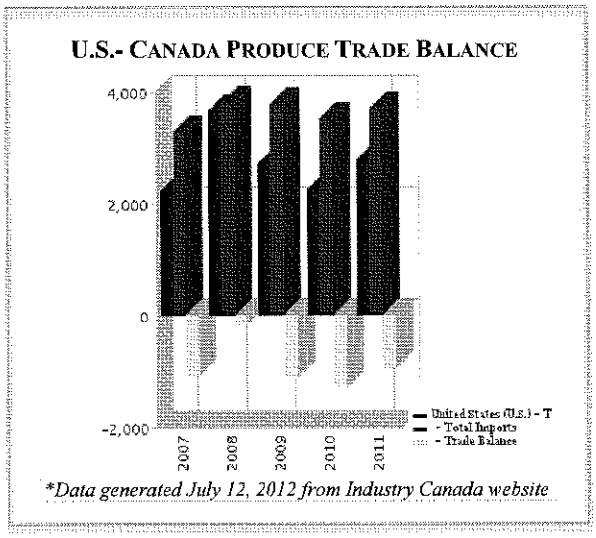
[151] *Id.* at s 5 (1) (b).
[152] *Id.* at s 12.
[153] Constitution 1867, *supra* note 9, s 91 (2).
[154] Export and Import Permits Act, R.S.C., 1985, c E-19.
[155] *See* Export of Sugar Permit SOR/83-722; General Export Permit No. Ex. 31 — Peanut Butter SOR/95-41;General Import Permit No. 7 — Turkeys and Turkey Products for Personal Use SOR/95-38.
[156] FULLER, *supra* note 12, at 196. Such actions have been undertaken as anti-dumping measures under international legal regimes such as may be found in the Special Import Measures Act, R.S.C. 1985, c S-15.
[157] *See* Special Import Measures Act, R.S.C. 1985, c S-15 ; *see also* The Canadian International Trade Tribunal Act, R.S.C. 1985, c 47 (4th Supp).
[158] Seeds Act, R.S.C. 1985, c S-8.
[159] Plant Protection Act, R.S.C. 1990, c 22.
[160] *See* Brooks v. Moore, [1907] 13 B.C.R. 91; *see also* R v. Bradford Fertilizer Co., [1972] 1 O.R. 229.
[161] HOGG, *supra* note 8, ch 20 at 13.
[162] Fertilizers Act, R.S.C. 1985, c F-10.
[163] Feeds Act, R.S.C. 1985, c F-9.
[164] Pest Control Products Act, R.S.C., 2002, c 28.
[165] Food and Drugs Act, R.S.C., 1985, c F-27.

IV. EXISTING LEGAL PROTECTIONS FOR INTERNATIONAL AND INTERPROVINCIAL PRODUCE TRADERS

Since the NAFTA, trade in fresh produce has significantly increased between the U.S. and Canada.[166] In the U.S., the Agricultural Marketing Service regulates the sale of perishable agricultural commodities in interstate and foreign commerce to dealers, brokers, and commission merchants.[167] Legislatively, the *Perishable Agricultural Commodities Act* provides protections that mitigate the unique risks faced by the sellers in such transactions.[168] However, as it is a U.S. law, the PACA does not apply when the sellers (or shippers) export produce to buyers in Canada. As a result, shippers must avail themselves of the protections available under the federal Canadian Agricultural Products Act (CAPA), or alternatively join the private Fruit and Vegetable Dispute Resolution Corporation (DRC) to facilitate a remedy resulting from a dispute in the course of their international trade. This has created unique challenges for U.S. Produce Traders when they choose to export their perishable agricultural commodities to Canadian buyers.



Presently, U.S. Shippers must familiarize themselves with the federal, state, provincial, and private "licensing" systems provided by the Canadian Food Inspection Agency (CFIA, under the CAPA) and the DRC. These regulatory entities offer resources for U.S. shippers to conduct due diligence on potential buyers, and in the case of the DRC, offer a means to resolve disputes involving transactions of fresh produce between its members.[169] However, ultimately U.S. Produce Traders must rely on sound business practices, including good record keeping and use of written contracts in transactions with Canadian buyers as no PACA-like legislation exists at either the Federal or Provincial level. For an industry that frequently trades through verbal agreements this is more complicated than it may seem.

This section begins by presented a list of the current protections offered to international and interprovincial produce traders in Canada. In the second part of this section a survey of Provincial Statutes and Regulations related to fresh and frozen produce is presented.[170] These descriptions are restricted to "produce traders" rather than those involved in the trade of livestock generally or intraprovincial grading.[171] This was an important cut off to make because of the breadth of legislation

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[166] Free Trade Agreement Helped U.S. Farmers, *supra* note 1. Statistics for the last five years on trade balances in agricultural commodities between the U.S. and Canada are available by province in Appendix G.

[167] Statutory trust under Perishable Agricultural Commodities Act, 128 A.L.R. Fed. 303, 1 (1995).

[168] Perishable Agricultural Commodities Act, 7 USC §499e et seq..

[169] *Fruit and Vegetable Dispute Resolution Corporation - Mediation and Arbitration Rules*, http://www.fvdrc.com/adx/aspx/adxGetMedia.aspx?DocID=10,1,Documents&MediaID=a6d1522c-ab21-462e-8666-dbe44ffe5ae2&Filename=DRC_Med_%26_Arb_Rules_May_26_2011_english.pdf.

[170] The Provinces under study are: Alberta, British Columbia, Manitoba, Ontario, Prince Edward Island (PEI), and Quebec.

[171] *See* Agri-Food Choice and Quality Act, S.B.C 2000, c 20; Agricultural Produce Grading Act, R.S.B.C. 1996, c 11; The Fruit and Vegetable Sales Act, R.S.M. 1987, c F180; Farm Products Containers Act, R.S.O. 1990, c F.7; Farm Products Grades and Sales Act, R.S.O. 1990, c F.8; Food Safety and Quality Act, 2001, S.O. 2001, c 20;

involved as well as the differences in Regulation in the latter two areas of business. Also, the PACA Trust was designed to protect traders of perishable commodities—mainly fruits and vegetables—where short shelf lives have a measurable effect on marketability.[172] Therefore, although some of the legislation included in this section may be applicable to all producers and traders of anything farmed, the focus of the analysis will remain on produce (fruits and vegetables).

Additionally, it is important to note at this point that there are constitutional constraints (as noted above) affecting the power of the provinces to enact legislation with regards to agriculture. This materially affects the relevance of Provincial Statutes when considering how to protect the rights of produce traders on an international or interprovincial level. In general, what has been found is that the provincial statues are highly restricted to deal with issues of intra-provincial concern.

A. Federal Protections

Every produce dealer involved in *interprovincial or international* trade must register with one of two available regimes – the CFIA-administered CAPA, or the private DRC - both of which allow for due diligence of potential buyers and provide a forum for the resolution of payment disputes between shippers (sellers) and buyers in Canada. [173]

i. U.S. Protections – The PACA

The PACA was enacted in the U.S. in 1930 to regulate the marketing and trade of produce and other agricultural commodities in interstate and international trade. Since perishable commodities lose their value quickly due to spoilage, the PACA was established to remedy the perceived unfairness that the ordinary collection process imposed on agriculture producers. PACA ensured that proceeds from the sale of perishable goods were being used to pay the businesses that had produced the goods.[174]

Part of the reason for a federal law was the belief that ordinary state court collections lawsuits for the recovery of damages (the typical remedy available to shipper/traders pre-PACA) did not adequately protect the sellers of perishable goods. The legislature found that certain financing arrangements, which took place in the market downstream from the shippers, were responsible for depriving the shippers from payment, and ultimately disserved the public interest. The PACA was designed to be a sort of "self-help" tool to enable shippers/traders of fresh produce to protect themselves from the risk of losses resulting from the frequently-encountered slow-pay and no-pay practices by receivers of fruits and vegetables.[175]

Representatives from the fruit and vegetable industry have estimated that more than $1 billion has been collected as a direct result of the PACA Trust provisions. According to executive vice president of the Western Growers Association and PACA expert Matt McInerney, "The PACA Trust delivered on its

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Agricultural Products Standards Act, R.S.P.E.I. 1988, c A-9; Food Products Act, R.S.Q., c P-29 (Food grading for imports falls under federal jurisdiction, and provincial grades, in general, are supplementary for intra-provincial produce. As such, the Statutes are not highly relevant to the goal of establishing a PACA-like trust).

[172] *See* Belobaba, *supra* note 8.

[173] *Options for Financial Risk Mitigation in Canada's Fresh Produce Industry*, Serecon Management Consulting, Inc. 12 (March 2012) [hearinafter *Serecon*].

[174] Elan A. Gershoni & Shan A. Haider, Trust in the PACA Trust: A Bankruptcy Practitioner's Primer on the Perishable Agricultural Commodities Act , ABI *Unsecured Trade Creditors Committee Newsletter*, http://www.abiworld.org/committees/newsletters/utc/vol9num2/trust.html (last visited July 11, 2012)

[175] Scott Blakeley, *PACA Claims Against Owners of Business*, TRADE VENDOR QUARTERLY – BLAKELEY & BLAKELEY (2005), *available at* http://www.coveringcredit.com/business_credit_articles/Laws_and_Regulations/art782.shtml (last visited July 11, 2012).

promise to protect farmers . . . Every dollar that's preserved in the PACA Trust is being brought back to the farm so that they can battle another day. It makes the difference between them having a profitable year, or being around to continue to produce a food product for the American consumer."[176]

In 1984, Congress amended PACA to impose a statutory trust in favor of any unpaid produce supplier (the "PACA trust).[177] Congress found that in the agriculture industry it was common for producer / sellers of perishable agricultural commodities to not receive missed payments for shipments when a buyer had to liquidate inventory due to insolvency or bankruptcy. Congress recognized this as a "burden" on the industry and "contrary to the public interest."[178] To fix the problem, Congress provided unpaid suppliers with a trust over any goods sold, related account receivables, and proceeds from the sale of goods.[179] Essentially, the PACA trust ensures that unpaid suppliers are paid first when their buyer's wind up in a bankruptcy situation. The provision provides an effective risk mitigation tool for U.S. agriculture producers.[180]

Operation of the PACA Trust

Any perishable agriculture product supplier who sells to a "commission merchant, dealer, or broker" can use a PACA trust.[181] As mentioned above "all inventories of food or other products derived from perishable agricultural commodities, and any receivables or proceeds from the sale of such commodities or products" in connection with the transaction are deemed to be held in trust by the merchant, dealer, or broker.[182] To use a PACA trust the seller needs to specify that the goods that are sold are subject to a PACA trust. The seller can do this by simply including standard language on the purchase invoice stating:

The perishable agricultural commodities listed on this invoice are sold subject to the statutory trust authorized by section 5(c) of the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. 499e(c)). The seller of these commodities retains a trust claim 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.[183]

ii. Canadian Federal Protections - The CAPA

Under the Canadian Agricultural Products Act (CAPA), the Canadian Food Inspection Agency (CFIA) administers the Produce Licensing Regulations in Canada. The CAPA's full title explains its purpose in greater detail:

An Act to regulate the marketing of agricultural products in import, export, and interprovincial trade and to provide for national standards and grades of agricultural products, for their inspection and grading, for the registration of establishments and for standards governing establishments.[184]

The CAPA provides the statutory basis for the interprovincial and international trade of fresh produce. Until the 1974 decision in *Steve Dart Co. v. D.J. Duer & Co.*, a Board of Arbitration was appointed to

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[176] Whalen, *supra* note 4.
[177] *The Perishable Agricultural Commodities Act - Superpriority Lien*, Meyner and Landis LLP, http://www.meyner.com/CM/CreditorsRights-Bankruptcy/Articles19.asp (last visited July 11, 2012).
[178] Perishable Agricultural Commodities Act. 7 U.S.C. § 499(e)(c)(1).
[179] *Id.* § 499 (e)(c)(2).
[180] *Id.*
[181] Perishable Agricultural Commodities Act, *supra* note 177, § 499(e)(c)(2).
[182] *Id.*
[183] *Id.* § 499(e)(c)(4).
[184] *Id.*

adjudicate complaints concerning the failure of a licensee to pay an account due to a supplier / shipper.[185] From 1934 to 1974, the Canadian Board of Arbitration (BOA) administered the licensing program for shippers and buyers of fresh produce. However, in 1974, a court held it to be illegitimate, relegating the BOA to rule on disputes pertaining to grading standards only.[186]

The Steve Dart Decision and its effect on the CAPA

In *Steve Dart*, the BOA's statutory authority to provide rulings over disputes was challenged in Federal Court. The Court reasoned that Parliament had no statutory authority to set up any sort of system of tribunals through CAPA for adjudicating a dispute among CAPA licensees under s.101 of the *Constitution*.[187] Tribunals cannot simply be set up through an order of counsel, as was the case with the creation of the BOA at that time.[188] In the wake of this decision, the BOA was relegated to rule on grading and standards only. Arbitration between disputing parties would only be allowed on a voluntary basis.

Even though CAPA was amended in 1983 to partially reinstate the authority of the BOA and strengthen licensing requirements for its licensees, the BOA still remained without power to rule on contractual disputes pertaining to non-payment of invoices and intraprovincial trade.

It was believed then that such authority could only be granted to a federal board either through a change in the Constitution, or through the establishment of cumbersome federal-provincial agreements, both of which were politically unachievable at the time. The CFIA BOA thus fell short of vital industry needs and expectations in several critical areas, leading to greater incidences of non-payment and slow-payments, as well as increased frustration among shippers of agricultural products to Canada.[189]

After the decision in *Steve Dart*, the produce industry needed an alternative mechanism to mitigate risk for shippers, yet complied with the (current) legislative authority of CAPA. While the *Steve Dart* decision weakened the enforcement ability of the CFIA under CAPA, the licensing regime still exists today. However, currently licensees under CAPA account for less than ten percent (10%) of the industry participants. In fact, the CFIA's Board of Arbitration has not adjudicated a dispute in the past seven years. One possibility for this is the emergence of the Fruit and Vegetable Dispute Resolution Corporation, commonly referred to as the DRC.[190]

iii. Bankruptcy and Insolvency Act (BIA) and Companies' Creditors Arrangement Act (CCAA)

The *Bankruptcy and Insolvency Act* governs bankruptcies in Canada, while the *Companies' Creditors Arrangement Act* deals with the restructuring of insolvent corporations with debt over $5 million. To date, Canada has not enacted a PACA-like trust, and the insolvency regime only offers limited protection to suppliers who ship from the U.S. to Canadian buyers. The most recent amendment to the BIA and CCAA that increased the amount of protection for produce traders came in 1992. Those amendments primarily

[185] Steve Dart Co. v. D.J. Duer & Co., 1974 CarswellNat 87.
[186] Serecon, *supra* note 173 at 8.
[187] Constitution 1867, *supra* note 9, s.101.
[188] Steve Dart Co. 1974 CarswellNat 87.
[189] *See* Miguel Gomez, Maleeha Rizwan & Katie Ricketts, *Origins, Creation, and Evolution of the Fruit and Vegetable Dispute Resolution Corporation*, Cornell University Charles H. Dyson School of Applied Economics and Management (January 2012).
[190] Serecon, *supra* note 173 at 9.

protected suppliers from a practice known as "juicing."[191] In the produce trading context, this practice occurs when traders buy excess inventory with the knowledge that they will not pay for it because of their plan to file for bankruptcy. As result, the amount realized by secured creditors increases upon bankruptcy but unpaid suppliers are left receiving pennies on the dollar for their sold goods.

The two sections that were added to the BIA to combat this predatory practice were 81.1 and 81.2. Section 81.1 adds a limited right for suppliers to repossess goods supplied within the 30 days prior to bankruptcy. Section 81.2 gives farmers, fishers, and aquaculturalists a preferred claim to goods supplied fifteen days before the bankruptcy.

Section 81.1 – Right of Repossession

Under s. 81.1 of the BIA, a supplier may repossess goods supplied 30 days prior to the bankruptcy. The claim ranks above any creditor of the purchase except a *bona fide* purchaser. Under the section, there are certain requirements that must be met:

A.) The supplier must make a written demand for the goods within 15 days after the purchaser enters bankruptcy or receivership.

B.) The goods must be used in relation to the purchaser's business and in the possession of the receiver, trustee, or purchaser.

C.) The goods must be identifiable and not fully paid for, in the same state as they were on delivery, and not resold at arm's length or subject to an agreement for sale.

If the goods are partially paid for then the supplier may collect pro-rata on the amount owing or return the partial payment and collect the entirety of the goods.

Section 81.2 – Preferential claim for Unpaid Farmers, Aquaculturists, and Fishermen

Under section 81.2, unpaid farmers, aquaculturists, and fishermen have special priority in bankruptcy. These groups receive security in inventory for goods supplied up to 15 days before the bankruptcy or appointment of a receiver. The security ranks before any claim except those under s. 81.1 of the BIA. The farmer, aquaculturist, or fisherman must file a proof of claim for unpaid goods within 30 days of the bankruptcy or receivership. The section also imposes liability on the trustee or receiver if either party disposes of inventory covered under the security.

Impact of Perishable Product Producers

Section 81.1 has proved onerous to suppliers and ineffective at protecting their rights. This is because the conditions that determine what goods can be repossessed are particularly strict, depending on the nature of the goods in question. Two problematic requirements in the section are identifiability of goods and the "same state" requirement. Numerous cases exemplify the problems created by these provisions. In one, a consumer electronics supplier was denied the right to recover goods from a buyer who was in bankruptcy because the goods could not be identified by serial numbers and the buyer's inventory count prior to

[191] Alysia Davies, *Bankruptcy: Protecting Unpaid Suppliers* (Nov 14, 2008), Canadian Legal and Legislative Affairs Division, http://www.parl.gc.ca/Content/LOP/ResearchPublications/prb0238-e.htm#recent (last viewed July 11, 2012).

receiving the goods was not zero.[192] These rules are particularly burdensome to commodity and produce traders because of the inability to keep produce separated. For instance, in one case a supplier could not recover orange juice sold because the buyer had pumped it into a partially filled vat after it had been delivered.[193] The "same state" condition also is ineffective in the agriculture context, since many goods are transformed after sale in the creation of processed foods.[194] This transformation occurs immediately after sale because produce goods quickly spoil.

Another problem with the section is that it is particularly ineffective in the agriculture context because most goods that can be repossessed are perishable. The section only entitles a supplier to repossess the goods delivered; it does not entitle the supplier with priority to proceeds from the goods or a security interest over the buyer's other assets. Repossession of perishable goods is unlikely to provide any recovery for the buyer as the goods lose value quickly. Therefore, repossession cannot protect agriculture producers the same as other suppliers who produce durable products. This is especially true considering that suppliers may not know about a bankruptcy or receivership until many days after it occurs.[195]

Section 81.2 overcomes some of the problems that occur under section 81.1 by providing priority for farmers, aquaculturists, and fishermen upon distribution instead of a right of repossession. However, there are deficiencies to the provision. Firstly, there is a limited time frame for which the charge applies. Payment terms can often extend past 15 days, particularly as a buyer encounters cash flow problems while spiraling towards insolvency. Second, priority only applies to inventory. This is significant because recovery can be limited since inventory may not provide sufficient value to cover the unpaid amount. Lastly, the provision does not apply to reorganizations under the BIA or CCAA. This is an important consideration especially as "liquidating CCAAs" become more prevalent in Canada.[196] While these factors do limit the challenges of 81.1, it must be noted that section 81.2 is infrequently applied. This may either be due to farmers, aquaculturists, and fishermen failing to enforce their rights under the statute or little dispute as to the interpretation of the section.

B. Fruit and Vegetable Dispute Resolution Corporation (DRC)

The DRC is a non-governmental trade organization created by members of the produce industry in North America under the North American Free Trade Agreement (NAFTA).[197] This section will outline the origins of the DRC, its operating guidelines, and its shortcomings in order to gain an understanding of why further amendments in Canada are required to achieve PACA like protections.

Origins of the DRC

The DRC was established in February 2000, pursuant to Article 707 of NAFTA. Article 707 provides for the creation of a private, commercial dispute resolution entity which would deal exclusively with trades concerning perishable agricultural commodities.[198] The DRC was conceived through the collaborative

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[192] Thomson Consumer Electronics v. Consumers Distributing, 43 C.B.R. 3d 77. An appeal of the case was dismissed because of the goods were in possession of a warehouseman and s. 81.1 requires the bankrupt to have possession of goods supplied. *See* Thomson v. Consumer Electronics v. Consumers Distributing, 5 C.B.R. 4th 141, 170 D.L.R. 4th 115.

[193] Bruce Agra Foods Inc. v. Everfresh Beverages Inc. (Receiver of), [1996] 45 C.B.R. 3d 169.

[194] Serecon, *supra* note 173.

[195] Under the BIA, a bankrupt person has to give notice to creditors within 5 days of the bankruptcy. A receiver must notify other creditors within 10 days of the receivership. *See* Davies, *supra* note 191.

[196] Liquidating CCAA involve asset sales under the CCAA instead of the BIA. *See* Nortel Networks Corp. (Re), [2009] O.J. No 2558, [2009] 55 C.B.R. (5th) 68 (Ont. S.C.J.).

[197] North American Free Trade Agreement, 32 ILM 289, 605 (1993).

[198] *Id.*

efforts of North American produce industry trade groups and the governments of the U.S., Canada, and Mexico. The focus of these groups was to create a means to establish a credentialing organization that could serve as an efficient and effective means to resolve disputes arising from fresh produce transactions. The DRC's membership includes growers; brokers; packers; shippers; wholesalers; fresh processors; food service distributors; retailers; transportation brokers; freight contractors; and carriers.[199]

The DRC was modeled after an existing dispute resolution service in the U.S. under the PACA. The entity was designed to fill the voids within the Canadian and Mexican dispute resolution systems, both lacking the protections of PACA and thus severely impede international trade in fresh produce. Currently, the DRC's membership exceeds 1,400; its mediation and arbitration services have helped the DRC's members resolve more than 1,300 disputes, covering transactions with an estimated value of approximately USD $ 33 million.[200]

The DRC has earned a reputation amongst the fresh produce traders for promoting ethical and efficient practices throughout North America. The DRC's chartered mission is to establish harmonized trading standards and procedures among NAFTA partners, while simultaneously providing the tools necessary to resolve transactional disputes between its members in an efficient, cost-effective manner. The DRC's multi-tiered dispute resolution process starts with more informal preventative activities and cooperative problem-solving opportunities, and gradually escalates to more formal binding measures. The result is a flexible dispute resolution program that has worked well over the past decade.[201]

Dispute Resolution through the DRC

The DRC has a multi-leveled system of handling disputes, ranging from informal mediation to formal arbitration. The disputes involve most aspects of the produce sale including condition, transportation, contract, and payment issues. The DRC assists members in resolving disputes with members and nonmembers, and the process is often faster than traditional litigation. Moreover, the cost of resolving a case through the DRC is often considerably less than a lawsuit. A short explanation of each system of mediation/arbitration and the requisite dispute amounts needed follows below:

Type of Procedure	*Threshold Amount*	*Description*
Informal Mediation	Any Amount	The least procedurally-intensive form of DRC dispute resolution. Here, one of the parties requests the DRC to *informally* mediate under a preset timeframe, in hopes of reaching a voluntary resolution.
Formal Mediation	> $15,000 USD	If a voluntary settlement cannot be achieved through informal mediation, the parties may agree to use an assigned mediator at an in-person settlement conference to assist them in their attempt to negotiate a voluntary resolution.
Expedited	$15,000 - $50,000 USD; or by	A third party arbitrator from DRC's panel

[199] Douglas Hedley, *Report to the Fresh Produce Alliance on the Financial Practices of the Canadian Horticultural Sector* 14-15 (December 2005).
[200] Miguel Gomez, Maleeha Rizwan & Katie Ricketts, *Origins, Creation, and Evolution of the Fruit and Vegetable Dispute Resolution Corporation* 5 (January 2012).
[201] *Id.*, at 47-50.

Arbitration	parties' agreement	based on written submissions of evidence by the parties will impose a binding resolution of the dispute on the parties.
Formal Arbitration	> $50,000 USD	A third party arbitrator from DRC's panel will impose a binding resolution of the dispute on the parties after a live, in-person hearing.[202]

If the parties are unable to informally resolve a dispute over a transaction, they can file a Notice of Dispute with the DRC. Once the Notice is filed, the dispute is resolved by arbitration or mediation within 21 days.[203]

Decisions and orders of DRC's formal arbitrations are posted online. One such recent dispute involved a shipper of fresh grapes from Bakersfield, California and a produce dealer in Montreal, Quebec. Both parties were members of the DRC, therefore the DRC arbitrator had jurisdiction (per the membership agreement) to decide the outcome of the disputed transactions. After both parties submitted their claims and appeared in-person before the arbitrator in an oral hearing, the arbitrator issued a decision to resolve the dispute. In the order, DRC trading standards (from the group's bylaws) were cited as authority, as were inspection regulations from the CAPA.[204]

Ultimately, DRC decisions in formal proceedings are binding on the parties. Failure to pay a settlement imposed by the DRC could result in discipline to the member, potentially even revocation of membership privileges. This serves as a deterrent to prevent dealers from paying shippers, as revocation of a membership could cause a tremendous loss of business once the dealer's other suppliers realize the loss of DRC membership status. Furthermore, the dealer would likely have to register with the CFIA (if they had not done so already) to comply with CAPA regulations in the event of a loss of DRC membership privileges.

Shortcomings of the DRC

One drawback of the DRC is that the only authority to enforce an unpaid award is to de-list the "offender" from membership. If a DRC award is not paid, the supplier must take an additional second step to enforce it by filing in a court with jurisdiction over the offender's assets. To this end, the party must use that court's available remedies to place a lien on or seize the assets.

C. Comparison Between U.S. and Canadian Federal Protections

The PACA achieves effective risk mitigation through four different methods, all of which provide additional protection for shippers of fresh produce:

i. Licensing: More inclusive than CAPA; more uniform than CAPA / DRC dual "licensing" regimes

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[202] Katy Koestner Esquivel, *Dear Ms. Produce Law* (May 30, 2012), *available at* http://www.meuerslawfirm.com

[203] *Fruit and Vegetable Dispute Resolution Corporation – Mediation and Arbitration Rules* 10 (May 26, 2011), http://www.fvdrc.com/adx/aspx/adxGetMedia.aspx?DocID=10,1,Documents&MediaID=a6d1522c-ab21-462e-8666-dbe44ffe5ae2&Filename=DRC_Med_%26_Arb_Rules_May_26_2011_english.pdf

[204] Fruit and Vegetable Dispute Resolution Corporation, Decision and Order # 18768, http://www.fvdrc.com/adx/aspx/adxGetMedia.aspx?DocID=518,255,8,1,Documents&MediaID=3e6c6e70-5a62-477e-82bc-3cbb99073fae&Filename=2011_08_22_DRC_Arb_File_18768.pdf

In the U.S., the majority of market participants (shippers, dealers, etc.) are licensed or somehow directly impacted by the PACA. In contrast, the *Canadian Agricultural Products Act* (CAPA) has several safe harbors, which exempt many dealers from participation. The largest such exemption is for individuals who are DRC members. Also, there is an exception for dealers who sell directly to consumers, earn less than $230,000 per year, and are not subject to licensing under CAPA.[205]

Since DRC members are not required to hold a license under CAPA, they become subject to a different set of rules and regulations than those promulgated by the CFIA. This functional "split" of the DRC members and the CAPA licensees results in a lack of uniformity of best practices and standards for transactions among produce buyers, which can cause confusion and compound the risk exposure of produce exporters in the U.S. who sell to Canadian dealers.

ii. Dispute Resolution: Provides Acceptable Trade Practices, Default Contract Terms, and Speedier Collections than the CAPA / DRC

The default payment terms of transactions covered by the PACA are net 10 days, after which the AMS can use its powers to freeze assets (see below) to enforce the trust provisions of the PACA. This often results in the speedy recovery of unpaid funds to shippers by dealers frightened by the potential asset freezing permitted by the trust component of the PACA.[206]

To contrast, the CAPA does not set any default terms for transactions among its licensees. Due to the perishable nature of produce and the consumer's desire for freshness, transactions are frequently made without a contract in place at the time of delivery, which exacerbates issues when disputes arise among the shippers and dealers.[207]

The PACA establishes standards and rules for the trade of perishable agricultural commodities to establish default terms, which assist shippers in enforcing their sales agreements. The PACA statute requires traders to comply with the terms of their contract, or face discipline against their license. The best practice standards work both ways in a transaction between a shipper and a buyer/dealer—sellers must ship the quantity and quality of produce specified by the buyer; the buyers cannot refuse shipments that meet the contract specifications; and, perhaps more importantly, the buyer must pay the seller promptly after receipt and acceptance of goods.

Regulation of Trade Practices among Produce Traders

The PACA forbids buyers and sellers from engaging in unfair trade practices. Examples of these unfair trade practices include:

- Rejecting without reasonable cause produce bought or contracted to be handled on consignment;
- Failing to pay promptly the agreed price of produce that complies with contract terms;
- Discarding, dumping, or destroying without reasonable cause any produce received to be sold on behalf of another firm;
- Failing or refusing to truly and correctly account or to make full payment promptly for produce shipped on consignment or on joint account;

[205] Hedley, *supra* note 199.
[206] Serecon, *supra* note 173, at 11.
[207] *Id.* at 14-16.

- Misbranding or misrepresenting grade, quality, quantity, weight, state, or country of origin of fruits and vegetables;
- Making false or misleading statements regarding the sale of produce; and
- Altering inspection certificates in an attempt to defraud a seller.[208]

If the AMS PACA branch receives a written complaint that a company is engaging in any of the aforementioned or other unfair trade practices, an investigation of the company is initiated. The AMS can then initiate a disciplinary action before an administrative law judge (ALJ), seeking to have the suspect company's PACA license suspended or even possibly revoked. The 1995 amendments to PACA increased the power of the AMS; it is now permitted for the AMS PACA branch to impose a civil fine against a PACA licensee for breaching unfair trade practices in a transaction for perishable agricultural commodities.

iii. "Deemed" and "Floating" Statutory Trust: Not Available Under CAPA or DRC

The deemed trust was added through an amendment to the PACA in 1984. This deemed trust is the keystone of the PACA that allows shippers to enjoy protection from risk of goods sold to dealers who fail to pay in a timely fashion. Under PACA, a trust in favor of the shipper is created automatically by law the instant that a shipper delivers perishable agricultural goods to a receiver. The trust is created in the goods themselves, or in the proceeds generated (accounts receivables or cash) from the sale of such goods. This trust is also "floating" to accommodate the perishable nature of produce. In other words, since in a dispute it is unlikely that the specific goods or their proceeds will be identifiable, under PACA the trust will continue, or "float", even if they are comingled with other assets.[209]

"Locking In" PACA Trust Rights

A PACA trust beneficiary (shipper) may lose its trust rights if it agrees to payment terms or extensions beyond those permitted by the PACA, such as payment terms greater than 30 days or by extending time for a buyer to pay beyond 30 days. Forbearance agreements, creating notes or other securities for past due amounts, or implementing any type of payment plan between the parties will all disqualify a shipper from their PACA trust rights if the 30-day rule is breached.[210]

A case that exemplifies this relationship is *Bocchi Americas Associates Inc. v. Commerce Fresh Marketing Inc.*[211] Therein, Bocchi, a Delaware fresh produce shipper, delivered twenty shipments of perishable agricultural commodities to a buyer, Commerce Fresh Marketing (CFM), located in Texas. CFM offered to pay the $123,000 balance due in weekly payments of $2,000 until the balance was paid in full. Although Bocchi never signed any document, they did deposit the first $2,000 check and subsequently the next seven weekly payments. As a result, Bocchi lost their "trust" rights under the PACA trust since they acquiesced to a payment plan which exceeded the maximum permitted 30-day limit.

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[208] Meuers Law Firm, P.L., *Frequently Asked Questions*, http://www.meuerslawfirm.com/faq.htm#1 (last visited July 11, 2012).
[209] Statutory trust under Perishable Agricultural Commodities Act, 128 A.L.R. Fed. 303 (1995).
[210] *The Interaction Between the Bankruptcy Code and the Perishable Agricultural Commodities Act*, 2006 ANN. SURV. OF BANKR. L. 4 (2006); *see also* Idahoan Fresh v. Advantage Produce, Inc., 157 F.3d 197, 206 n. 9 (3d Cir.1998).
[211] 515 F.3d 383 (2008).

Because the trust is automatically created when goods are shipped, the title of the goods is held in trust and does not pass to the receiver until the shipper is paid in full. Bankruptcy courts have held that the unpaid goods held in trust do not become part of the bankrupt's estate. So, in effect, the PACA trust has a "super-priority" claim to secured creditors (i.e. banks) who may have a security interest in the receiver's inventory. If the inventory subject to the PACA trust is sold in a foreclosure initiated by a secured creditor, the proceeds must be paid to the shipper / beneficiary, not to the secured creditor.[212]

Under PACA, some courts have recognized shipper's claims for attorney's fees if the claimant's litigation efforts "are directly responsible for the availability of the funds from the statutorily created trust."[213] Allowing for the possibility of the shipper to recover attorney fees from a delinquent dealer adds a further layer of protection to shippers in the event of a litigated dispute under the PACA.

Failure to maintain the funds in trust is unlawful under § 2 of PACA, and also grounds for the suspension of the dealer's AMS license to act as a produce dealer.[214] These provisions further increase the licensing and dispute resolution powers that the AMS holds under PACA, especially when compared to the CFIA regime under CAPA.

Individual liability under the PACA

PACA also imposes liability on individuals who are in control of assets that must be held in trust but and fail to meet that obligation.[215] If a buyer/dealer's assets are not sufficient to cover the shippers claim under PACA, this provision allows the shipper to take action against the dealer's principals individually. Similar to a "piercing of the corporate veil" theory, this individual liability is derived from a breach of a fiduciary duty owed by the principal to protect the PACA trust assets. This provision creates an important second "pocket" of payment. This pocket is important in situations where the buyer's corporation goes out of business and a common law breach of contract claim would at best bring an unenforceable judgment.[216]

iv. Temporary Restraining Orders: Not currently available under CAPA / DRC

Under PACA, a shipper can file a trust enforcement action in federal court to seek a temporary restraining order, which temporarily freezes the bank accounts of the debtor / dealer until the shipper / grower is paid (or the dispute is settled). This seems to be a key tool to resolve disputes due to the potential to halt the entire business of a dealer / buyer over one disputed transaction. Many sellers find this to be an extremely effective tool for the speedy recovery of payments from dealers, even in advance of Court action on the dispute—the effect of such an order gives the shipper great leverage in bringing the dealer "to the table" to quickly settle any disputed transaction(s).[217] Often in the U.S., the shipper can be in federal court within 7 to 10 days of bringing such a motion, well in time to freeze the buyer's account before issues are further complicated by insolvency or even the initiation of bankruptcy proceedings.[218]

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[212] Steve Dart Co., 1974 CarswellNat 87.
[213] In re Milton Poulos, 947 F.2d at 1353, *see also* Middle Mountain Land and Produce Inc. v. Sound Commodities Inc., 307 F.3d 1220 (2002).
[214] Golman Hayden Co. v. Fresh Source Produce Inc., 217 F.3d 348, 351 (5th Cir.2000); 7 USC §499b; 7 USC §499h(a).
[215] Bocchi Americas Associates Inc. v. Commerce Fresh Marketing Inc., 515 F.3d 383 (2008).
[216] Blakeley, *supra* note 175.
[217] Serecon, *supra* note 173, at 12.
[218] Belobaba, *supra* note 8, at 5.

D. Existing Provincial Protections

In Canada, most provincial protections afforded to agricultural produce traders are for intraprovincial transactions. Moreover, many of these protections do not even cover the produce assets that would be included in a PACA like trust. In other words, as this section illustrates, Canadian provincial laws afford little, if any, protections to international and interprovincial produce traders. As a result, it does not appear that these statutes would, by and large, conflict with federal PACA like legislation. While coverage of all the provincial statutes would fill a multi-set volume, this section focuses on some of the more prominent provincial laws to illustrate these points. Notably, this section focuses on areas like foreign ownership restrictions, marketing boards, and financial assistance schemes.

Foreign Ownership Restrictions

One of the largest provincial protections concerns foreign ownership restrictions. But these laws focus on ownership of real estate assets, not produce. Moreover, they only exclude ownership by foreign traders, interprovincial traders are not covered. Thus, these laws are unlikely to conflict with the assets covered in a federal PACA like trust. Even still, they can still impact international produce traders in the event that a foreign producer would have otherwise been able to seize restricted land in satisfaction of a debt. Only three of the six Provinces included in this report have legislation that restricts such ownership of farmland: 1) Alberta; 2) Manitoba; and 3) Quebec.

Agricultural lands in Alberta are restricted to ownership by Canadian Citizens or Permanent Residents.[219] The *Foreign Ownership of Land Regulation*[220] creates a restriction on the ownership of any parcel of land exceeding 20 acres and outside of an urban area by a foreign controlled corporation or person, with limited exception.[221] Further, the Regulation makes specific note of trusts, stating:

18(1) No ineligible person or foreign controlled corporation shall, as beneficiary of a trust, other than a trust resulting from the death of a person, acquire a beneficial interest in an interest in controlled land that he could not under these regulations acquire directly.

(2) No trustee shall acquire for a trust of which he is trustee any interest in controlled land that would, if acquired, result in a beneficiary of the trust acquiring a beneficial interest in an interest in controlled land contrary to subsection (1).[222]

This section of the Regulation would only have an effect on a PACA-like trust in the event that a foreign producer was required to seize restricted land in satisfaction of a debt. In such an event, the Regulations provide two options. The Regulation does allow for an interest to be acquired (by trust or otherwise) as a result of indebtedness, but the interest must be divested within three (3) years of acquisition.[223] This is not likely to be a problem as most foreign creditors would rather recover the debt than hold land. However, depending on the economic climate and the real estate market, there may exist a conflict if the land cannot be sold in time. In such a situation, the second option listed in the Regulation is to have a judicially appointed sale.[224] A judicially appointed sale is not likely a preferred method of disposal as all expenses relating to the sale must be satisfied before the creditor can make a claim against any of the proceeds of the sale. It is also important to highlight the fact that this Regulation and the provision relating to trusts

[219] Agricultural and Recreational Land Ownership Act, RSA 2000, c A-9.
[220] Foreign Ownership of Land Regulation, Alta Reg 160/1979.
[221] *Id.* ss 5, 6, 14(1).
[222] *Id.* s. 18(1)-(2).
[223] *Id.* s .17.
[224] *Id.* s. 20.

will not affect a Canadian interprovincial trader, as all Canadian Citizens and Corporation can hold land in Alberta. Therefore, this is a hurdle that only a foreign trader would have to overcome.

Manitoba has two relevant pieces of legislation relating to foreign ownership and the right to farm. The first is *The Farm Lands Ownership Act*,[225] which is similar in substance to the Alberta legislation. The Manitoba Act requires that only Approved Persons or Corporations (Canadian) may take control directly or indirectly through a trust of farmland in excess of 40 acres.[226] Perhaps one of the most notable differences here is that the Alberta Act restricts ownership regardless of use, whereas the Manitoba Legislation restricts the ownership of farmland. Additionally, the Manitoba Act also makes special allowances for the ownership rights acquired through debt obligations. Section 3(4) allows anyone (unrestricted persons or corporations) to realize a *bona fide* debt obligation against restricted land. Section 3(6) allows for the seizure of farmland by an unapproved class of person so long as the ownership interest is reduced to 40 acres within three years. In this respect, the Manitoba Act appears to be more tolerant of foreign ownership than the Alberta Act, especially in relation to the potential for seizing restricted land.

The second piece of legislation in Manitoba (and unique to Manitoba) is *The Family Farm Protection Act.*[227] The Act protects all Farmers (defined as those engaged in farming or holding an interest in farmland in Joint Tenancy) from being dispossessed of their farmland as a result of a legal proceeding.[228] The Statute is not limited to mortgage interests, but is written broadly to insulate the farmer from any claim seeking to enforce a mortgage, security agreement, or encumbrance by one of the following mechanisms:

i) sale;
ii) foreclosure;
iii) appointment of a receiver/manager;
iv) possession; or
v) any other relief as may be permitted.[229]

As a result, any person or corporation seeking to enforce a claim must first obtain leave of the court to do so.[230] This has the potential to make the debt recovery process cumbersome and time consuming. Further, when this Act is read in conjunction with the restriction in *The Farm Lands Ownership Act* it appears that there is a serious potential for conflict in any attempt to recover a debt from a farm business in Manitoba. While it would not be impossible to recover the debt, the procedure under the current legislation would nonetheless be time-consuming, not nearly as streamlined as the U.S. PACA. Removal of these protections is likely to create opposition by Manitoba farmers.

In Quebec, *An Act Respecting the Acquisition of Farm Land by Non-Residents* restricts the ownership of farmland over four hectares (approximately 10 acres) to residents of the province.[231] The Act stipulates that non-residents can only acquire farmland if authorized by the "Commission de Protection du Territoire Agricole du Québec."[232] The term "acquisition" also denotes becoming the owner by way of forced sale.[233] Exemptions to the Act are covered in s 33(1). Unlike the other acts that restrict ownership, nothing

[225] The Farm Lands Ownership Act, R.S.M. 1987, c F35.
[226] *Id.* s. 4(b).
[227] The Family Farm Protection Act, S.M. 1986-87, c 6.
[228] *Id.* s. 8(1).
[229] *Id.* s. 8(2).
[230] *Id.*
[231] An Act Respecting the Acquisition of Farm Land by Non-Residents, R.S.Q. c. A-4 at 1.
[232] *Id.* s. 3.
[233] *Id.* s. 1.

contained in the Quebec Act exempts a *bona fide* creditor from taking control of the lands temporarily. The application process to take control of land is quite extensive, including an affidavit confirming the applicant's intention to settle in Quebec.[234] In addition, the government reserves the right to make final decisions on an application. The Act itself is silent on whether a resident trustee may take control of land in trust for a non-resident. As the Act is silent on this issue, it is unknown what challenge this provision would pose for a forced sale under a PACA-like trust enforcement situation.

Marketing Boards

Marketing boards are a central focus of provincial statutes and regulations related to the Agriculture Industry. Provincial marketing boards and commissions operate as a method of protecting producers selling (marketing) their product within their province by allowing producers to establish plans for marketing.[235] The established plans then dictate how the producer's products may be marketed (including price) and how processors must deal with producers—including, in some cases, payment terms.[236]

The provinces derive their power over intraprovincial marketing from their constitutional control over "property and civil rights."[237] However, the extent to which the provinces can regulate products entering or leaving their borders has been, in large part, left to the judicial interpretation of the Judicial Council of the Privy Council and the Supreme Court of Canada. The results of the courts' rulings have created four widely accepted and recognized propositions:

1) Canadian (federal) statutes and regulations cannot control purely intraprovincial trade as they would trench on the property and civil rights power;[238]

2) Provincial marketing legislation cannot have the effect of controlling the flow of interprovincial and international trade without being constitutionally suspect and potentially trenching on the federal trade and commerce power;[239]

3) Provincial marketing boards cannot require outside producers to sell through their boards or adhere to their price controls;[240] and

4) A marketing board seeking to control interprovincial trade must be established through Federal and Provincial cooperation to be constitutional—likely through the administrative delegation of powers.[241]

Provincial marketing boards therefore are an important consideration for any PACA-like trust being enacted within the provinces. Provincial marketing boards exercise their power over producers and distributors that are licensed to operate within their jurisdiction. Further, all of the provincial marketing acts have some provision for the licensing of their members and revocation of the license, as outlined below.[242] The power of the provincial boards ought to be considered in the creation of any PACA-like trust. Their members will be the relevant stakeholders at the provincial level, and their statutory powers

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[234] *Id.* s. 20.
[235] *See* Farm Products Marketing Act, R.S.O. 1990, c F.9 s. 2 (Purpose of Act).
[236] *Id.*
[237] Reference re Natural Products Marketing Act, [1937] 1 DLR 691 (JCPC).
[238] Canadian Federation of Agriculture v. Quebec (Attorney General) (Margerine Reference II), [1951] AC 1979 (JCPC).
[239] Manitoba (Attorney General) v. Manitoba Egg and Poultry Assn., [1971] S.C.R. 789.
[240] Manitoba (Attorney General) v. Burns Foods Ltd, [1975] 1 S.C.R. 494.
[241] Reference re Agricultural Marketing Act, [1978] 2 S.C.R. 1198.
[242] *See* Farm Products Marketing Act, R.S.O. 1990, c F.9 at s 7(1).

give them the ability to regulate as well as resolve disputes within their provinces. Therefore, it may be feasible for the pre-bankruptcy enforcement of PACA-like claims to be enforced at the provincial level through marketing boards.

If pre-bankruptcy enforcement were to be done at the provincial level with the assistance of the marketing boards it would require cooperation with each province. Essentially, the provinces would have to empower their provincial marketing boards or oversight boards (for example the Ontario Farm Products Marketing Commission) to manage slow pay or no pay situations. The oversight boards could then implement the programs. The drawback of engaging the provinces to empower their provincial marketing boards to create a PACA-like regime is two-fold. First, to have a uniform set of regulations across Canada it would be necessary for all provinces to agree on identical amendments to their respective act. This would not likely be easy, but may be accomplished through administrative delegation or some similar cooperation between the Federal and Provincial Governments. The second drawback is that in their current form, the *Acts* only apply to products that are regulated. This means that each respective Act will only apply to produce within their provinces where a provincial marketing plan has been set up to control that type of produce. For example, in Ontario, Grapes are regulated through Regulation 414.[243] In Ontario, it is estimated that up to two thirds of the farm gate value of produce is regulated.[244] Conversely, this also means that one third of the produce leaving farms is currently not under provincial regulations for marketing and production.

Further, not all of the provinces regulate the same products. For example, in British Columbia Cranberries are regulated through a special scheme, while Ontario has specific regulations for asparagus and Alberta for sugar beets.[245] While this is not detrimental to any effort to impose a provincial PACA-like trust through the marketing boards, it does provide a roadblock. To overcome such an obstacle, a provincial marketing board would have to be established that dealt with the licensing of any individual or corporation involved in the marketing of any perishable commodity within the provincial boundaries, regardless of species. This would likely be one of the only ways to ensure that there was coverage of all "perishable commodities" in a PACA-like trust at the provincial level using the existing marketing board infrastructure. Further, this would likely require the cooperation of all provinces as well as the federal government to make it a viable option.

The statues and regulations of each province relating to marketing are outlined below. For ease of comparison, the following terms require a standard definition in this section as there may be some slight variations province to province: 1) marketing; 2) producer; and 3) processor.

- "Marketing" consists of buying, selling, transporting, financing, packing, storing, or generally dealing with a product of agriculture. For the purposes of this section, "Marketing" refers to only intraprovincial marketing, unless otherwise specified.

- "Processor" means a person or corporation involved in the processing of an agricultural product, including packaging. For the purposes of this section, the processor must be buying the product from a producer subject to the jurisdiction of the marketing board.

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[243] Regulation 414, R.R.O. 1990, 414.

[244] Ontario Ministry of Agriculture, Food, and Rural Affairs, *Role of the Ontario Farm Products Marketing Commission in Ontario's Regulated Market System*, http://www.omafra.gov.on.ca/english/farmproducts/factsheets/role.htm (last accessed July 11, 2012).

[245] *See* British Columbia Cranberry Marketing Scheme, B.C. Reg 259/68 (1968); Asparagus - Marketing Regulation, R.R.O. Reg 390 (1990); Sugar Beet Production and Marketing Regulation, Alta. Reg. 287/1997.

- "Producer" is the entity producing the agricultural product, which can be a farmer if the product is in its raw form, or a processor if the product has been packaged. Producers in provincial statutes are those engaged in production within the boundaries of the province.

Alberta

The governing statute in Alberta is the *Marketing of Agricultural Products Act*,[246] which delegates oversight of the Act and the general administration of marketing schemes to the Alberta Agricultural Products Marketing Council (AAPMC).[247] The Council is then empowered with the broad discretion to create and maintain a system of marketing boards or commissions and approve marketing plans for regulated products, including the power to terminate an existing board.[248] Once a plan is established, the AAPMC can transfer all regulatory aspects to the board or commission that has been given oversight. Boards then make regulations relating to the licensing of all producers and processors that are engaged in trading in the province, the prohibition of marketing in the province, and the ability to make administrative orders to enforce regulations.[249] In addition, boards alone (not commissions) are granted extra regulatory powers to enact quotas on certain products, and provide for the collection of money owed to a producer from any person by legal action for a regulated product.[250]

A unique clause in the (Alberta) *Marketing of Agricultural Products Act* is section 31. This section creates a provincial statutory trust for funds owed to a producer. The section reads:

31 Where a person has control over funds that are:
(a) Owing to a producer for a regulated product sold to the person by the producer,
(b) Owing to a board or commission, or
(c) Payable to a board or commission on behalf of a producer,
That person holds those funds in trust for the producer, board, or commission, as the case may be and the producer, board, or commission may collect those funds by legal action or otherwise.

As stated, this clause is unique to Alberta. The trust created is not a "deemed" trust because it does not state whether or not the trust survives in the event of comingling.[251] Further, the enforcement language is broad and would be more effective if it clarified what "otherwise" means. This could be understood to mean some form of extra-judicial board or tribunal enforcing the trust obligation. Finally, beneficiaries of the trust are limited by the definition of a producer, which relies on the regulations to define. All plan regulations enacted in Alberta define a producer as a person who produces the regulated product within Alberta.[252]

This provision may conflict with a PACA-like trust because if a situation arose in which both a federal PACA like trust and an Alberta trust were created, then a conflict would arose over which trust had priority. Amending the language of the Alberta trust would help avoid such a conflict.

With the inclusion of the sections outlining financial protections for producers, the Alberta *Marketing of Agricultural Products Act* is the most inclusive of the marketing acts among the English speaking

[246] Marketing of Agricultural Products Act, R.S.A. 2000, c M-4.
[247] *Id.* s. 3(1).
[248] *Id.* ss. 10–11.
[249] *Id.* s. 26(1)–(3).
[250] *Id.* s. 27(1)(q).
[251] Belobaba, *supra* note 8, at 7.
[252] *See, e.g.*, Alberta Barley Commission Regulation, A.R. Reg. 123/1999; Alberta Vegetable Growers Production and Marketing Regulation, A.R. Reg. 160/2007.

provinces. However, even the trust included in the Act does not provide as much safety as the PACA trust because Alberta's trust covers only regulated products, those subject to a marketing plan. The additional protections offered by a PACA like trust may be attractive to Alberta and facilitate the amendment of its act.

British Columbia

In British Columbia (BC), the *Natural Products Marketing Act*, (BC Act)[253] is the Statute that governs all marketing boards. The Statute creates the power of oversight in the British Columbia Farm Industry Review Board (BCFIRB).[254] The BC Act is similar to the Alberta Act in that it too grants broad discretion. The BCFIRB has "general supervision" over the boards and commissions, and may exercise its powers without notice.[255] The roles of commissions and boards in BC are to license marketers, producers, and processors of regulated agricultural goods. Further, commissions are also given the authority to set standards, advertise, and carry out educational initiatives for a regulated product.[256]

The BC Act is also careful not to trench on any federal authority. In order to better control produce within the province, sections 6 and 7 specifically mention the authority of the province to delegate some powers to the federal government. Moreover, the federal marketing board may at any time exercise its powers within BC's provincial boarders. Additionally, there is a section that states that the Act should be construed within its constitutional limitations and is only intended to affect matters within the competence of the BC legislature.[257]

There does not appear to be any financial protection in the BC Act for its producers, although some boards may require a pooled payment structure. However, the BC Act is still highly relevant because of its "cooperative" language found in sections 5, 6, and 7.

Manitoba

The Act that covers marketing in Manitoba is *The Farm Products Marketing Act*.[258] Under this Act, power is given to the Manitoba Farm Products Marketing Council (MFPMC) to be the oversight board for the licensing of boards and commissions.[259] As with the other acts relating to marketing, the Manitoba Act is concerned with promoting and regulating marketing within Manitoba.[260] However, the Act itself focuses less on how to set up a plan or commission and more on enforcement. The Act seems to be more concerned with the over-production of products that could hurt the intraprovincial pricing system.

Perhaps the most unique section involves cooperation. Section 8 states that the MFPMC may at any time cooperate with extraprovincial boards for the marketing of products within Manitoba. A similar statement is made with regards to the power of the federal board at section 32. The specific inclusion of this section seems to suggest that Manitoba is not only open to additional trade cooperation within their borders, but expects such cooperation.

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[253] Natural Products Marketing Act, R.S.B.C. 1996, c. 330.
[254] *Id.* s. 3(1).
[255] *Id.* ss. 7–8.
[256] *Id.* s. 14.
[257] *Id.* s. 21.
[258] Farm Products Marketing Act, S.M. 2001, c. 16.
[259] *Id.* s. 12(1).
[260] *Id.* s. 3(1).

Ontario

In Ontario, the *Farm Products Marketing Act* is the main piece of legislation covering marketing.[261] The Act gives power to the Ontario Farm Products Marketing Commission (OFPMC), which was established under the *Ministry of Agriculture, Food, and Rural Affairs Act.*[262] The Ontario Act's scope is narrower than Alberta's due in part to the fact that there is an alternative and complimentary legislation in Ontario to deal with slow payment and bankruptcy situations, as explained in the Financial Assistance Schemes section below. However, the Act is notable for its section on cooperative agreements, as well as the power given to the OFPMC to resolve disputes.

The language on cooperative agreements in the Ontario Act is being included as an example of how the other acts are worded; however, what is particularly beneficial in the Ontario Act is sub-section (c). This section is worded broadly enough that, for the purposes of marketing agricultural products, the minister may enter into an agreement with the Government of Canada without a vote in the provincial legislature. This is a sound example of how administrative delegation may be obtained quickly where federal-provincial cooperation on matters related to agriculture is needed.

Farm Products Marketing Act

Agreements

22. (1) The Minister may, with the approval of the Lieutenant Governor in Council, enter into agreements with the Government of Canada providing for,

(a) the performance by a marketing agency of Canada, on behalf of the Government of Ontario, of any function relating to intra-provincial trade in a regulated product in respect of which the marketing agency may exercise its powers relating to interprovincial or export trade;

(b) the performance by the Commission or any local board of Ontario, on behalf of the Government of Canada, of any function relating to interprovincial or export trade in a regulated product in respect of which the Commission or local board may exercise its powers relating to intra-provincial trade; and

(c) such other matters relating to intra-provincial and interprovincial or export trade as may be agreed upon by the Minister and the Government of Canada.

Further, the Ontario Act in section 7(1) states that the OFPMC has the power to license producers, marketers, and processors. Moreover, this section grants the OFPMC the related power of revocation.[263] Although it does not appear that the power to revoke licenses is exercised often in any of the provinces, the OFPMC has recently suspended the license of a processor for non-payment of its debts to producers belonging to the Ontario Processing Vegetables Growers.[264] This decision presents recent insight into the powers of the OFPMC and the speed at which they work. In the decision, the processor had failed to pay producers for their 2011 tomato crop. This led OFPMC to conduct a hearing on March 20, 2012, which resulted in a preliminary decision on March 21, 2012. In this decision, the processor was given one month

[261] Farm Products Marketing Act, R.S.O. 1990, c. F.9.
[262] Ministry of Agriculture, Food, and Rural Affairs Act, R.S.O. 1990, c. M.16.
[263] An Act Respecting the Acquisition of Farm Land by Non-Residents, R.S.Q. c. A-4, s. 7(1).
[264] Ontario Farm Products Marketing Commission, News Release, *In the matter of Jema International Foods* (May 31, 2012), *available at* http://www.omafra.gov.on.ca/english/farmproducts/index.html.

to pay the amount owed or face license suspension. On May 31, 2012, the OFPMC suspended the processor's license for non-payment.[265]

The above result shows the limited powers of the OFPMC, and of the producers, to recover money in the event of default. Although there are mechanisms in place to adjudicate a dispute, the affected producers were unable to collect the debt. This suggests that the affected producers will have to now rely on conventional debt recovery tactics, such as obtaining a judgment, in order to try and recover from the debtor.

Prince Edward Island

According to the *Natural Products Marketing Act*,[266] the Prince Edward Island Marketing Council (PEIMC) is responsible for the general supervision of all commodity boards, marketing commissions, and commodity groups established under the Act.[267] The scope of this Act includes the regulation of natural products in the province, including products of agricultural origin; of the forest, sea, lake or river; or any article in whole or partly derived from such products.[268] Among the powers of the council is the arbitration of disputes between producers, processors, distributors, and transporters of natural products.[269] The Natural Products Appeals Tribunal hears appeals of orders and decision of commodity boards and marketing commissions.[270] Like the other provinces, the statute also includes language allowing for cooperation with the federal government.[271]

Of particular interest in the PEI legislation is the ability to establish a fund for the indemnity of losses sustained by producers as a result of their marketing activities.[272]

Natural Products Marketing Act
11. (1) A marketing commission may establish and maintain one or more funds that may be used **(a) to indemnify producers against damage to or loss of a regulated product or of an agricultural product used in the production of a regulated product; or** **(b) to indemnify producers or protect producers against financial loss suffered by them or on their behalf in respect of the marketing of a regulated product.**

Since the protections afforded under this section apply to intraprovincial traders, these provisions would not apply to the producer relying on a PACA-like trust. But they are interesting nonetheless because it appears that the government is recognizing the requirement to protect its' producers. Furthermore, unlike the Alberta trust, or the suspension of licenses in Ontario, this solution provides the producers of PEI with a concrete method of recovering funds lost in the marketing of their produce. A conflict may develop with the producers of PEI if they see a PACA-like trust affecting their indemnity.

Quebec

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[265] *Id.*
[266] Natural Products Marketing Act, R.S.P.E.I. 1988, c. N–3.
[267] *Id.* s. 2(4).
[268] *Id.* s. 1(f).
[269] *Id.* s. 2(6)(a).
[270] *Id.* s. 18(1).
[271] *Id.* s. 15.
[272] *Id.* s. 11(1)(a)–(b).

An Act Respecting the Marketing of Agricultural, Food and Fish Products[273] empowers the Régie des Marchés Agricoles et Alimentaires du Québec (Régie) to oversee the marketing of agricultural and food products and may confer on any person who takes part in the production of an agricultural product the rights and obligations of a producer.[274]

The Quebec Act is not particularly unique in that it provides for cooperation between the Provincial and the Federal marketing boards,[275] and a method of resolving disputes through the Régie.[276] In general, the Statute seems to be more interested in ensuring the protection of intraprovincial prices, like Manitoba. Thus, the Statute itself is not likely to pose any significant problems for a PACA-like trust in Canada.

Financial Protection Statutes

This section will cover provincial level schemes that either promote financial stability or alter creditor priorities; this section is limited to insurance and financial schemes specifically aimed at agriculture. Other additional Statutes within each province that provide aid for small business (such as Tax Statutes) are excluded from this survey in order to focus on the most relevant statutes and regulations.

Alberta

In Alberta, there are two main Statutes that may conflict with PACA–like legislation: 1) *Crop Liens Priorities Act*[277] and 2) *Crop Payments Act.*[278]

The *Crop Liens Priorities Act*, has largely been repealed. But one important section remains that may affect the rights of produce traders. Alberta has a provincial crop insurance scheme administered under the *Agricultural Financial Services Act*[279] that requires producers to pay premiums for any insurance provided. In order to protect their ability to recover insurance premiums the Alberta Government has kept Section 1(c) of the *Crop Liens Priorities Act* in force, which states:

Crop Liens Priorities Act
Priority of liens **1. Notwithstanding anything in any Act or in the common law, the following liens and charges on crops have, in the order hereinafter set out, priority over all other claims, liens, privileges or encumbrances on those crops:** **(c) liens and charges for the amount payable to the Agriculture Financial Services Corporation in respect of any application for insurance under the *Agriculture Financial Services Act.***

As stated, the rest of the Act has been repealed, but the Province has maintained priority over crops for any amounts outstanding on provincial crop insurance. A potential conflict with a PACA-like trust may develop if the creditor and the government are trying to recover from the same pool of funds. However,

[273] An Act Respecting the Marketing of Agricultural, Food and Fish Products, R.S.Q., c. M–35.1.
[274] *Id.* ss. 5, 27.
[275] *Id.* s. 120.
[276] *Id.* s. 26.
[277] Crop Liens Priorities Act, S.A. 2000, c. C–34.
[278] Crop Payments Act, R.S.A. 2000, c. C–33.
[279] Agriculture Financial Services Act, R.S.A. 2000, c. A–12.

this would only likely be the case where the debtor was involved in both the buying and selling functions of the produce trade.

The second potential conflict exists as a result of the *Crop Payments Act.* The Act is designed to give a mortgagor or landowner a claim against crops grown as a method of satisfying any outstanding debt.[280] However, any interest is limited to a total amount of one third of the crop grown; protections above this amount do not exist. Further, any application for relief must be made to the appropriate provincial tribunal.[281] As with the *Crop Liens Priorities Act*, this Act is only likely to be a conflict with a PACA-like trust where the produce trader is involved in both buying produce internationally and selling crops that it produced.

British Columbia

In British Columbia, legislation is in force that may help compliment anything available under a PACA-like trust. The *Farm Income Insurance Act*[282] is designed to provide farmers with an available scheme to protect their entire operations from losses. The Regulation provides that the provincial government by itself or with the cooperation of the federal government may offer plans to stabilize income among farmers.[283] The particular details of these plans are not the subject of statutes or regulations, but rather a provincial program. It is likely that these plans are aimed mostly at the protection of income due to fluctuating commodity prices.

Manitoba

Manitoba has three statutes that are relevant to payment priorities. They are the (1) *Crop Payments Act*;[284] (2) *Seed and Fodder Relief Act*;[285] and (3) *Threshers' Lien Act.*[286]

The Crop Payments Act is similar to Alberta's, giving mortgagors or landpersons a priority over crops to satisfy outstanding payments. However, unlike Alberta, Manitoba does not limit the amount of recovery to one third of the crop. Rather, in Manitoba a priority is granted to the amount of crop as agreed to in the mortgage or lease document.[287] This essentially means that all of a farmer's crops could potentially be pledged to another party, who according to the Act takes priority notwithstanding any other provincial Statute. Again, the potential for conflict here is limited to parties who operate both as producers and purchasers of finished goods. However, if the situation were to ever to develop it is possible that a priority for as much as 100% of the proceeds from a field crop to have been given to a mortgagor as collateral for a secured loan. This would inevitably lead to a conflict with a trust and perhaps litigation over priority.

The Seed and Fodder Relief Act allows a farmer to apply to the government of Manitoba for the supply of seed at the beginning of the growing season. In exchange, a promissory note for the amount of the seed is created in favor of the provincial government. This note creates a priority lien against the crop.[288]

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[280] Crop Liens Priorities Act, S.A. 2000, c. C–34, s. 2.
[281] *Id.* ss. 3–4.
[282] Farm Income Insurance Act, R.S.B.C. 1996, c. 130.
[283] Farm Income Plans Regulation, B.C. Reg. 123/2004.
[284] Crop Payment Act, R.S.M. 1987, c. C320.
[285] Seed and Fodder Relief Act, R.S.M. 1987, c. S80.
[286] Threshers' Lien Act, R.S.M. 1987, c. T60.
[287] Crop Payment Act, R.S.M. 1987, c. C320, s. 1(h).
[288] Seed and Fodder Relief Act, R.S.M. 1987, c. S80, s. 5(3).

The Threshers' Lien Act is an act designed to give threshers a lien on crops up to the amount of their services until they are compensated. The lien is super priority and prevails over all other claims to the crop.[289] The *Threshers' Lien Act* may be of assistance as potential example of "super-priority" charges within provincial agricultural legislation. The wording of section 6 that gives priority is as follows:

The right of retention hereinbefore provided for prevails against the owner of the grain and against any and all liens, charges, encumbrances, conveyances, and claims whatsoever, including any mortgage or encumbrance charged upon the grain to secure the purchase price of the seed from which it was grown.[290]

The statute then includes provisions on how and when the retained goods may be disposed. Although in a PACA-like trust the producer will have nothing to retain, the above Act is still perhaps the best example of a super-priority charge within provincial agricultural legislation.

Ontario

Ontario has a single act of interest: The *Farm Products Payment Act*.[291] This act is unique to Ontario, as stand-alone legislation, and has recently undergone some legislative change in its regulations. The *Farm Products Payment Act* is of interest here because it demonstrates a method of protection for producers within Ontario that does not rely on a trust and it relates to slow payments and bankruptcy situations.

The *Farm Products Payment Act* is designed to insulate farmers from slow pay and bankruptcy situations. The Act operates by giving the Lieutenant Governor in Council (by proclamation, without a vote) the authority to establish a fund for producers of agricultural products and establish a board to administer the fund.[292] Section 3 outlines when the funds may be drawn upon, stating:

Farm Products Payment Act

Application for payment from fund

3(1) Where a farm product is sold by or on behalf of a producer and,

(a) the dealer has not paid the producer the price of the farm product within fifteen days of the time the payment became due; or

(b) the whole or any part of the dealer's assets has been placed in the hands of a trustee for distribution under the *Bankruptcy Act* (Canada) or the *Bulk Sales Act*, the producer may apply to the board that administers the fund for the farm product claiming payment from such fund.

Although this Act essentially provides for an insurance scheme against payment default, it is not available for all producers. On July 1, 2012, a new regulation took effect that lumps all grain producers together as eligible to apply for relief from the fund.[293] In addition, producers of livestock have had a fund established for them.[294] There is currently no regulation relating to producers of tender fruit, vegetables, or any other farm commodity. The lack of a fund created for perishable commodity producers is somewhat suspicious given the overhaul to the regulations as of July 1, 2012. The provincial government would have had an opportunity at that time to also include perishable commodities producers. The Act

[289] Threshers' Lien Act, R.S.M. 1987, c. T60. s. 6.
[290] *Id.*
[291] Farm Products Payment Act, R.S.O. 1990, c. F.10.
[292] *Id.* s. 2(1).
[293] Payments from Funds for Grain Producers, O. Reg. 70/12.
[294] Fund for Livestock Producers Regulation, O, Reg. 560/93.

provides mostly a secondary support for producers trying to recover from a delinquent dealer. One interesting point is that nowhere in the Act or regulations is it stated that a producer must have their operations within Ontario. As long as the producer has paid into the fund they may apply for relief. This system of relief (establishing a fund and charging a premium) may be another viable way for producers shipping internationally to insulate themselves against losses.

Quebec

Quebec has legislation in place, like BC, to stabilize the income of farmers at a provincial level. The Régie des Assurances Agricoles du Québec may order the establishment of a farm income stabilization insurance scheme for any category of products it deems necessary according to section 2 of *An Act Respecting Farm Income Stabilization Insurance.*[295] The purpose of this Act is to ensure positive net incomes (annual receipt from the sale of each unit of a product less expenditures and depreciation) for the producers. Those producers with an annual income lower than the stabilized net annual income will receive compensation.[296]

Conclusions: Provincial Legislation

The above survey of provincial legislation shows that the provinces have not taken any unified approach to how they wish to insulate producers from losses, or how far they wish to intervene to ensure the speedy recovery of funds for a producer at the hands of a delinquent purchaser. In addition to the statutes listed, the provinces also have additional schemes, such as crop insurance, for the protection of their farmers' financial stability.[297] Of all the provinces, it appears that Ontario has best addressed the problem of debt recovery for produce traders. But this legislation is not entirely unique. Various protections in other provinces operate through provincial marketing schemes. What is unique about Ontario's legislation is that it is stand-alone legislation and could potentially be adapted to serve a greater group of producers. Finally, although some of the provinces have statutes that could potentially conflict with a priority granted for a PACA-like trust, these statutes would only be applicable in limited situations. At any rate, the priorities granted in the provincial statutes may not even survive into a bankruptcy.

When considering the impact of provincial legislation on a PACA-like amendment it must be acknowledged that a large portion of the existing legislation is not likely to negatively impact any attempt to introduce a PACA-like amendment. The value of the provincial legislation explored illustrates how each province has tried to protect its "local" producers. Because of constitutional constraints and matters of self-interest, these protections typically do not extend to foreign or extraprovincial producers. Even still, most of the statutes above demonstrate a willingness on the provincial level to at least enact legislation to protect producers, or at the very least to empower producers to establish bodies to protect themselves. What this may mean is that conflicts are unlikely to arise in a PACA-like amendment, whether purely federal or in coordination with the provinces. However, this may also mean that the provinces are content with only supporting legislation that protects their "local" producers and may not be open to legislation designed to provide protections within their provinces to foreign or out of province producers. This may in fact actually strengthen the argument that a federal amendment is needed, which

[295] Act Respecting Farm Income Stabilization Insurance, R.S.Q., c. A–31.
[296] *Id.* s. 3.
[297] *See* Farm Credit Stability Act, R.S.A. 2000, c. F–6; Farming and Fishing Industries Development Act, R.S.B.C. 1996, c. 134; Insurance for Crops Act, R.S.B.C. 1996, c. 229; Farm Income Assurance Plans Act, R.S.M. 1987, c. F30; Manitoba Agricultural Services Corporation Act, S.M. 2005, c. 28; AgriCorp Act, 1996, S.O. 1996, c. 17, Schedule A; Crop Insurance Act, S.O. 1996 c. 17, Schedule C; Agricultural Insurance Act, R.S.P.E.I. 1988, c. A–8.2; Crop Insurance Act, R.S.Q., c. A–3. The proceeding statutes do not impact the ability to enact a PACA-like trust, but deal specifically with agriculture within the provinces.

in turn builds the constitutional argument that such an amendment would be constitutional under the Trade and Commerce clause. Finally, the extent that the provinces provide producers with statutory (extra-judicial) mechanisms to assist in the recovery of delinquent debts is limited to debts incurred within the respective provincial boundaries. This inherent weakness in the provincial legislation may garnish support from provinces and local producers for the additional layer of protection for producers and traders alike that a PACA like trust would offer.

V. IN SUMMARY: WHY CHARACTERIZATION MATTERS

As this Report turns to specific recommendations, it is important to establish the context in which the recommendations must exist. To do this, the recommendations must account for the aforementioned nuances in Canadian law that may each, in their own right, facilitate or challenge the creation of PACA-like protections in Canada. Moreover, it is important to account for the particular nature of the produce trading industry. To this end, how amendments are characterized will be critical to their ultimate constitutionality and efficacy.

First, since PACA-like amendments will involve a very important area of commerce, agriculture, the amendment process will be contentious. The Canadian fresh fruit and vegetable industry is estimated at approximately $3 billion annually.[298] The NAFTA has facilitated considerable trade across provincial and international boundaries, with imports totaling over $4 billion. The U.S. is the largest importer of fresh produce into Canada. International trade is now necessary to satisfy Canadian consumers' desire for a wide variety of fresh produce, otherwise unavailable in Canada's native climate.[299] PACA-like coverage could address inefficiencies unique to agriculture: highly perishable goods that are often intermingled. Thus, delays in transactions can result in significant profit losses in an industry that operates on narrow margins.[300] Moreover, general rules governing commercial transactions often break down when applied to agricultural products, which are often comingled.

On one hand, it will be important to achieve the backing of the many groups who will support a PACA-like law in Canada. Industry stakeholders from both sides of the border, including the Fresh Produce Alliance, the Canadian Produce Marketing Association, the Canadian Horticultural Council, and the DRC have all spoken to this end.[301] Increasing the stability of the fresh produce market can stabilize and thus perhaps lower prices for consumers. Thus, consumers groups may also support PACA-like legislation. On the other hand, it is important to account for significant opposition. While a PACA-like legislation is attractive, the immense wealth tied to the status quo will natural create resistance to change as new "winners and losers" are established. In particular, creditors who hold security interests in produce assets may strongly oppose this legislation.

Regarding the amendment's language, unique constitutional factors regarding Canada's division of powers must be carefully addressed. Otherwise, the amendment is likely to be struck as unconstitutional. As explained, the provinces are responsible for elements of law such as contracts and trusts, while the federal government retains jurisdiction over Trade and Commerce as well as Bankruptcy issues. And while recently courts have tended to grant more authority to the federal government in this arena, some cases suggest that this out may not be a dependable. As a result, the scope of any amendment must be narrowly couched within powers that fit as squarely as possible within federal authority. To this end, it is prudent that amendments focus on products that are in international and interprovincial. Moreover, it is important to understand why a federal amendment is the only likely solution in this case. While accounting for these factors will protect the law against being struck down as unconstitutional, it may not go far enough to protect it against the risk of a challenge in the first place. Even if constitutional, such a challenge could nonetheless delay or hinder the act's objectives. Thus, it is advisable to pursue a federal-provincial partnership to create PACA-like protections in Canada in order to hedge against the risk of a constitutional challenge.

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[298] Serecon, *supra* note 173, at 1.
[299] *Id.*
[300] Bruce W. Ackerly, *Prosecuting and Defending Claims under the PACA Trust – Questions and Answers,* 2 (Aug. 2011).
[301] Serecon, *supra* note 173 at 11–12.

The above discussion has attempted to define some of the substantial limits found in current Canadian law, preventing the creation of a PACA-like regime. These are identified as:

- Need to amend the current Canadian produce statute to protect sellers and buyers from risk of default by their customers.

- The current CFIA licensing regime (under the CAPA) purports to regulate the market for the international and interprovincial trade of fresh produce in Canada. However, since the *Steve Dart* decision in 1974, the powers of the CFIA under CAPA have been restricted as far as resolving transactional disputes amongst its licensees efficiently.

- The DRC provides a solid alternative to the CAPA licensing scheme for U.S. exporters desiring to mitigate risk of non-payment or slow-payment when shipping products to customers in Canada. The DRC is respected for its time-tested, effective tiered system of dispute resolution which its members are obligated to abide by per their membership agreement with the DRC. However, the DRC is a private entity, and membership is not mandatory for any buyer in Canada due to the parallel dual "licensing" regimes available through the CFIA and the DRC. Also, the DRC bylaws can do little to protect U.S. shippers in the event of a bankruptcy of a Canadian buyer who owes money to the U.S. shipper. In other words, the shipper will have to "stand in line" with the rest of the default buyer's secured and unsecured creditors, and will likely not receive compensation for any outstanding, unpaid transactions.

- The PACA provides significantly greater protection for unpaid sellers of perishable agricultural products in the U.S. The combination of broader licensing requirements, establishment of speedy default contract terms, and most importantly the statutory trust which gives the unpaid shipper a super-priority over other creditors all combine to significantly reduce the risk of non- or slow-payment for sellers under PACA. To effectuate such PACA-like protections in Canada, the federal CAPA statute should be amended to emulate the increased protections of the PACA in the U.S.:

    - formation of deemed, floating statutory trust in favor of the shipper;

    - broader licensing requirements;

    - establishment of default transactional terms and more stringent industry standards; and

    - provide the legal basis for a more robust dispute resolution entity.

VI. RECOMMENDATIONS

As the previous sections illustrate, achieving PACA-like protections for international and interprovincial produce traders in Canada will require legislative amendments. The ratification of amendments in Canada will face significant political hurdles and, possibly, constitutional challenges. However, if political support is achieved, skilled drafting of the proposed amendments to the CAPA could serve as the platform to create a nationwide, PACA-like regulatory scheme in Canada. This would benefit not only U.S. produce shippers, but also Canadian producers.

Industry 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). Increasing the stability of the fresh the 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.

A. Canadian Federal Process for Amendment

Canada's government is a constitutional monarchy. Its executive powers are largely shared between the Head of State, the British Monarchy, as represented by the Governor General, and the Head of Government, as represented by the Prime Minister. Technically, these two individuals have separate mandates and governing powers.[302] Today, the Governor General is primarily a figurehead who has few responsibilities outside the approval of the Prime Minister.[303] Generally it is the Prime Minister, as the Head of Government, who works with his cabinet to exercise executive power in Canada.[304] The Prime Minister is typically the leader of the party with the majority of seats in the House of Commons.[305] The party who has the majority of seats in the House of Commons is colloquially referred to as "the government" as it is the governing party of Parliament. The Cabinet is appointed by the current Prime Minister and its members are drawn from the House of Common's elected Members of Parliament (MPs).[306] Cabinet members, known as "Ministers", have the task of "developing new policy for that ministry and ensuring that existing policy is being executed effectively and efficiently."[307] This is done through cabinet and party caucuses (meetings) where collective party decisions can be generated, so that "whenever ministers have an idea for new legislation in their area, their proposal must win the approval of the cabinet before it can be taken to Parliament."[308] Thus, an amendment here would require the support from an individual minister sponsor and the approval of the Cabinet as a whole.

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[302] JOHN A. FRASER, THE HOUSE OF COMMONS AT WORK 7 (1993). John A. Fraser is a retired Canadian Parliamentarian and former speaker of the House of Commons. *Id.*

[303] The Head of State is the British Monarchy represented by the Governor General. The Governor General is appointed by the Sovereign based on the advice of the Prime Minister. While originally the Governor General was strictly under the authority of the British Monarch, over the past century "the Governor General ceased to be under the control of the United Kingdom." Thus, today the Governor General is primarily a figure head and has few responsibilities outside the approval of the Prime Minister. Because the Governor General "no longer has any meaningful legislative or executive power, the office of Governor General is sometimes referred to in colloquial terms as a mere rubber stamp." *Id.* at 7–10.

[304] PATRICK MALCOLMSON & RICHARD MEYERS, THE CANADIAN REGIME: AN INTRODUCTION TO PARLIAMENTARY GOVERNMENT IN CANADA 101, 103 (4th ed. 2009).

[305] FRASER, *supra* note 302, at 7.

[306] MALCOLMSON, *supra* note 304, at 104.

[307] *Id.* at 105; "Ministry" is referring to the department of government of which a Cabinet Minister is responsible. FRASER, *supra* note 302, at 12.

[308] MALCOLMSON, *supra* note 304, at 105.

Today, Parliament acts as the primary law making body of Canada on federal issues.[309] Canada's Parliament consists of two houses: the Senate and the House of Commons. While in law both houses have similar powers, in practice the Senate has generally refrained from taking a proactive legislative stance.[310] This has led to a parliamentary convention where "the Senate must not oppose a bill that has the support of the House of Commons."[311] Thus, while the Senate may make recommendations for improvements to bills, they play a diminished role in the actual lawmaking process. Rather, it is The House of Commons that is central to the legislative process. Therefore, the fundamental function of the House of Commons is the adoption of bills, as discussed in the next subsection.[312]

Due to party politics, parliamentary power lies with the majority party and by derivative with the cabinet, which consists of that party's leadership.[313] Most successful bills are proposed by cabinet Ministers who can rely on the majority's support, which results in Parliament merely ratifying the "legislative decisions that have in effect been made by the cabinet."[314] Once the bill is introduced the entire caucus of the governing party is expected to support the bill. Members of the governing party who refuse to support a government bill are expected to resign.[315] While any member of Parliament can propose a bill, the success rate of a non-cabinet motion (a "Private Member's Public Bill) is low.[316]

i. Statutory/Legislative Process

The *Constitution Act* of 1867 granted parliament the power to make laws for Canada.[317] This power has its limitations and certain areas of law are reserved for the provinces. In Canada, a bill goes through numerous parliamentary readings, reviews, and amendments before becoming law. The nature of a bill determines what particular process it must take. Since a bill proposing an amendment to the BIA and CCAA would be considered a "Public Bill", this section will focus on the process that a "Public Bill" must take.[318]

Generally the government proposes bills that have already been approved by the Cabinet as well as the party with the majority of seats in the House of Commons. Once the Cabinet agrees on the need for a particular legislative measure, the relevant Minister will prepare a comprehensive memorandum detailing the law's objectives.[319] That memo is then sent to a Cabinet committee. If that committee agrees with the legislative program, it returns to the Cabinet for a vote.[320] Finally, if the Cabinet agrees with the legislative measure, then it is turned over to the Department of Justice's Legislation Section to be drafted into a bill.[321] Once the bill is drafted, in both English and French, it goes back to the Minister responsible

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[309] *Id.* at 117.
[310] *Id.* at 130.
[311] *Id.* at 131.
[312] MALCOLMSON, *supra* note 304, at 23.
[313] "In the Canadian regime, it is Parliament that adopts legislation, and, formally, it is Parliament that determines whether a cabinet has the right to govern. But the existence of highly disciplined parliamentary parties means that Parliament rarely uses it power in these matters. When it adopts legislation, Parliament is in most cases merely ratifying decisions that have in effect been made by the cabinet." *Id.* at 117-118.
[314] *Id.* at 118.
[315] LEGISLATIVE ASSEMBLY OF ONTARIO, HOW A GOVERNMENT BILL BECOMES A LAW (2001).
[316] FRASER, *supra* note 302 at 101
[317] *Id.* at 100.
[318] FRASER, *supra* note 302, at 101. A "Public Bill" is defined as a bill that affects the public in general and is not limited in scope to certain individuals and groups. *Id.* at 100-101. Public bills introduced by an ordinary MP is the personal responsibility of that MP. Once the Content of the bill is decided it is submitted to the Legislative Counsel Office to be drafted. *Id.* at 104.
[319] *Id.* at 101.
[320] *Id.*
[321] *Id.*

for approval and then to the Cabinet as a whole.[322] If the formal bill receives the approval of the Cabinet it will be introduced to Parliament.[323]

A bill will usually be introduced to the House of Commons first by the Government House Leader.[324] Upon introduction, the bill will automatically pass two motions: 1) to be introduced to the house and 2) "to be read a first time and printed."[325] During this first reading no debate occurs and ministers "generally [will] not elaborate on the bill."[326] The bill will then be open to the public and will be distributed to the members of parliament.[327] The Government will then decide the date that the bill will be called for the second reading.[328]

The second reading is characterized as the "most important stage that a bill must go through."[329] Debate over the principle of the bill occurs during this time allowing MPs in opposing parties to "criticize not only the proposed legislation but also the policy it represents."[330] Even with a majority of the votes in the House of Commons, a bill is often stalled at this stage, since the opposition may resort to "procedural tactic[s] available to delay passage."[331] Debate during this stage is regulated, with only the Prime Minister and the Leader of the Official Opposition not subject to time restrictions.[332] "During the initial round of speeches and during the first five hours of debate" speeches are limited to 20 minutes with an additional 10 minutes reserved for questions.[333] Afterward, speeches are limited to only 10 minutes with 5 minutes reserved for questions.

After approval of the underlying principles of a bill, the House of Commons will send the bill to a committee to examine it "clause by clause."[334] Committee members will analyze the various clauses in detail. This stage provides the first opportunity to propose amendments to the text of the bill.[335] "The committee has the power to modify the provisions of a bill to the extent that when it is reported to the House it may be completely different in substance from the bill referred to the committee."[336] While in theory these committees are supposed to subject a bill to detailed scrutiny, the reality is often different.[337] For example, in insolvency legislation, Committee members often have no prior knowledge of insolvency issues and often rely exclusively on outside reports.[338] Further, many members of Parliament "sit on multiple committees and often do not attend the same committee meetings regularly."[339] Committees often call witnesses to answer questions and present their views of the bill.[340] Typically the first witness

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[322] *Id.*
[323] *Id.* at 104.
[324] *Id.*
[325] *Id.*
[326] *Id.*
[327] *Id.*
[328] *Id.*
[329] *Id.* at 105.
[330] *Id.* at 104.
[331] *Id.*
[332] *House of Commons Procedure and Practice*, PARL. OF CAN., http://www.parl.gc.ca/procedure-book-livre/Document.aspx?sbdid= 7C730F1D-E10B-4DFC-863A-83E7E1A6940E& sbpidx=1&Language=E&Mode=1 (last visited July 12, 2012).
[333] *Id.*
[334] FRASER, *supra* note 302, at 107.
[335] *Supra* note 310.
[336] *Id.*
[337] Jacob S. Ziegel, *Canada's Dysfunctional Insolvency Reform Process and the Search for Solutions*, 26 BANKING & FIN. L. REV. 63, 78 (2010).
[338] *Id.*
[339] *Id.*
[340] *Supra* note 310.

to be called will be the minister responsible for the bill. Because of a lack of expertise, Committees may be more deferential to prestigious professional bodies like the Insolvency Institute of Canada over evidence presented by academics. After hearing from the various witnesses, the Committee will analyze the elements and clauses of the bill in a prescribed order.[341] Once a proposed clause is carried with or without amendment "it may not be discussed further without unanimous consent."[342] After the committee finishes considering the bill, clause-by-clause, the bill is then submitted in its entirety, with or without the amendments, for committee approval.[343]

The Committee will report the bill to the House who will then debate its contents, yet again. Thereafter, the House has two options: either concur with the report as it is or make a motion for amendments.[344] After all amendments have been debated and voted on, the responsible Minister will ask the house to concur in the new bill.[345] The bill will then immediately go to a vote. After the bill has made it through extensive debate it will face its third reading. The third reading provides a forum for the bill to be heard in its final form.[346] Finally, if the bill receives a majority vote after the third reading it has passed the approval stage by the House of Commons and will be sent to the Senate. Since the Senate typically will not oppose bills supported by the House, a discussion of the Senate legislative process will be omitted.[347] However, the Senate will often suggest technical amendments that will require further approval by the House of Commons. Once a bill in identical form has passed both Houses it will become law as soon as it receives Royal Assent by the Governor General's signature.[348] This final stage of the legislative process is largely ceremonial, as no Governors General have refused to give Royal Assent to a federal law.[349]

A History of Canadian Bankruptcy Reform

Canada's first general bankruptcy act was put in place in 1919.[350] This Act was amended several times during the first few decades of the 20th century.[351] During this time period, Parliament also enacted the Companies' Creditors Arrangement Act (CCAA) in order "to facilitate the reorganization of large companies."[352] The 1919 Legislation provided for the ranking of creditors, which gave secured creditors a disproportionate interest in an insolvent estate.[353]

Recognizing the need for reform in the late 1960s, the government created a Study Committee on Bankruptcy and Insolvency Legislation to make recommendations to reform Canadian Insolvency Legislation.[354] This committee issued its report in 1970, which recommended a complete reform of insolvency regulation.[355] The government accepted these recommendations and introduced Bill C-60 to Parliament.[356] After extensive debate in both houses of Parliament, an amended Bill S-11 was introduced

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[341] *Id.*
[342] *Id.*
[343] *Id.*
[344] *Id.*
[345] *Id.*
[346] FRASER, *supra* note 302, at 108.
[347] MALCOLMSON, *supra* note 304, at 131.
[348] FRASER, *supra* note 302, at 110.
[349] *Id.*
[350] Jacob S. Ziegel, *The Modernization of Canada's Bankruptcy Law in a Comparative Context*, 33 TEX. INT'L L.J. 1, 4 (1998).
[351] *Id.* at 5.
[352] *Id.*
[353] *Id.*
[354] Jacob S. Ziegel, *Canada's Phased-In Bankruptcy Law Reform*, 70 AM. BANKR. L.J. 383 (1996).
[355] Ziegel, *supra* note 337, at 67.
[356] Ziegel, *supra* note 350, at 383.

in 1978.[357] This Bill as well as four subsequent bills failed to become law over the next seven years.[358] While the specific reasons for this are unclear, it is generally agreed that the failure was a result of disagreement over: how to treat "unpaid wage claims in an employer's bankruptcy, the low visibility of bankruptcy as a political issue, and above all, the lack of commitment to the reforms by successive governments."[359] The bill also failed as a result of the government's "unwillingness to override committee opposition to some of the bills' features."[360] The Standing Senate Committee on Banking, Trade and Commerce complained the bill was: "heavily biased in favor of debtors and against creditors (especially secured creditors), that it lacked proper balance, and that the language and terms used in the bill were often cumbersome and confusing."[361] Specifically, the Committee was against the provisions providing unpaid employees priority over secured creditors.[362] A bill to amend the BIA and CCAA to provide a PACA-like trust may also receive similar scrutiny since it would impact the priority that secured creditors would have in produce assets.

Finally, in 1992 the conservative government passed Bill C-22 to amend the *Bankruptcy Act*.[363] One significant provision of this bill required the government to report to Parliament on the operation of the newly titled *Bankruptcy and Insolvency Act* within five years.[364] This provision was created to ensure that bankruptcy provisions remained up to date so that decades did not go by without further reform. Following the Act, the government created the Bankruptcy and Insolvency Act Advisory Committee (BIAC), with the purpose of formulating "new proposals and amendments for what was intended from the beginning to be a second phase" in the reform process.[365] Unfortunately, in the BIAC "creditor and insolvency practitioners were overrepresented" and the Committee lacked consumer representation.[366] The BIAC issued a series of recommendations, which led to the 1997 amendments.[367] These amendments received little opposition, and successfully amended both the BIA and the CCAA in a single bill.[368] The House of Commons essentially "rubber stamped" the BIAC recommendations without any extensive debate resulting in the passage of Bill C-5 in 1997.[369] One major criticism of the 1992 and 1997 amendments was the failure to provide guarantees to wage earner claims. It was widely agreed that the bankruptcy code should protect these individuals by guaranteeing "what is owed to them by an insolvent employer up to a reasonable amount."[370] Protection for these claims was included in the original C-22 Bill in 1991, but a consensus on how to protect these individuals could not be reached and the government was forced to abandon the provisions.

Similar to the 1992 amendments, the 1997 amendments required feedback from the federal government within five years.[371] However, instead of creating a new BIAC, the government relied on the reports from

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[357] *Id.*
[358] *Id.* at 384.
[359] *Id.*
[360] Jacob S. Ziegel, *Bill C-55 and Canada's Insolvency Law Reform Process*, 43 CAN. BUS. L.J. 76, 79 (2006).
[361] Ziegel, *supra* note 337, at 67.
[362] *Id.*
[363] The Bill was based on the recommendations of the Bankruptcy Advisory Committee, created eight years earlier. The Bill changed the name of the Act to the Bankruptcy and Insolvency Act, in order to encompass provisions applicable outside of bankruptcy. Jacob S. Ziegel, *Canada's Phased-In Bankruptcy Law Reform*, 70 AM. BANKR. L.J. 383, 384 (1996).
[364] Bankruptcy and Insolvency Act, S.C. 1992, c. 27 s. 92.
[365] Ziegel, *supra* note 50, at 384.
[366] Ziegel, *supra* note 337, at 67.
[367] *Id.*
[368] *Id.*
[369] *Id.* at 72.
[370] Ziegel, *supra* note 350, at 12.
[371] Ziegel, *supra* note 337, at 72.

a number of interest groups and government committees, including Industry Canada, The Senate Standing Committee on Banking Trade and Commerce, and the Personal Insolvency Task Force.[372] The various reports filed by interest groups deeply influenced the 2005 Bill C-55, and reflect the importance of interest groups in shaping federal bankruptcy law. Bill C-55 was proposed by the minority government and covered many of the issues identified in the "PITF and Senate, Banking reports, but also included an entirely new bill establishing a statutory scheme for the protection of unpaid wage earners."[373] Opposition to the new bill came from the financial community who were against the "provisions in C-55 subordinating security interest to pension fund and similar claims, as well as to unpaid wage earner claims."[374] Despite this vocal opposition, Bill C-55 received Parliamentary approval without any in depth analysis of the bill. In fact, the committee appointed to review the bill "unanimously endorsed the 145 page bill with only two modest changes" after only a few days of deliberations. [375] This lack of consideration was due to the various political parties wanting to take credit for the unpaid wage protections in the upcoming elections.[376] In a later version of this bill, the Senate Standing Banking Committee admitted approving the bill "without a comprehensive study of its provisions, in order to speed up the implementation of the [Wage Earner Protection Program Act] (WEPPA) provisions."[377] The Committee mentioned some stakeholders had reservations about the bill and promised to resume it study in upcoming years.[378] The provisions in these bills affecting the BIA and CCAA were not put in place until September 18, 2009.

Supplier Protection - Provisions 81.1 and 81.2 of 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. These provisions have been largely opposed and will provide a good example of the opposition a PACA-like amendment will face by various interest groups.

Seeing the need for further protection of certain industries, Parliament passed 81.2 providing "Special right[s] for farmers, fishermen, and aquaculturists."[379] Section 81.2 expands the rights available to these groups by providing a priority interest in *all* inventory of the purchaser provided certain conditions are met.[380] One such limiting condition requires that the goods were received by the bankrupt entity in the 15 days preceding the declaration of bankruptcy.[381] These provisions were enacted to "protect suppliers—who often lack a realistic ability to demand security for the transaction—from harm by insolvent debtors who order excessive amounts of inventory prior to bankruptcy as a means of increasing the assets available to satisfy secured creditors."[382] The Bankruptcy Advisory Committee issued a report in 1986 completely opposed to giving any special status to unpaid suppliers.[383] Despite this opposition, the House

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[372] The Personal Insolvency Task Force was established by the Superintendent of Bankruptcy in 2000, with the mandate to report to the Superintendent of Bankruptcy on the effect of federal bankruptcy legislation on consumers. *Id.* at 81.
[373] *Id.* at 72.
[374] *Id.*
[375] *Id.*
[376] *Id.*
[377] *Id.* at 74.
[378] *Id.*
[379] Bankruptcy and Insolvency Act, S.C. 1992, c. 27 s. 81.2.
[380] *Id.* (emphasis added).
[381] *Id.*
[382] STANDING COMM. ON BANK, TRADE AND COM., DEBTORS AND CREDITORS SHARING THE BURDEN: A REVIEW OF THE BANKRUPTCY AND INSOLVENCY ACT AND THE COMPANIES' CREDITORS ARRANGEMENT ACT 106 (Nov. 2003).
[383] ADVISORY COMM, ON BANKR. AND INSOLVENCY, REP. ON THE ADVISORY COMMITTEE ON BANKRUPTCY AND INSOLVENCY (2d ed., 1986).

of Commons Standing Committee was sympathetic to suppliers and included these provisions in the final bill.[384] For many reasons, these provisions have failed to adequately protect suppliers.[385]

Over the past two decades, Parliament has repeatedly assigned committees to review the deficiencies of the *Bankruptcy and Insolvency Act*. Despite this environment of continuous review, Parliament has never amended provisions 81.1 and 81.2 to reflect the original policy of protecting the rights of suppliers. The reason for this failure is best illustrated from the reports and viewpoints of various interest groups who influenced the bankruptcy reform process. Despite disagreements, one widely held notion among interested parties is that the current legislation is useless in protecting the rights of suppliers. The failure of Parliament to address these problems in the 1997 amendments is an "illustration of the weakness of Canadian suppliers as political lobbyists."[386]

The Joint Task Force on Business Insolvency Law Reform in 2002 created a report in which it concluded that these provisions should be repealed or left un-amended.[387] The task force was composed of two private bankruptcy organizations, The Insolvency Institute of Canada and The Canadian Association of Insolvency and Restructuring Professionals.[388] The task force argued that there is "no justification for preferring suppliers over other unsecured creditors."[389] In addition, the task force claimed that "81.1 and 81.2 have reduced the borrowing capacity of certain businesses without at the same time having conferred on unpaid suppliers all the protection they may initially have sought."[390]

In 2003, The Standing Senate Committee on Banking, Trade and Commerce made a series of recommendations to reform the bankruptcy legislation. Recommendation 23 dealt with sections 81.1 and 81.2. These recommendations read: "The Bankruptcy and Insolvency Act be amended to repeal, subject to the noted exception, the provisions that provide protection for unpaid suppliers of goods to bankrupt companies. The provisions that protect the rights of farmers, fishers and aquaculturalists as suppliers should be retained."[391] In making these proposals the Committee listened to a variety of views, "some suggesting that [the protection] be abolished . . . others recommending that it be changed to correct the deficiencies that have been identified."[392] The Committee based its final recommendations on the fact that the "existing provisions are not effective; moreover, they are not accessible to all suppliers . . . and are not fair from the perspective that they provide protection to recent unpaid suppliers at the expense of other creditors."[393] Despite these conclusions weighing against both provisions 81.1 and 81.2, the Senate recommended the provisions protecting farmers, fishers, and aquaculturalists be retained. While the Committee did not elaborate on the need to protect this vulnerable group, their final recommendation for the amendment does suggest that this committee may likely support a PACA-like trust amendment in Canada. However, what still remains unknown is how strong the support is among parliamentarians.

Various other reports have been issued regarding these provisions over the past decade. In 2005, the Insolvency Institute of Canada (IIC) again asked for the outright repeal of these provisions, claiming that the statutory priority "hurts the Canadian economy."[394] In 2011, Industry Canada reviewed Senate

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[384] Ziegel, *supra* note 350, at 15.
[385] *See* Belobaba, *supra* note 8.
[386] Ziegel, *supra* note 350, at 15.
[387] THE INSOLVENCY INST. OF CAN. CANADIAN ASSOCIATION OF INSOLVENCY AND RESTRUCTURING PROFESSIONALS, REP. ON JOINT TASK FORCE ON BUSINESS INSOLVENCY LAW REFORM (2002).
[388] *Id.*
[389] *Id.* at 65.
[390] *Id.*
[391] *Supra* note 360.
[392] *Id.* at 107.
[393] *Id.* at 110.
[394] Insolvency Inst. of Can., Bill C-55, Position Paper 9 (2005).

recommendation 23 and concluded that it would not be the most effective approach.[395] But it did not reject amendment outright. Rather, Industry Canada offered alternative amended language to correct the deficiencies in the legislation in order to better protect suppliers. Industry Canada rationalized the need for supplier protection by noting that "trade suppliers are generally smaller and unsecured creditors in an insolvency proceeding. It is onerous for them to participate in the process on a cost/benefit analysis."[396] Furthermore, "they are sometimes subject to abusive practice," and suffer from managers ordering excess supplies for the benefit of secured creditors.[397] Since the need to protect agricultural suppliers is even greater, a PACA like trust may be able to get the support of Industry Canada.

The history of 81.1 and 81.2 suggests that although there has been support for supplier friendly bankruptcy provisions, Canadian bankruptcy organizations have opposed these amendments in the past. Parliament relied primarily on these organizations' reports when enacting Bill C-55 amending the BIA and CCAA in 2005. These organizations are primarily composed of trustees, creditors, and other professionals. Most creditors oppose these provisions because they reduce the value of the remaining bankrupt estate. These provisions have been criticized by trade creditors as well for their failure to provide adequate protection for suppliers. While these provisions have received extensive criticism, a PACA like trust that successfully protects supplier's rights may receive more positive feedback.

ii. Political Considerations and Interest Groups

In order to successfully amend the BIA and related regulations, there must be support from the majority government in the House of Commons and influential interest and lobbyist groups. Amending the BIA without both these forms of support is unlikely.

Government Support

Political parties play a dominant role in the government of Canada. Today's Canadian government consists of "highly disciplined parliamentary parties."[398] As a result, when a party controls the majority of seats in Parliament, that party's leadership controls the entire legislative agenda. Therefore, to amend the *Bankruptcy and Insolvency Act* or the *Canadian Agricultural Products Act* there must be support of the current Conservative Government. The support of the Conservative government could be obtained through a variety of methods, including lobbying or arguing for U.S.-Canada cooperation. Once the support of the government is obtained, the most effective method of passing legislation would be through cooperation with the Cabinet, specifically the minister chosen to review and sponsor the proposed legislation.[399]

The Conservative Party in Canada currently controls 164 out of 308 seats in the House of Commons.[400] This 53 percent majority places the conservative party in control of the executive and legislative branches of the Canadian government until, at least, 2015 when the next federal election must be called. An election may be called before this time, as well, if the governing party wishes. The Conservative Party, led by Prime Minister Stephan Harper, has stated that its "foremost priority" is to steer the country

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[395] Industry Canada, BIA: Unpaid Suppliers – Clause by Clause Briefing Book – An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts. (2011)

[396] *Id.*

[397] *Id.*

[398] MALCOLMSON, *supra* note 304, at 117.

[399] For a list of the current Cabinet, *see* Appendix C.

[400] *Party Standings*, PARL. OF CAN. http://www.parl.gc.ca/SenatorsMembers/House/PartyStand ings/standings-E.htm (last visited July 12, 2012).

through the current global economic recession.[401] At the moment, bankruptcy reform is not on the party's list of priorities. The Conservative party typically stands for "lower taxes and less government control, [and] a more decentralized federation giving more responsibility to the provinces."[402] In order to create a PACA like trust in Canada, the Conservative Government must realize the urgent need for centralized legislation that protects the interests of international trade and the agriculture industry.

The Conservative Government's support of a PACA-like trust may require compromise. One crucial issue in gaining the support of the Conservative Government may be the recent tension between the U.S. and Canada. Over the past six years, some have argued that the Canadian government's positive attitude toward cooperation has consistently decreased.[403] This is partly due to the liberal "opposition" parties taking a different approach to Canada-U.S. relations.[404] Additionally, President Obama's recent opposition to the KeyStone Pipeline has increased tensions between the two countries.[405] Energy exports have quickly become one of Canada's top strategic priorities. To this end, delays of this project did not help facilitate Canadian-U.S. coordination.[406]

On the other hand, one key argument for the implementation of a PACA-like trust is reciprocity and the continued success of the NAFTA, which ash benefited the Canadian economy substantially. Establishing a PACA-like trust in Canada would further the goals of the NAFTA, to further international trade and integration between Canada, Mexico, and the U.S. Moreover, Canadian suppliers are afforded protection under PACA, thereby facilitating their trade into U.S. markets. As a matter of reciprocity, one might argue that U.S. suppliers should be afforded the same protections in Canada. Additionally, recent trends illustrate the importance of U.S. agriculture on the Canadian food supply. The Council on Foreign Relations has noted: "One of NAFTA's biggest economic effects on . . . trade has been to boost bilateral agricultural flows. Canada is the leading importer of U.S. agricultural products and U.S. agricultural exports to Canada roughly doubled between 1994 and 2003."[407] Lastly, the Conservative Party holds the agriculture industry as a key strategic economic sector for Canada."[408] If a PACA-like trust is not implemented, U.S. suppliers may be forced to raise prices, in the long run negatively effecting both U.S. and Canadian consumers.

In addition to the current state of government, it is important to note that that the current official opposition party is the New Democratic Party (NDP), which has seen increasing popularity over the past two years.[409] This party's opinion of U.S.-Canada cooperation has consistently declined over the past six years.[410] As a result, it would be prudent to implement bankruptcy reform before there is any shift in governmental control.

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[401] *Mission*, PRIME MINISTER OF CAN., http://www.pm.gc.ca/eng/feature.asp?pageId=142& feature Id=4 (last visited July 12, 2012).
[402] MALCOLMSON, *supra* note 304, at 182.
[403] Alexander Moens & Nachum Gabler, *Measuring Parliament's Attitude Towards Canada-US Cooperation* (2009), *available at* http://www.fraserinstitute.org.
[404] *Id.*
[405] Paul Wells & Tamsin McMahon, *How Ottawa Runs on Oil*, MACLEANS, Mar. 23, 2012, *available at* http://www2.macleans.ca/2012/03/23/oil-power/.
[406] *Id.*
[407] Lee Hudson Teslik, *NAFTA's Economic Impact*, COUNCIL ON FOREIGN REL., July 7, 2009, *available at* http://www.cfr.org/economics/naftas-economic-impact/p15790.
[408] *Party Declaration*, CONSERVATIVE PARTY OF CAN. (2011) *available at* http://www.conservative.ca/media/2012/07/20120705-CPC-PolicyDec-E.pdf
[409] *See, e.g.*, Adrian Humphreys, *NDP making huge gains as Canada tilts leftward: poll*, THE NAT'L POST (May 28, 2012), http://news.nationalpost.com/2012/05/28/ndp-making-huge-gains-as-canada-tilts-leftward-poll/ .
[410] Moens & Gabler, *supra* note 403.

Special Interest Groups

In Canada, special interest groups play a significant role in the "formulation of policies and the passing of legislation."[411] These groups assist "people with common concerns [to] communicate . . . directly to the decision makers."[412] Gaining the support of various lobby groups can help exert pressure on the government to amend the BIA and related regulations. Moreover, these groups could help develop public interest and advocacy on these issues, which would further influence legislation reform.[413] While the Government is aware that these groups are not objective, officials "lend them an attentive ear" and often call on them to participate in the legislative process.[414] For example, as mentioned, the government has called on numerous private interest groups in reforming bankruptcy legislation. In addition, whenever "law reform is envisaged, the Canadian Bar Association is automatically asked to participate."[415] All lobby groups are required to register with the Federal Government.[416] The number of lobby groups that would support a PACA-like trust is unknown, however, a list of some potential supporters is provided in the Appendix C.

Bankruptcy is an area of the law that is "technical and arcane and of little electoral interest."[417] As a result the law can be best understood by considering the positions of the various interest groups concerned with bankruptcy legislation. These interest groups are often the center of debate for future bankruptcy legislation. Recent governments "have appreciated that the growing complexity of insolvency problems at the commercial and consumer levels make it important to seek the advice and recommendations of outside bodies.[418] In the past, Parliament has largely relied on the reports and positions of external and internal committees when considering bankruptcy reform. These interest groups have shaped Canadian bankruptcy law over the past few decades. Due to the special role of these groups in shaping Canadian bankruptcy law, they will be discussed separately from everyday Lobby Groups.

Creditors groups, such as the Canadian Bankers Association, will likely provide the strongest opposition to a PACA-like trust in Canada. Creditors have significant lobbying power, through which they have historically influenced bankruptcy reform. Creditors are interested in profit maximization, "which assumes maximizing consumer borrowing and minimizing default and the costs of collection."[419] Creditors are also typically opposed to any provisions that lessen the priority of secured debt.[420] A PACA-like trust would increase the risk of lending to this industry, which would increase interest rates, resulting in a decline in borrowing. In addition, a PACA-like trust would reduce the size of the bankruptcy estate and would grant produce suppliers a priority interest over secured creditors. As a result, creditor associations and lobby groups will likely prove to be a significant barrier to amending the BIA and related regulations. Perhaps the most significant creditor association is the Canadian Bankers Association (CBA). "In Canada, the chartered banks dominate the individual market for secured and unsecured credit. They have had a significant influence on the shape of banking law and its interpretation. W.D. Coleman describes their lobbying arm, the [CBA], as 'one of the more formidable associations representing

[411] FRASER, *supra* note 302, at 27.
[412] *Id.*
[413] *Id.* at 26.
[414] *Id.* at 27.
[415] *Id.*
[416] Lobbyists Registration Act, R.S. (1985) c. L-12.
[417] Iain Ramsay, *Interest Groups and the Politics of Consumer Bankruptcy Reform in Canada*, 53 U. TORONTO L.J. 379, 384 (2003).
[418] Ziegel, *supra* note 337, at 76.
[419] Ramsay, *supra* note 417, at 391.
[420] *Id.*

Canadian business.'"[421] The CBA has continuous influence in politics, and primarily directs that influence "towards ensuring that their role as a secured lender would be unaffected by bankruptcy."[422] The CBA will likely lobby against a PACA-like trust in Canada.

A PACA-like trust will also likely face opposition from the Superintendent of Bankruptcy and Bankruptcy Trustees. The Superintendent of Bankruptcy is a self-financed regulatory agency with power over the administration and policy development of bankruptcy.[423] This agency licenses and regulates trustees and has been at the center of bankruptcy policy development.[424] This agency was also partly responsible for the creation of the Personal Insolvency Task Force. Trustees have a strong interest in ensuring that their role in consumer bankruptcies is not reduced.[425] Thus, "[r]eforms that downgrade the relevance of their expertise or limit their monopoly will be opposed."[426] Since a PACA-like trust would complicate bankruptcy proceedings and would impose on the autonomy of the trustee's role, these groups will likely oppose any such regulation. Furthermore, reducing the size of the bankruptcy estate will affect the trustee's ability to collect fees.

Organizations composed of creditors, trustees, lawyers, academics, etc. play the most significant role in the bankruptcy legislation process. These organizations include The Insolvency Institute of Canada, Industry Canada, and The Canadian Association of Insolvency and Restructuring Professionals. As seen from the overview of bankruptcy reform, Parliament has historically relied entirely on these groups to make suggestions for bankruptcy reform. As a result, the public and other lobby groups have limited access to effectuate bankruptcy reform. This process of relying primarily on outside organizations has resulted in Senate recommendations being primarily based on tradeoffs, failing to elicit a "broader public debate."[427] Based on their prior opposition to provisions 81.1 and 81.2 of the BIA, The Insolvency Institute of Canada and the Canadian Association of Insolvency will also likely oppose a Canadian PACA trust.

For the average consumer the costs of political participation are larger than the potential benefits, often causing them to become "rationally ignorant voters" when it comes to agricultural policy.[428] Similarly, bankruptcy and insolvency policy is often too complex and technical for the average consumer to understand. This trend is supported by the historical failure of Consumer groups to participate in bankruptcy reform. One bankruptcy provision that did receive widespread public political support was the unpaid wage provisions passed in 2005. In fact, these provisions were the primary reason Bill C-55 was rushed through Parliament. Both political parties wanted to take credit for these consumer friendly provisions before the pending elections. While unpaid wage provisions affected consumers in general, a PACA-like trust would only affect consumers indirectly. As a result, a PACA-like trust would likely receive little interest, either in support or opposition, from consumer interest groups.

In contrast, farmers and agribusinesses will have a large vested interest in agricultural policy, and will support a PACA-like trust.[429] These stakeholders participate in various influential organizations and are

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[421] *Id.* at 392.
[422] *Id.*
[423] *Id.* at 393.
[424] *Id.*
[425] *Id.* at 388.
[426] *Id.*
[427] Jacob Ziegel, *Canadian Bankruptcy Reform, Bill C-109 and Troubling Asymmetries* 27 CAN. BANKR. L. J. 108 (1996).
[428] Johan F.M. Swinnen, *The Political Economy of Agricultural and Food Policies: Recent Contributions, New Insights, and Areas for Further Research*, 32 APPLIED ECON. PERSP. AND POL'Y, 33, 36 (2010), *available at* http://aepp.oxfordjournals.org/.
[429] *Id.*

represented by numerous lobby groups.[430] The Fresh Produce Alliance (FPA) consists of the Dispute Resolution Corporation, the Canadian Horticultural Council, and the Canadian Produce Marketing Association. The FPA published a report in 2008 that compiled extensive data supporting the need for a PACA-like trust in Canada.[431] The FPA began its study after identifying a continued "high level of interest expressed across all segments of the Canadian produce industry (and particularly on the part of Canadian growers and shippers) in the potential value of a PACA-like trust instrument in Canada."[432] The FPA's study demonstrated that both U.S. and Canadian shippers rely substantially on PACA when supplying goods to the U.S. In fact, fifty percent of Canadian agricultural shippers admitted having relied on PACA in the past.[433] These statistics suggest that a PACA-like trust in Canada would receive support from the agricultural industry.

Various Canadian agriculture groups hold significant lobbying power. In 2010, out of "the top 10 associations lobbying on international trade . . . five related to agriculture."[434] These included the Dairy Farmers of Canada, Chicken Farmers of Canada, Canadian Federation of Agriculture, Canadian Cattlemen's Association and Canadian Agri-Food Trade Alliance.[435] These groups are just some examples of lobbying groups that would potentially support a PACA-like trust in Canada. Another organization, The Ontario Fruit and Vegetable Growers Association, has been working with the Canadian Horticultural Council to lobby "for the establishment of a made-in-Canada PACA-like trust program that extends the same benefits to the Canadian produce industry as in the U.S."[436] Cooperation with these groups will be beneficial in gaining the governments support to implement a PACA-like trust in Canada.

B. Recommended Canadian Federal PACA-like Amendments

Creating PACA-like protections in Canada will require amendments to the CAPA and the BIA to both establish trusts for international and interprovincial produce transactions and then recognize them in bankruptcy proceedings. As mentioned above, the federal government should be able to do this within its constitutional authority over Trade and Commerce and Bankruptcy matters. While the likelihood of such a statute being struck down is low, a challenge is not. Therefore, to hedge against such a challenge, the parties should consider coordination with the provinces.

This section begins by proposing standalone federal legislation that would create a PACA-like law in Canada. Because the scope of this report was meant to focus on a federal proposal, the majority of the weight in this section is placed on this section. However, since provincial coordination may be necessary, the section also briefly examines what would be involved if provincial coordination is deemed desirable.

i. Proposed Amendments to CAPA

First, a statutorily-imposed "deemed" trust (like the PACA) is necessary. This will ensure that the trust would survive any comingling of produce assets, as commonly occurs among produce traders. Otherwise, Canadian common law would consider the trust "collapsed" if comingled. Legislation is necessary to "deem" the trust to continue in these cases to ensure the shippers (the beneficiaries of the trust funds) are

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[430] *See* APPENDIX C (providing a list of lobbyist groups that could potentially support a PACA-like trust).

[431] L Patrick Hanemann, *Risk Experience in Canada and Risk Mitigation in the United States Perspectives from the Canadian Produce Community*, FRESH PRODUCE ALLIANCE (Dec. 2, 2008).

[432] *Id.* at 4.

[433] *Id.* at 16.

[434] *Agricultural Interest Dominate Trade Lobbying Last Year,* U. MONTREAL, (Feb. 9, 2011) *available* at http://www.cerium.ca/Agriculture-interests-dominate

[435] *Id.*

[436] Ontario Fruit and Vegetable Growers Assoc., BOARD BRIEFS (June, 2011), *available* at http://www.ofvga.org/readnews.php?ref=3&ID=2011-06-20%2015:18:09.

able to recover the value of the goods sold, even in the event of a bankruptcy or corporate reorganization.[437]

To enact a PACA-like trust law in Canada, consideration must be given to the legal framework surrounding trusts, bankruptcy, and the constitutional delegation of powers between the Canadian Federal Government and the provinces in Canada.[438] Although it appears that both the Provincial and Federal Governments have the jurisdiction to enact a PACA-like trust law, there are specific advantages and disadvantages to either approach.

To mirror the protections of the PACA in Canada, the CAPA would need to be amended to achieve the four methods of protection available under PACA: (1) mandatory licensing; (2) improved dispute resolution; (3) the existence of "deemed" and "floating" statutory trusts; and (4) temporary restraining orders.

(1) Mandatory Licensing

Create a mandatory licensing requirement for any business engaged in the interprovincial or international trade of produce. This will improve due diligence for U.S. shippers as they would be able to make an inquiry to the CFIA regarding the licensing status of a potential Canadian customer, including the history of any complaints, suspensions, or other negative events.

The CAPA should be amended to require that all produce dealers, merchants, or brokers obtain a license from the CFIA, thus eliminating the loopholes which currently limit the licensing regime in Canada. To illustrate, please note the language employed by the PACA to effectuate its more comprehensive regulation of market participants:

The Perishable Agricultural Commodities Act, 7 U.S.C.A. § 499f

(a) License required; penalties for violations

[N]o person shall at any time carry on the business of a commission merchant, dealer, or broker without a license valid and effective at such time . . . Any person desiring any such license shall make application to the Secretary. The Secretary may by regulation prescribe the information to be contained in such application and to be furnished thereafter.[439]

(2) Improved Dispute Resolution

CAPA should be amended to explicitly provide for a Board of Arbitration (or similar adjudicative body) to oversee licensing of market participants and to quickly and efficiently settle disputes arising from transactions between licensed parties. The CAPA has not had the ability to effectively police the transactions of its licensees since the *Steve Dart* decision in 1974. Amending the CAPA to grant the CFIA powers similar to those PACA vested in the AMS would serve to protect the interests of international and interprovincial produce traders in the event of a transactional dispute.

Under the PACA, the AMS Secretary has the power to resolve disputes between its license holders. This grant of authority arises under § 499f of the PACA, appropriately titled "Complaints, written notifications, and investigations." To provide a suggestion for the language to amend the CAPA to provide for an increase ability to oversee disputes among international traders in perishable agricultural

[437] HOULDEN AND MORAWETZ, BANKRUPTCY AND INSOLVENCY LAW OF CANADA 3 s.40.1 (3rd ed. 2003).
[438] *See* Citizens Ins. Co. v. Parsons, [1881] 7 App. Cas. 96.
[439] The Perishable Agricultural Commodities Act, 7 U.S.C.A. § 499f.

commodities, the following key excerpts from the PACA offer some guidance on what Canadian legislators need to keep in mind when considering amendments to increase the power of the CFIA:

The Perishable Agricultural Commodities Act

Any person complaining of any violation of any provision of Section 499(b) of this title by any commission merchant, dealer, or broker may, at any time within nine months after the cause of action accrues, apply to the Secretary by petition, which shall briefly state the facts, whereupon, if, in the opinion of the Secretary, the facts therein contained warrant such action, a copy of the complaint thus made shall be forwarded by the Secretary to the commission merchant, dealer, or broker, who shall be called upon to satisfy the complaint, or to answer it in writing, within a reasonable time to be prescribed by the Secretary.[440]

Any officer or agency of any State or Territory having jurisdiction over commission merchants, dealers, or brokers in such State or Territory and any other interested person (other than an employee of an agency of the Department of Agriculture administering this chapter) may file, in accordance with rules prescribed by the Secretary, a written notification of any alleged violation of this chapter by any commission merchant, dealer, or broker.

If there appears to be, in the opinion of the Secretary, reasonable grounds for investigating a complaint made under this section . . . the Secretary shall investigate such complaint or notification. In the course of the investigation, if the Secretary determines that violations of this chapter are indicated other than the alleged violations specified in the complaint or notification that served as the basis for the investigation, the Secretary may expand the investigation to include such additional violations.[441]

(3) Create a "Deemed" and "Floating" Statutory Trust

The intent of this provision is to cause sellers of produce to have priority over other creditors of their customers (produce dealers), including banks with perfected security interests in the inventory and receivables.[442] When enacting the PACA statutory trust, Congress expressly intended to provide trust protections only to shippers who extended short-term credit to buyers.

Please see the discussion below for further information on deemed trusts and suggested amendment language.

(4) Enable Temporary Restraining Orders to be Placed on Proceeds held in Trust

The CAPA should be amended to accommodate PACA-like temporary restraining orders to freeze the bank accounts of debtors until the trust beneficiaries (shippers) are paid. This is a key tool 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, § 499e(c)(5) of 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." [443] This grants U.S. District Courts

[440] *Id.*
[441] *Id.*
[442] 1984 U.S. Code Cong. & Adm. News 3701.
[443] The Perishable Agricultural Commodities Act, 7 U.S.C.A. § 499e.

jurisdiction over actions by private parties seeking to enforce payment from the PACA trust.[444] The CAPA should be amended to mirror this provision in PACA.

Creating Trusts in Canadian Law

In Canada, in order for legislation that creates a deemed trust to create an effective remedy that legislation must include:

a) who the trust is available to;
b) how the trust can be used;
c) what assets are held in trust;
d) what remedies are available to the trustee, including the tracing of assets; and
e) what effect bankruptcy has on the trust.

In a slow pay situation a trust may be utilized to enforce payment similar to a enforcing a contract. The trustee has an obligation to account for the property held in trust. The trustee cannot convert the property into other property for personal use.[445] In the case of transaction for agriculture goods a buyer cannot legally use the inventory and accounts receivable or proceeds of the inventory for a purpose other than to satisfy the debt to the supplier. Such an act gives rise to a personal claim for breach of trust and proprietary claim against the property if it is still indefinable.[446]

What assets are held in trust

A trust needs to define what assets are being held by the trustee for the beneficiary. Most Canadian deemed trusts are for tax collection purposes and therefore apply to money either deducted from a third party such as employees or for amounts deducted from transactions such as sales tax. Under the PACA, the trust applies to "all inventories of food or other products derived from perishable agricultural commodities, and any receivables or proceeds from the sale of such commodities or products."[447] Currently the priority provided for in s. 81.2 of the BIA only applies to inventory. This makes it unlikely that a trust could be extended to other property without strong objection from other interested parties. However, PACA provides that a trust in inventory in combination with proceeds and accounts receivable is usually adequate for recovery.

What remedies are available to the beneficiary including the tracing of assets?

The crucial aspect of remedies in deemed trusts is the tracing provision, which allows for commingled assets to be separated from the bankrupt's other property and prevented from being distributed among creditors. The drafting of tracing provisions is crucial to ensure the trust is not collapsed upon bankruptcy. In *Daulphin Plains Credit Union Ltd v. Xyloid Industries Ltd.*,[448] the Supreme Court of Canada considered two statutory trusts and whether the funds could be traced. Therein, a company was put into receivership and the receiver liquidated the company's assets. But the Federal Government opposed the receiver when he sought to pay out the proceeds to the first ranking secured creditor. The Federal Government argued that the funds should be withheld under the *Income Tax Act* and *Canada Pension Plan*. The Court found that the amounts covered by the *Canada Pension Plan* should be withheld but that

[444] Tanimura & Antle, Inc. v. Packed Fresh Produce, Inc., 222 F.3d 132, 138 (3d Cir. 2000).
[445] LAMER, *supra* note 73.
[446] *Id.*
[447] The Perishable Agricultural Commodities Act, 7 U.S.C.A. § 499.
[448] Daulphin Plains Credit Union Ltd v. Xyloid Industries Ltd., [1980] 1 S.C.R. 1182.

the amounts under the *Income Tax Act* should not. The conclusion was based on differing statutory language. Section 227(5) of the *ITA* was constructed as follows:

227(5) All amounts deducted or withheld by a person under this Act shall be kept separate and apart from his own moneys and in the event of any liquidation assignment or bankruptcy the said amounts shall remain apart and form no part of the estate in liquidation, assignment or bankruptcy.

Meanwhile, section 24(4) of the *Canada Pension Plan* was written as:

24(4) In the event of any liquidation, assignment or bankruptcy of an employer, an amount equal to the amount that by subsection (3) is deemed to be held in trust *for Her Majesty* shall be deemed to be separate from and form no part of the estate in liquidation, assignment or bankruptcy, whether or not that amount has in fact been kept separate and apart from the employer's own moneys or from the assets of the estate.

Subtle differences between the two provisions allowed the Canada Pension Trust to survive commingling but not the trust created under the *Income Tax Act*. Under the *Canada Pension Plan* provision, the deductions were to be deemed to be held separate and apart upon a liquidation, assignment, or bankruptcy. Conversely, the *ITA* did not make such a presumption. Rather, it assumed that the funds were in fact held separate and apart. The Court found that the phrase "whether or not that amount has in fact been kept separate and apart" in the *Pension Trust* was the crucial distinction between the two provisions.

The drafting of the deemed tracing provision for a PACA-like trust has to avoid the mistake contained in s. 227(5) of the *ITA*. Since *Daulphin Plains*, the deemed trust in the *ITA* has been amended to prevent this interpretation.[449] Similar drafting is also used in the deemed trust established in the *Excise Tax Act* (ETA).[450] Modeling the deemed trust for produce traders in *CAPA* after those in the *ITA* and *ETA* would ensure that the Canadian Supreme Court does not interpret the amendments as it did in *Daulphin Plains*. Also, adopting a similar provision would mean that it would be easier to predict how the trust would be interpreted by the Canadian judiciary. If there were uncertainty about the new deemed trust's interpretation, it may prove to be an ineffective risk mitigation tool as suppliers may fear the costs to litigate its interpretation.

What is the effect of bankruptcy on the trust?

As stated earlier, trust property is excluded from the assets in bankruptcy that are available to satisfy indebtedness to creditors. However, there has been uncertainty as to the meaning of word "trust" in s. 67(1)(a) of the BIA. In *British Columbia v. Henfrey Samson Belair Ltd*,[451] the Supreme Court of Canada considered whether a deemed trust created by *Social Service Tax Act* was within the meaning of "trust" in the BIA. The province attempted to recover funds in a bankruptcy over a secured creditor, which had been intermingled in the course of the bankrupt's operations. The Court rejected the province's argument, holding that the term "trust" only applied to trusts that met the common law definition. The Court went on to hold that a claim under the *Social Service Tax Act* was a crown claim within the meaning of the BIA. The result was that the province's claim was subordinated to secured creditors. The case illustrates that deemed trusts, even if traceable in the bankrupt's property, may not be exempt from distribution among creditors.

However, in *Henfrey*, there were other considerations beyond the issue of the meaning of word "trust" within s. 67(2) that may have caused the Court to come its conclusion. Under the *Constitution Act, 1867*[452] the

[449] *See* Amended Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.).
[450] Excise Tax Act, R.S.C. 1985, c. E-15 s. 222(3).
[451] Henfrey, *supra* note 77.
[452] Constitutional Act 1867, *supra* note 9, s. 91(21).

Federal Government has the exclusive jurisdiction to legislate bankruptcy and insolvency law. Allowing the province to legislate a deemed trust to exempt property from distribution among creditors would have effectively allowed the province to alter the priority scheme set out in the BIA. As later recognized by Canada's Supreme Court:

[Individual] provinces cannot create priorities between creditors or change the scheme of distribution on bankruptcy under s. 136(1) of the *Bankruptcy Act* . . . in determining the relationship between provincial legislation and the *Bankruptcy Act*, the form of the provincial interest created must not be allowed to triumph over its substance. The provinces are not entitled to do indirectly what they are prohibited from doing directly.[453]

The analysis suggests that only provincial deemed trusts may fall outside the scope the meaning of "trust" in s. 67(1)(a).

The BIA has since been amended to deal with this issue. Section 67(2) of the BIA states that "provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(a) unless it would be so regarded in the absence of that statutory provision."[454] Therefore the BIA has incorporated the jurisprudence in the statute. However, s. 67(2) would not apply to a PACA trust since it would not be in favor the Crown. This makes it possible that the BIA would not have to be amended for a deemed trust to be recognized in bankruptcy if legislation is passed by the Federal Government. However, there is risk that if the BIA is not amended, courts could rely on the reasoning in *Henfrey* to hold that "trust" within the meaning of s. 67(1)(a) does not constitute a deemed trust in favor of agriculture producers.[455] Thus, the most reliable path is to amend the BIA to recognize such a trust. This has been done for deemed trusts contained in the *ITA*, *Employment Insurance Act*, and *Canada Pension Plan*. If a trust is legislated by a provincial government the trust does need to be recognized by the BIA to survive bankruptcy.

Suggested Amendment Language to CAPA to Create a Deemed Trust

CAPA provides the basis for the licensing scheme of agriculture producers and most federal statutes closely related to the sale of agriculture. This makes it the most likely federal statute for a deemed trust in favor of agriculture producers to be imposed. The BIA does not contain any statutory trusts because the statute only relates to matters within the scope of bankruptcy. A deemed trust is an effective remedy both in and out of bankruptcy making it more appropriate to be included elsewhere. The following is the proposed wording to create a deemed trust. The provisions are based on the deemed trust established in s. 227(4) of the *ITA* and the trust established in *PACA*.

Definitions "agriculture products" means (*a*) an animal, a plant or an animal or plant product,

[453] Husky Oil Operations Ltd. v. Minister of National Revenue, [1995] 3 S.C.R. 453.
[454] Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3.
[455] Prof. Peter Hogg has noted that "as a matter of statutory interpretation, the decision in *B.C. v. Henfrey Samson Belair* suggests that in the absence of a segregated fund, even a federal deemed trust would not qualify as a 'trust' within the meaning of section 67 (l)(a) of the Bankruptcy and Insolvency Act." *See* HOGG, CONSTITUTIONAL LAW OF CANADA 648 (4th ed. 2002).

(*b*) a product, including any food or drink, wholly or partly derived from an animal or a plant, or
(*c*) a product prescribed for the purposes of this Act;

"agriculture supplier" means a person who sells agriculture products to a dealer.

"dealer" means a person who
(*a*) is engaged in the business of purchasing or selling agricultural products,
(*b*) negotiates consignments, sales, purchases or other transactions involving agricultural products,
(*c*) receives or handles, on commission, agricultural products, or
(*d*) is prescribed as a dealer for the purposes of this Act;

"sell" includes
(*a*) agreeing to sell or offering, keeping, exposing, transmitting, conveying or delivering for sale,
(*b*) selling by consignment,
(*c*) exchanging or agreeing to exchange, and
(*d*) disposing of or consenting to dispose of, in any manner, for a consideration;

"secured creditor" means a person who has a security interest in the property of another person or who acts for or on behalf of that person with respect to the security interest and includes a trustee appointed under a trust deed relating to a security interest, a receiver or receiver-manager appointed by a secured creditor or by a court on the application of a secured creditor, a sequestrator or any other person performing a similar function;

"security interest" means any interest in property that secures payment or performance of an obligation and includes an interest created by or arising out of a debenture, mortgage, hypothec, lien, pledge, charge, deemed or actual trust, assignment or encumbrance of any kind whatever, however or whenever arising, created, deemed to arise or otherwise provided for;

"specified person" means a particular person means a person who is, in relation to the particular person or the disbursements, property, business or estate of an dealer, including but not limited to:
(*a*) a trustee;
(*b*) a liquidator;
(*c*) a receiver;
(*d*) an interim receiver;
(*e*) a receiver-manager;
(*f*) a trustee in bankruptcy or other person appointed under the *Bankruptcy and Insolvency Act*;
(*g*) an assignee;
(*h*) a secured creditor;
(*i*) an executor, a liquidator of a succession or an administrator;
(j) a person appointed (otherwise than as an employee of the creditor) at the request of, or on the advice of, a secured creditor in relation to the particular person to monitor, or provide advice in respect of, the disbursements, property, business or estate of an dealer under circumstances such that it is reasonable to conclude that the person is appointed to protect or advance the interests of the creditor;

Of these definitions only "agriculture supplier" is new. "Sell", "dealer", and "agriculture products" are defined in *CAPA* and the definitions of "secured creditor", "security interest", and "specified person" are taken from the *ITA*. The definition of agriculture supplier would define who is able to use a trust under *CAPA*. The definition would ensure market participants similar to those who sell to "commission merchant, dealer, or broker" under PACA are within the scope of the provisions.

The following amendments would be placed in CAPA in a new section. The provisions create the deemed trust and provide for how the trust would operate in practice.

(1) A dealer who enters into an international or interprovincial transaction with an agriculture supplier involving goods that cross provincial boundaries is deemed, notwithstanding any security interest, to hold the inventory, related accounts receivable, and proceeds thereof separate and apart from their property and from property held by any secured creditor of the dealer that but for the security interest would be property of the dealer, in trust for the agriculture supplier and for payment to the agriculture supplier in the manner and at the time provided under this Act or as otherwise specified in an written agreement between the dealer and agriculture supplier, until full payment of the sums owing in connection with such transactions has been received by the agriculture supplier.

(2) Notwithstanding any other provision of this Act, the *Bankruptcy and Insolvency Act* (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law, where at any time an amount deemed by subsection (1) to be held in trust for an agriculture supplier is not paid to that supplier in the manner and at the time provided under this Act or as otherwise specified in a written agreement, the property of the dealer and property held by any secured creditor of that dealer but for a security interest would be property of agriculture supplier, equal in value to the amount so deemed to be held in trust is deemed:

(*a*) to be held, from the time of the purchase separate and apart from the property of the dealer, in trust for the agriculture supplier whether or not the property is subject to such a security interest, and

(*b*) to form no part of the estate or property of the dealer from the time the amount was so deducted or withheld, whether or not the property has in fact been kept separate and apart from the estate or property of the dealer and whether or not the property is subject to such a security interest and is property beneficially owned by the agriculture supplier notwithstanding any security interest in such property and in the proceeds thereof, and the proceeds of such property shall be paid to that agriculture supplier in priority to all such security interests.

(3)(a) Payment by a dealer for agriculture products imported from outside the dealer's province shall be made within 15 days of the purchase to the agriculture supplier unless otherwise specified in a written agreement between the dealer and an agriculture supplier.

(b) An unpaid agriculture supplier shall lose the benefits of such trust unless such person has given written notice of intent to preserve the benefits of the trust to dealer within thirty calendar days (i) after expiration of the time prescribed by which payment must be made, as set forth in subsection (3)(a), or (ii) after expiration of such other time by which payment must be made, as the dealer and agriculture supplier have expressly agreed to in writing before entering into the transaction. The written notice to the dealer shall set forth information in sufficient detail to identify the transaction subject to the trust.

(4) For a trust to exist under subsection (1) an agriculture supplier must provide written notice to the dealer that the agriculture products involved in the transaction are subject to a trust under Section X(1) of the *Canadian Agriculture Products Act*.

(5) Where a specified person in relation to a dealer (in this subsection referred to as the "payer") has any direct or indirect influence over the disbursements, property, business or estate of the payer and alone or together with another person, takes possession or in any way disposes of property held in trust for an agriculture supplier, the specified person is liable for the claim of agriculture supplier to the extent of

the net amount realized on disposition, after deducting the cost of realization, and is subrogated in and to all rights of the agriculture supplier to the extent of the amounts paid to them by the specified person.

The trust established with these sections would operate similar to the PACA. An amount to the agreed purchase price in respect to supplied agriculture products is deemed to be held in trust for an agriculture supplier by the dealer. Upon bankruptcy the amount is set aside from property that is divisible among creditors. Also, agriculture producers have to give notice that supplied goods are subject to a deemed trust and if the trust is not enforced within 30 days of payment becoming due. If notice is not given then the agriculture supplier loses their equitable interest in the dealer's property. Additionally, there is section imposing liability upon individuals who improperly dispose of trust property. This ensures compliance by individuals who have control over the dealer's property and may be acting on behalf of another interested party such as a secured creditor. Lastly, language has been included to specify that the trust is only created for produce assets that cross provincial lines. This ensures that the scope of this law falls within federal powers.

ii. Suggested Amendments to the BIA

As mentioned, in order to be certain that the aforementioned amendments are recognized during bankruptcy proceedings, the BIA must be amended to account for the new trust. Thus, the proposed amendment to the BIA after the creation of the above deemed trust is as follows:

67. (4) Any property held in trust for a person as specified by the *Canada Agriculture Products Act* shall be regarded as held in trust for that person for the purpose of the paragraph 67(1)(a).

C. Provincial Considerations for a Bi-Jurisdictional Approach to Implementation

Creating a PACA-like trust in Canada may require, or at least may be prudent to obtain, the support of the provincial and territorial governments. While the Federal Government has the authority to pass bankruptcy legislation, elements of a PACA-like trust may fall within areas of law typically reserved for the provinces.[456] The Federal Government's ability to regulate agricultural trade is usually limited to interprovincial and international trade. Despite, these jurisdictional issues, comprehensive federal legislation would likely be constitutional under its Bankruptcy authority as well as its Trade and Commerce powers. Yet, while a uniform federal program is preferable it may be challenged constitutionally by some of the provinces.

A federal-provincial approach could be taken instead of comprehensive federal legislation or could be used in the unlikely event that the comprehensive federal legislation is deemed unconstitutional. To overcome constitutional barriers of this federalist system, the creation of a PACA-like trust may require a great deal of "policy coordination."[457] "Policy coordination" between the Federal and Provincial Governments could be expensive and time consuming. This section will begin by briefly discussing the provincial legislative process. Then this section will look at the Canadian federalist system with an emphasis on "policy coordination" between the two levels of government. Finally, this section will

[456] Constitutional Act 1867, *supra* note 9, s. 91; *see supra* Part III, Constitutional Conflicts.

[457] Herman Bakvis & Douglas Brown, *Policy Coordination in Federal Systems: Comparing Intergovernmental Processes and Outcomes in Canada and the United States*, 40 J. FEDERALISM 484, 484 (defining "policy coordination" as a "mutual adjustment that causes (governments) to pursue different policies than they would have chosen had policy-making been unilateral.").

analyze the politics and policies of several provinces in order to understand the likely success of "policy coordination" in the creation of a PACA-like trust.

i. Provincial Statutory/Legislative Considerations

Provincial Legislative Process

The provincial legislative process is nearly identical to the federal process discussed earlier in this report. The primary difference being that there is only one house in the provincial legislative bodies—the provincial legislature.[458] Similar to the federal system, provincial bills must go through three readings and receive royal assent by the Lieutenant-Governor of each province.[459] Royal assent has not been refused since 1945 and is essentially a formality.[460] This general legislative procedure is shared by all the provinces.

Like the Federal Government procedure, each province's government is made up of the party with a majority of seats in the provincial legislature. The cabinet is drawn from the government's membership and sets the legislative agenda which essentially controls much of the law making for the province. The Premier of the province is the head of the political party holding the majority of seats in the province. This "parliamentary model ensures executive dominance of the legislature, through party discipline and the conventions of responsible government and cabinet solidarity."[461] As a result of this control, almost all provincial legislation is introduced by the Cabinet Minister or the Speaker of the House on behalf of the government.[462] These party ties also create a strong unified provincial government, which "sharpens concerns with jurisdiction and encourages jurisdictional disputes."[463]

Since the Cabinet makes the legislative decisions, the pre-legislative stage of a bill is often more important than the formal legislative process.[464] This pre-legislative process occurs amongst the various branches (or provincial ministries) of the cabinet, outside the public eye, and differs from one government to the next.[465] During this process most of the work and drafting is performed by the relevant ministry(ies), under the direction of the Cabinet Office and Premier's Office.[466] Once the "Government" agrees on the need for legislation, a Minister of the Cabinet will usually introduce the Government Bill to the provincial parliament.[467] Once a bill is introduced the Cabinet and the entire caucus of the governing party are expected to support the bill.[468] In fact, any minister who refuses to support a government bill is expected to resign.[469] Since the provincial legislative process mirrors the federal system and bills proposed by the "Government" are unlikely to be defeated, a full analysis of the legislative process is omitted.[470] While a bill is unlikely to be defeated "it may be delayed, or held up in committee, or be

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[458] EUGENE FORSEY, HOW CANADIANS GOVERN THEMSELVES 46 (Library of Parliament Ottawa, ON 7 ed. 2010).
[459] *Id.*
[460] *Id.*
[461] Bakvis, *supra* note 457, at 491.
[462] "Government" is referring to the political party currently in control of the legislature, the leadership of which makes up the provincial cabinet.
[463] Bakvis, *supra* note 457, at 491.
[464] *How a Government Bill Becomes Law (Pre-Legislative Process)*, LEG. ASSEMBLY ONT., (Jan. 23, 2009) (providing a brief description of Ontario's legislative process, other provinces may differ, but will generally follow the same process).
[465] *Id.*
[466] *Id.*
[467] How a Government Bill Becomes Law, LEG. ASSEMBLY ONT. (Aug. 2, 2001).
[468] *Id.*
[469] *Id.*
[470] *Id.*

pushed aside on the legislative timetable by more pressing bills, or die on the Order Paper when the House prorogues or is dissolved."[471] Based on the structure of provincial governments, it will be necessary to gain the support of each province's cabinet and Premier in order to effectuate legislative change. This support can be achieved through political ties, bargaining, and "policy coordination" among the different levels of government.

Canadian Federalism: Cooperation between levels of government

A PACA-like trust may require coordination between the Federal and Provincial Governments. This concept of "policy coordination" is often achieved in the U.S. through a central legislative process and a matrix of intergovernmental relations.[472] In contrast, in the Canadian federal system no such matrix exists, each level of government operates "within its own sphere" and "mechanisms for allowing other jurisdictions to influence policy-making at the federal level are largely absent."[473] As a result, coordination takes the form of intergovernmental bargaining between "executives of the Federal Government and the executives of the provinces and territories."[474] Coordination is made even more difficult "because provincial jurisdictional autonomy is protected by constitutional law from many forms of federal encroachment."[475]

Federal-provincial cooperation in Canada "while relatively infrequent over the past decade, have mainly been the result of lengthy negotiations between Ottawa and the provinces, and the programs have largely consisted of separate but coordinated delivery."[476] In the past, intergovernmental relations in Canada have been tense, threatening the ideals of national unity and federal integration.[477] Specifically in Quebec, the government has repeatedly opposed the jurisdiction of the Federal Government, and has often demanded the right to opt out of conditions tied to the receipt of federal funds. [478] Some successful examples of intergovernmental coordination in the past include: (1) maintaining and reforming health insurance programs; (2) greenhouse gas emission reductions; and (3) major highway infrastructure.[479] These programs achieved different measures of success and provincial cooperation largely resulted from the granting of conditional federal funds. In contrast, passing a PACA-like trust would not involve federal funds. Thus intergovernmental coordination may be more difficult.

More recently, Ottawa has tried to impose a system known as "Collaborative Federalism", which treats federal and provincial governments as equal "partners rather than as competitors with neither subservient to the other."[480] A related development was the creation of the Social Union Framework Agreement (SUFA).[481] This agreement between the Federal Government and the governments of the provinces and territories discussed a mutual willingness "to work more closely together to meet the needs of Canadians."[482] One identified objective of the agreement was to "[u]ndertake joint planning to share information on social trends, problems and priorities and to work together to identify priorities for

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[471] *Id.*
[472] Bakvis, *supra* note 457, at 485.
[473] *Id.* at 487.
[474] *Id.* at 485.
[475] *Id.*
[476] *Id.* at 501.
[477] *Id.* at 492.
[478] *Id.*
[479] *Id.* at 493–499.
[480] *Id.* at 492.
[481] A FRAMEWORK TO IMPROVE THE SOCIAL UNION FOR CANADIANS, AN AGREEMENT BETWEEN THE GOVERNMENT OF CANADA AND THE GOVERNMENTS OF THE PROVINCES AND TERRITORIES (Feb. 4, 1999).
[482] *Id.*

collaborative action."[483] This agreement has been useful in the implementation of a number of joint programs.[484] If the Federal Government identifies the need for a PACA-like trust this agreement would be useful in obtaining the cooperation of the provinces.

If a PACA-like trust will require provincial legislation, the process will require separate lengthy negotiations with each province. Intergovernmental bargaining rarely involves the legislative branch and negotiations occur at informal meetings often involving First Ministers, ministerial councils, and other senior officials. The success of these negotiations will rely on a number of factors, including the political ideals of each province's "Government." In general, a national political consensus on the need for a PACA-like trust would ease the burden of coordination between the two levels of government. However, such a consensus is unlikely, considering the low political visibility of bankruptcy law.

Passing separate legislation in each of the provinces would be a far more time consuming and costly process than implementing a comprehensive federal act. In addition, the success of such an intergovernmental program will be difficult, considering the political ties of the different provinces. This approach would involve negotiating with thirteen different governments each with their own politics, priorities, and policies to consider. Quebec for instance, is unlikely to cooperate in any legislative program that diminishes its autonomy. While under SUFA these provincial governments have agreed to work together in meeting the needs of Canadian citizens, they may not agree on the need for a PACA-like trust, and may expect something in return for their cooperation.[485] Despite the numerous barriers facing "policy coordination", the Canadian model shows "surprising degrees of coordination through more decentralized processes."[486] In summation, while an intergovernmental PACA-like trust would face numerous barriers, it could be achieved through "policy coordination" and negotiation among the different levels of government.

Politics in the Provinces

If a PACA-like trust is to involve provincial legislation then it will require gaining the support of the "Government" of each province. As discussed above, this process will involve a great deal of "policy coordination" between federal and provincial executive level of governments. Political leaders in the executive branch belong to highly disciplined political parties and need the support of their cabinet prior to proposing legislation. Political parties would likely prove the most significant barrier to "policy coordination" between the various governments. However, every political party has stated an interest in protecting the agricultural industry. This subsection will identify the various provincial governments, in order to better understand the barriers an intergovernmental PACA-like trust would face.

The Conservative Party of Canada is currently in control of the Federal Government. The conservative party in the provinces is known as the Progressive Conservative Party and is structurally distinct from its federal counterpart.[487] While these two parties differ on some issues, they share the same core values, and the provincial governments "tend to agree with [their] federal counterparts."[488] Therefore, the several provinces controlled by a Conservative party might more easily cooperate with any legislative reform proposed by their federal counterpart. The Progressive Conservative Party currently controls the

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[483] *Id.*
[484] Bakvis, *supra* note 457, at 492.
[485] *Supra* note 459.
[486] Bakvis, *supra* note 457, at 502.
[487] Rosanne Waters, *The Relationship Between Provincial and Federal Political Parties: A Perspective from the Ontario Legislature* 10 (2009), *available at* http://www.ontla.on.ca/library/ repository/mon/23008/294748.pdf.
[488] *Id.* at 13 (quoting an interview with Lisa MacLeod, a member of the Progressive Conservative Party of Ontario and the Legislative Assembly of Ontario since 2006).

governments of Alberta, New Brunswick, Newfoundland and Labrador. In addition, the party is the official opposition in Manitoba, Ontario, and Prince Edward Island. Agriculture reform is of primary importance to the Progressive Conservative Party, and a number of the party's policies are aimed at protecting this important industry.[489] A PACA-like trust would also protect this industry and would likely be supported by the Progressive Conservative Party. Based on these reasons, the provinces of Newfoundland and Labrador, Alberta, and New Brunswick may support an intergovernmental effort to create a PACA-like trust in Canada.

The two other major political parties across Canada are the New Democratic Party (NDP) and the Liberal Party. The Liberal Party currently controls the governments of British Columbia, Ontario, Quebec, and Prince Edward Island. The government of Quebec is distinguishable from these other three provinces and will be discussed further below. While this section will discuss the Liberal party in general, it is worth noting that each province has a separate Liberal party focused on the issues specific to that province.[490] Despite these differences, the provincial Liberal Parties share the same core values and policies as their federal counterpart. The Liberal Party of Canada has made a commitment to sustainable farm incomes, and supports innovation and programs protecting farmers from risk.[491] The Liberal Party of Prince Edward Island has shown its commitment to agricultural reform by stating its "priority resolution" is a partnership with Agriculture and Agri-Food Canada and the Canadian Federation of Agriculture to develop a national food strategy for Canada.[492] Similar resolutions have been entered into by other provincial Liberal party governments. Despite this support for reform protecting the agricultural industry, the provincial Liberal governments may oppose intergovernmental coordination based solely on its opposition to the Conservative Party of Canada. However, such an opposition would be a direct contradiction to the parties' official policies, and as a result British Columbia, Ontario, and Prince Edward Island would like cooperate with the establishment of an intergovernmental PACA-like trust.

The New Democratic Party (NDP) shares many of the same social values as the Liberal Party and currently controls the governments of Manitoba and Nova Scotia. Unlike the Conservative and Liberal Parties of Canada, the NDP is a unified party, cohesive "from a provincial-federal point of view."[493] The NDP is currently the official opposition in the Federal Government and the governments of Manitoba and Nova Scotia may oppose intergovernmental coordination based on political ties. The NDP has expressed its commitment to protecting the "family farm," which it considers distinct from agri-business.[494]

Of all the provinces, Quebec is the least likely to cooperate in a national effort to implement a PACA-like trust. The current government is controlled by the Quebec Liberal Party which has been independent from the federal Liberal Party since 1955. While the Quebec Liberal Party would not necessarily oppose a PACA-like trust, the formal opposition, the Patri Québécouis would strongly oppose such "policy coordination." The Patri Québécouis has consistently worked to maintain the strength of the Quebec sovereignty. In the past, Quebec has demanded the right to opt out of conditions imposed by the Federal

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[489] *Policies,* PROGRESSIVE CANADIAN PARTY, (July 28, 2009), *available at* http://www.pcparty.org/index/php/about-us/pc-policies ("We need a solution of a similar nature for farmers to once and for all relieve the terrible pressures driving them off the farms.").

[490] Waters, *supra* note 487, at 10 ("There is extensive evidence to suggest that the governing party in Ontario will put its policy needs and interests ahead of support for its federal cousins.")

[491] *Your Family. Your Future. Your Canada,* LIBERAL PARTY PLATFORM, 66 (2011), *available at* http://djsvoutqo4b1q.cloudfront.net/files/2011/04/liberal_platform.pdf.

[492] Liberal Biennial Convention, Agriculture and Rural Policy, *available at* http://convention. liberal.ca/agriculture-rural/17-agriculture-and-rural-policy/. At the Liberal Party Biennial Convention each Provincial Liberal Party was allowed to submit one resolution as a "priority resolution." Prince Edward Island chose this partnership. *Id.*

[493] Waters, *supra* note 487, at 14.

[494] New Democratic Party, Platform, s. 5.6 Protecting the Family Farm (2011), *available at* http://xfer.ndp.ca/2011/2011-Platform/NDP-2011-Platform-En.pdf.

Government as part of intergovernmental programs.[495] Based on the ideals of Quebec sovereignty the provincial government would likely oppose an intergovernmental PACA-like trust. In addition, Quebec would likely challenge the constitutionality of a comprehensive federal PACA-like trust.

ii. Approaches to Creating Provincial Law

The Canadian provincial jurisdiction over property and civil rights is broad enough to impose a statutory trust upon the buyers of perishable agricultural commodities that are located in the particular province.[496] This would cover sellers in a slow-payment situation, but creation of a federal PACA-like law or recognition of provincial trust in the *Bankruptcy and Insolvency Act* would be needed in order to for a deemed trust to be effective to apply in bankruptcy situations. The Federal Government in Canada has authority over bankruptcy and insolvency issues, therefore only the Federal Government could enact a statutory trust law that alters or amends the scheme of distribution of assets in bankruptcy as laid out by the *Bankruptcy and Insolvency Act*.[497]

The constitutional division of powers in Canada complicates the implementation of a provincial PACA-like trust. According to a legal opinion written by current Superior Court Justice Edward Belobaba, "a provincial PACA-like trust provision would be constitutionally valid and effective in cases where the buyer was guilty of slow payment but not yet bankrupt; but the law would become inapplicable and ineffective as soon as the buyer became bankrupt." [498] Ensuring that the new trust law would survive bankruptcy proceedings is important to ensuring U.S. shippers have adequate protection from risk of default. Under current BIA rules, U.S. shippers who are paid within three months of their buyer/dealer/customer filing a Notice of Intention (first step of a bankruptcy) can have the payments revoked and deemed fraudulent as they may be considered preferential (to other creditors) due to the absence of PACA-like trust protections.[499] When there is a distribution to creditors, shippers will share ratably with other unsecured creditor, which in most situations provides for minimal recovery.

An alternative possibility would be for the provinces to individually amend their current laws to delegate the authority to impose a statutory trust and regulate the licensing of fresh produce dealers through the amended CAPA. While it would involve more resources to enact legislation in Canada's ten provinces, the likelihood of legal challenges to the new regulatory scheme would be less likely than without the provincial delegation.

To ensure that the PACA-like protections under the amended CAPA would survive any legal challenges, the provinces would need to amend their laws to enact parallel legislation to the CAPA. This would require the most resources and cooperation between all of the legislative bodies involved, and as discussed previously, would likely be politically impractical to achieve.

A final alternative is for the provinces to individually create PACA-like trusts and for the federal government to recognize such trusts in the *Bankruptcy and Insolvency Act*. The CAPA amendment language provided above could be adapted and applied to provincial statutes related to agriculture or property of suppliers. A provincial trust could apply to more transactions than a federal trust and include intraprovincial transactions as well as international or interprovincial transactions. The language would have to be amended to reflect this difference.

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[495] Bakvis, *supra* note 457, at 492.
[496] Constitution Act 1867, *supra* note 8, s.91(21).
[497] *Id.* s. 92(13); *see also* Belobaba, *supra* note 8, at 5.
[498] *Id.*; *see also* HOGG, *supra* note 8, at 648; Continental Casualty Co. et al. v. MacLeod Stedman Inc., 141 D.L.R. (4th) 36 Man. C.A.
[499] Canadawide Fruit Wholesalers Inc. v. Hapco Farms Inc., 1998 CarswellQue 1942.

The amendment to the BIA recognizing a provincial trust needs to be broader than the one provided above. It needs to ensure a trust created by a province in any statute for the purpose of ensuring agriculture suppliers are paid is enforceable in bankruptcy proceedings. The recommended language to be place in the BIA is as follows:

> 67. (4) Any property held in trust for a person under any provincial or federal law for the purpose of ensuring that person is paid in relation to the sale of agriculture products shall be regarded as held in trust for that person for the purpose of paragraph 67(1)(a)

VI. CONCLUDING POINTS

Trade in fresh produce has increased between the United States (U.S.) and Canada exponentially.[500] Despite these strides, the U.S. and Canadian economies still contain inefficiencies that are created by differences in our legal systems. In particular, the two countries grant varying levels of protection to produce sellers in the event that purchasers fail to pay for delivered goods. While the U.S. affords interstate and foreign produce sellers significant rights, in Canada similar protections do not exist. As a result, international and interprovincial produce sellers incur unnecessary risk and expenses by selling their goods into Canadian markets. This impinges on international and interprovincial trade. Thus, greater legislative protections must be enacted in Canada.

The success of U.S. efforts in the area is the result of the *Perishable Agricultural Commodities Act* (PACA), which grants protections that mitigate the risks that produce sellers face in such transactions.[501] This Act covers the sale of perishable agricultural commodities in interstate and foreign commerce to dealers, brokers, and commission merchants.[502] To this end, it has been very successful in protecting produce sellers' rights, saving the fruit and vegetable industry more than have $1 billion as a direct result of its trust provisions.

In February 2011, the U.S. President and Canadian Prime Minster jointly announced the creation of the Regulatory Cooperation Council (RCC)[503] to find and harmonize discordant laws and regulations in Canada and the U.S. in order to promote growth. One included area was the protections afforded to produce traders.[504] To this end, the U.S. Department of Agriculture and Agriculture Canada initiated talks to harmonize these laws. As part of that effort, the Parties have focused on PACA as a model for legislation. In order to achieve this goal, however, the Parties must understand the regulatory, legislative, cultural, and political differences in Canada and the U.S. This Report explained these differences and how they might impact the passage of PACA-like legislation in Canada.

For one, while it does not appear so, Canada and the U.S. come from very different constitutional constraints. The U.S. federal government has broad authority under its Commerce Clause, in which it can regulate deep into intrastate commerce. Meanwhile, Canada's power is more restricted. To this end, Canadian divisions of power render the federal government's ability to enact PACA-like legislation somewhat more complicated. As this Report illustrated, the federal government in all likelihood has the authority to enact such a law under its Bankruptcy and Trade and Commerce powers. But doing so without provincial coordination comes at a risk of a constitutional challenge. While the federal government is likely to prevail, that outcome is not certain. The outcome will turn on whether the law's primary purpose is viewed as an effort to impact interprovincial and international trade such that the trust and contractual provisions are viewed as incidental. This outcome would be even more likely if the law's federal enactment—rather than provincial—was viewed as necessary to obtain these ends.

Additionally, the governments must understand the existing protections for produce traders in Canada. As this Report illustrated, Canadian federal and provincial protections for these parties are limited. This

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[500] *Free Trade Agreement Helped U.S. Farmers*, NEWSWISE.COM, http://newswise.com/articles/view/541349/ (last visited July 11, 2012); *see also* Appendix G.

[501] Perishable Agricultural Commodities Act, 7 USC §499e et seq..

[502] Statutory trust under Perishable Agricultural Commodities Act, 128 A.L.R. Fed. 303, 1 (1995).

[503] *Joint Statement by President Obama and Prime Minister Harper of Canada on Regulatory Cooperation* (Feb. 4, 2011), *available at* http://www.whitehouse.gov/the-press-office/2011/02/04/joint-statement-president-obama-and-prime-minister-harper-canada-regul-0.

[504] *Id.*

explains why international and interprovincial produce sellers have incurred additional risks that intraprovincial sellers have not. These related points support the argument that a federal law is needed in Canada and would therefore be constitutional since there are no provincial laws on the matter and there is no sign that the provinces have an incentive to offer such protections. Lastly, knowing the extent of these protections is important so as to avoid potential conflicts when drafting this federal law.

Lastly, in order to successfully implement PACA-like protections in Canada, the Parties must understand technically what will be involved in enacting such a law. This starts with an understanding of the Canadian legislative system and how it operates. To this end, the Parties must know which politicians, committees, and cabinets will need to support such a law. But the analysis cannot end there. Rather, the Parties must also be aware of the special interest groups and political Parties that are likely to react strongly to such a law.

APPENDIX A: PROVINCIAL AGRICULTURAL LAWS' CONFLICTS WITH A FEDERAL PACA-LIKE AMENDMENT

Law	Impacts Fed. Amendment?	Needs Amended?	Coverage	Involves Seller's Rights?	Covers Trust Law?	Contract Law?	Covers Int'l Trade?
			ALBERTA				
Agricultural and Recreational Land Ownership Act and Foreign Ownership of Land Regulation	**Conflict:** Foreigners cannot seize land to satisfy debt (not likely to arise often as non-real estate assets are seized first) Not issue in bankruptcy since creditor will look to recover debt from trustee	N	Intraprovincial producers/traders and non-Canadian traders	Foreign seller's right to other assets (land) is limited	Y	N	N
Marketing of Agricultural Products Act	**Conflict:** If federal PACA-like trust has the effect of reducing protection for farmers (only applies to producers of regulated products) **Conflict**: A PACA-like trust could conflict with the trust that already exists within the Act for Alberta Farmers. Need to ensure that it is clear which trust would take priority.	Y	Intraprovincial producers/traders Unclear if statutory trust is effective outside the province	Produce assets	Y	Y	N
Crop Liens Priorities Act	Gives priority to liens on crops for outstanding amounts on insurance payments → **conflict** if creditor and government are trying to recover from same pool (if debtor was buying and selling)	Y[505]	Intraprovincial producers/traders	Produce assets	N	N	N
Crop Payments Act	Gives mortgagor a claim against crops grown for satisfying debt →	Y[506]	Intraprovincial producers/traders	Produce assets	N	N	N

[505] To deal with situation where farmer is also purchaser
[506] To deal with situation where farmer is also purchaser

	conflict if creditor and government are trying to recover from same pool (if debtor was buying and selling)						
			BRITISH COLUMBIA				
Natural Products Marketing (BC) Act	**Compliment:** due to cooperative language (between governments)	N	Intraprovincial producers/traders	Produce assets	N	Y	N
Farm Income Insurance Act	**Compliment:** Currently there is protection of income due to fluctuating commodity prices	Y[507]	Intraprovincial producers/traders	Produce assets	N	N	N
			MANITOBA				
The Farm Lands Ownership Act	**Conflict:** Even though foreigners are able to seize land to satisfy debt they must reduce it to 40 acres within 3 years → unlikely for this situation to arise Not issue in bankruptcy since creditor will look to recover debt from trustee	Y[508]	Intraprovincial producers/traders	Foreign seller's right to other assets (land) is limited Real estate (land)	Y	N	N
The Family Farm Protection Act	**Conflict:** In conjunction with Act above for a foreigner attempting to recover a debt from a farm business → can make debt recovery process cumbersome	Y	Intraprovincial producers/traders	Real estate (land)	N	N	N
The Farm Products Marketing Act	**Compliment:** due to cooperative language (with Federal Government regarding trade) **Neutral:** Mostly concerned with intraprovincial pricing	N	Intraprovincial producers/traders	Produce assets	N	Y	N
The Crop Payments Act	**Conflict:** Gives mortgagor priority over crops to satisfy outstanding payments and conflict can arises for parties who are both producers and purchasers (issue of who has the best claim over the crops to satisfy debt: seller or mortgagor)	Y[509]	Intraprovincial producers/traders	Produce assets and Real Estate	N	N	N

[507] Include protection against bad debts
[508] Only to eliminate possibility of conflict if the rare situation does arise
[509] To deal with situation where farmer is also purchaser

The Seed and Fodder Relief Act	**Conflict:** Government provides seeds for promissory note (gov has promissory lien over crops) and conflict may arise if farmer is also a purchaser (seller has claim over crops)	Y[510]	Intraprovincial producers/traders	Produce assets	N	N	N
The Threshers' Lien Act	**Neutral:** Threshers have highest priority lien over crops until paid for their services, but it is unlikely that producers will have claim on the same crops	N	Intraprovincial producers/traders	Produce assets	N	N	N
			ONTARIO				
Farm Products Marketing Act	**Compliment:** Friendly to agreement with Federal Government on marketing of products (delegation of power); Also, the current license suspension system for dealing with debt is ineffective (real solution is needed)	N	Intraprovincial producers/traders	Produce assets	N	Y	N
Farm Products Payment Act	**Compliments:** Insulates farmers from slow payment and bankruptcy (insurance scheme against default in payment but only for certain types of producers)	Y[511]	Intraprovincial producers/traders No mention that it's limited to residents of Ontario; if producer paid into fund, protection is available	Produce assets	Y	N	N
			PRINCE EDWARD ISLAND				
Natural Products Marketing Act	**Neutral:** But **conflict** may arise if indemnity fund for intraprovincial producers is threatened by a PACA-like trust	Y[512]	Intraprovincial producers/traders	Produce assets	Y? (indemnity fund is a trust?)	Y	N
			QUEBEC				
An Act Respecting the Acquisition of Farm Land by Non-Residents	**Neutral:** Creditor can take temporary control of lands; Unknown what challenges this provision would pose for a forced	N	Intraprovincial producers/traders	Foreign seller's right to other assets (land) is limited	N	N	N

[510] To deal with situation where farmer is also purchaser
[511] To include producers of perishable products
[512] To deal with indemnity fund

	sale under PACA-like trust enforcement Not issue in bankruptcy since creditor will look to recover debt from trustee						
An Act Respecting the Marketing of Agricultural, Food and Fish Products	**Neutral:** Only concerned with intraprovincial pricing	N	Intraprovincial producers/traders	Produce assets	N	Y	N
An Act Respecting Farm Income Stabilization Insurance	**Neutral:** Compensates producers with annual net income that is lower than the stabilized annual income	N	Intraprovincial producers/traders	Produce assets	N	N	N

APPENDIX B: CHART COMPARING CFIA, DRC, AND PACA PROTECTIONS

	CFIA (CAPA)	DRC	AMS (PACA)
Licensing / Membership Requirements	Y	Y	Y
Ability to Suspend Licenses / Memberships	Y	Y	Y
Ability to Resolve Disputes based on Transactions	N	Y	Y
Government Entity Created by Statute	Y	N	Y
Provides Default Contract terms for Transactions between Licensees / Members	N	N	Y
Creates Statutory Trust in Favor of Sellers of Fresh Produce	N	N	Y
Allows for Temporary Restraining Orders to Freeze Bank Accounts of Delinquent Buyers	N	N	Y

APPENDIX C: LIST OF RELEVANT INTEREST GROUPS IN CANADA

Key Members of the Conservative Government

The Right Honorable Stephen Harper
Prime Minister of Canada

The Honorable Robert Douglas Nicholson
Minister of Justice and Attorney General of Canada

The Honorable Marjory LeBreton
Leader of the Government in the Senate

The Honorable Peter Gordon MacKay
Minister of National Defense

The Honorable Vic Toews
Minister of Public Safety

The Honorable Rona Ambrose
Minister of Public Works and Government Services and Minister for Status of Women

The Honorable Diane Finley
Minister of Human Resources and Skills Development

The Honorable Julian Fantino
Minister of International Cooperation

The Honorable John Baird
Minister of Foreign Affairs

The Honorable Tony Clement
President of the Treasury Board and Minister for the Federal Economic Development Initiative for Northern Ontario

The Honorable James Michael Flaherty
Minister of Finance

The Honorable Peter Van Loan
Leader of the Government in the House of Commons

The Honorable Jason Kenney
Minister of Citizenship, Immigration and Multiculturalism

The Honorable Gerry Ritz
Minister of Agriculture and Agri-Food and Minister for the Canadian Wheat Board

The Honorable Christian Paradis

Minister of Industry and Minister of State (Agriculture)

The Honorable James Moore
Minister of Canadian Heritage and Official Languages

The Honorable Denis Lebel
Minister of Transport, Infrastructure and Communities and Minister of the Economic Development Agency of Canada for the Regions of Quebec

The Honorable Leona Aglukkaq
Minister of Health and Minister of the Canadian Northern Economic Development Agency

The Honorable Keith Ashfield
Minister of Fisheries and Oceans and Minister for the Atlantic Gateway

The Honorable Peter Kent
Minister of the Environment

The Honorable Lisa Raitt
Minister of Labour

The Honorable Gail Shea
Minister of National Revenue

The Honorable John Duncan
Minister of Aboriginal Affairs and Northern Development

The Honorable Steven Blaney
Minister of Veterans Affairs

The Honorable Ed Fast
Minister of International Trade and Minister for the Asia-Pacific Gateway

The Honorable Joe Oliver
Minister of Natural Resources

The Honorable Peter Penashue
Minister of Intergovernmental Affairs and President of the Queen's Privy Council for Canada

The Honorable Julian Fantino
Associate Minister of National Defense

The Honorable Bernard Valcourt
Minister of State (Atlantic Canada Opportunities Agency) (La Francophonie)

The Honorable Gordon O'Connor
Minister of State and Chief Government Whip

The Honorable Maxime Bernier
Minister of State (Small Business and Tourism)

The Honorable Diane Ablonczy
Minister of State of Foreign Affairs (Americas and Consular Affairs)

The Honorable Lynne Yelich
Minister of State (Western Economic Diversification)

The Honorable Steven John Fletcher
Minister of State (Transport)

The Honorable Gary Goodyear
Minister of State (Science and Technology) (Federal Economic Development Agency for Southern Ontario)

The Honorable Ted Menzies
Minister of State (Finance)

The Honorable Tim Uppal
Minister of State (Democratic Reform)

The Honorable Alice Wong
Minister of State (Seniors)

The Honorable Bal Gosal
Minister of State (Sport)

APPENDIX D: POSSIBLE INTERESTED CANADIAN LOBBYING GROUPS

Consultant: Albert Chambers
Consulting firm: Monachus Consulting
Client: Canadian Supply Chain Food Safety Coalition

In-house Organization: Fruit and Vegetable Dispute Resolution Corporation / Corporation de Réglements des Différends Dans les Fruits et Légumes
Responsible Officer: Fred Webber

In-house Organization: Canadian Produce Marketing Association / Association canadienne de la distribution de fruits et legumes
Responsible Officer: Ron Lemaire

Consultant: Sally Rutherford
Consulting firm: Self-employed
Client: Dairy Processors Association of Canada / L'Association des transformateurs laitiers du Canada
777930-251242-5

Consultant: Kathleen Sulivan
Consulting firm: Self-employed
Client: Canadian Agri-food Trade Alliance / Canadian Agri-food Trade Alliance

In-house Organization: Croplife Canada
Responsible Officer: Lorne Hepworth
775828-617-31

Consultant: Tom Hoogendoorn
Consulting firm: Self-employed
Client: BC Dairy Association

In-house Organization: Food Processors of Canada / Fabricants de produits alimentaires du Canada
Responsible Officer: Christopher Kyte
776938-518-31

Consultant: Vernon Froese
Consulting firm: Self-employed
Client: Chicken Farmers of Canada / Les Producteurs de Poulet du Canada

In-house Organization: Alliance of Manufacturers & Exporters Canada (CME) / Alliance des manufacturiers et des exportateurs du Canada (MEC)
Responsible Officer: Jayson Myers

Consultant: Sandra Graham
Consulting firm: The Capital Hill Group Inc.

Client: Canadian Co-Operative Association / l'Association des coopératives du Canada
778987-293325-1

In-house Organization: Grain Farmers of Ontario
Responsible Officer: Barry Senft

Consultant: Morris Hanson
Consulting firm: BC Dairy Association
Client: BC Dairy Association
788691-275425-3

In-house Organization: Canadian Meat Council / Conseil des Viandes du Canada
Responsible Officer: Jim Laws

Consultant: BRUNO LETENDRE
Consulting firm: Self-employed
Client: Dairy Farmers of Canada / Les Producteurs laitiers du Canada
782016-258202-5

In-house Organization: Canadian Organic Growers / Cultivons Biologique
Responsible Officer: Elizabeth McMahon
811930-229501-10

Consultant: Denis Morin
Consulting firm: Self-employed
Client: Dairy Farmers of Canada / Les Producteurs laitiers du Canada
Consulting firm: Self-employed
Client: Fédération des producteurs de lait du Québec
790043-276784-4

Consultant: Eugene Legge
Consulting firm: Self-employed
Client: Canadian Federation of Agriculture / La Fédération canadienne de l'agriculture
792723-281744-2

In-house Organization: Food Sovereignty Coalition / Coalition pour la souveraineté alimentaire
Responsible Officer: Frédéric Paré
829831-297265-1

Consultant: Phil Von Finckenstein
Consulting firm: PVF Consulting Inc.
Client: Canadian Aquaculture Industry Alliance / Alliance de l'Industrie canadienne de Aquaculture
775654-296625-1

Consultant: Tim Ansems
Consulting firm: Self-employed
Client: Chicken Farmers of Canada / Les Producteurs de Poulet du Canada
826371-296445-1

Consultant: David Wiens
Consulting firm: Self-employed
Client: Dairy Farmers of Manitoba
788760-278670-4

In-house Organization: Ontario Federation of Agriculture (OFA)
Responsible Officer: Neil Currie
778280-6273-13

Consultant: Alan Young
Consulting firm: Tactix Government Relations and Public Affairs Inc.
Client: Western Canadian Shippers Coalition
777915-13529-13

In-house Organization: Food and Consumer Products of Canada / Produits alimentaires et de consommation du Canada
Responsible Officer: Nancy Croitoru
776397-231-23

Consultant: John Maldwyn Thomas
Consulting firm: Self-employed
Client: Seafood Producers Association of British Columbia
781565-293607-1

Consultant: Robert Wilson
Consulting firm: Wilson , Spurr LLP
Client: Grain Farmers of Ontario
807790-285090-2

Consultant: Mark Wales
Consulting firm: Self-employed
Client: Canadian Federation of Agriculture / Fédération canadienne de l'agriculture
821711-293205-1

Consultant: Jim Thompson
Consulting firm: J. Thompson Communications Inc.
Client: Agriculture Union - PSAC / Syndicat Agriculture - AFPC
780657-16712-6

Consultant: Jean-Guy Vincent
Consulting firm: Canadian Pork Council / conseil canadian du pork
Client: Canadian Pork Council / conseil canadien du porc
721934-236842-1

In-house Organization: Canadian Horticultural Council / Conseil canadien de l'horticulture
Responsible Officer: ANNE FOWLIE
775908-390-22

Consultant: Fons de Jong
Consulting firm: Self-employed

Client: Dairy Farmers of New Brunswick
789681-275724-4

Consultant: Joanne Dobson
Consulting firm: HILL + KNOWLTON STRATEGIES
Client: Cavendish Farms
781242-275104-2

Consultant: Bernard MacDougall
Consulting firm: Self-employed
Client: Dairy Farmers of Nova Scotia
819734-292105-1

Consultant: John Bysterveldt
Consulting firm: Self-employed
Client: Dairy Farmers of Prince Edward Island
817993-290985-1

In-house Organization: Ontario Agricultural Commodity council
Responsible Officer: GRAEME HEDLEY
779707-17206-7

In-house Organization: Canadian Egg Marketing Agency COB Egg Farmers of Canada
Responsible Officer: Tim Lambert
782882-16783-7

Consultant: Rob Brunel
Consulting firm: Self-employed
Client: Keystone Agricultural Producers
782818-223582-3

Consultant: Humphrey Banack
Consulting firm: Self-employed
Client: Canadian Federation of Agriculture / La Fédération canadienne de l'agriculture
792722-278607-2

Consultant: DAVID DYER
Consulting firm: THE CAPITAL HILL GROUP INC.
Client: Canadian Farm Press Association Limited/Association Canadienne des Publications Agricole Ltdee.
777825-16344-5

In-house Organization: CANADIAN FOODGRAINS BANK
Responsible Officer: JIM CORNELIUS
776998-82-13

Consultant: Martin Rust
Consulting firm: StrategyCorp
Client: RIVERLAND AG CORP
730256-280745-2

Agricultural Marketing Service Division, U.S. Dep't of Agriculture

In-house Organization: Canadian Agri-Food Policy Institute / Institut canadien des politiques agro-alimentaires
Responsible Officer: David Mcinnes
776978-240721-5

Consultant: Ron Bonnett
Consulting firm: Self-employed
Client: Canadian Federation of Agriculture / La Fédération canadienne de l'agriculture
781877-14928-6

APPENDIX E: LIKELY CHALLENGES TO VARIOUS FEDERAL/PROVINCIAL APPROACHES

	Purely Fed. Amendment	Provinces Delegate to Fed.	Collective Provincial Laws[513]
Slow-payments Protections	?	X	X
Bankruptcy Protections	X	X	X
Separation of Powers Concerns	X	?	
Political Barriers to Enactment	Low	Medium	High
Potential for Litigation	High	Medium	Low

[513] This would be similar to the UCC in the U.S.

APPENDIX F: SEMINAL SUPREME COURT CASES

Parts of Trade and Commerce Clause

1. *Int'l / Interprovincial* – Federal law regulates cross provincial boundary transactions
2. *General* – Federal law regulates generally across the nation, applying to interprovincial and intraprovincial without regard

Case / Ct.	Yr.	Subject Matter	Impact	Issue/Answer	Ruling(s)
Citizens' Ins. Co. v. Parsons →Privy Council	1881	• Int'l/Interprov. Trade & Commerce • Property & Civil Rights → Insurance (Prov.)	Restriction	**Issues**: Whether provincial law requiring insurance policies within a province to meet certain conditions infringed on federal trade and commerce power. **Answer**: Law valid.	• Two classes of Trade & Commerce: (1) Interprovincial/Int'l and (2) General Dominion. • Fed. cannot legislate "contracts of a particular trade in . . . a single province."[514] • Trade and Commerce clause includes "trade requiring the sanction of parliament, . . . [trade] of interprovincial concern, and . . . general . . . trade affecting the whole dominion."
Insurance Re →Privy Council	1916	• Int'l/Interprov. Trade & Commerce (fed) • Property & Civil Rights → Insurance (prov.)	Restriction	**Issue:** Whether federal licensing act that exempted insurance companies operating wholly within a province and who's purpose was national was valid. **Result:** Law invalid.	• Trade and Commerce clause does not allow regulations by a licensing system of a particular trade in which Canadians would otherwise be free to engage in intraprovincially
Re Board of Commerce Act →Privy Council	1922	• Int'l/Interprov. Trade & Commerce (fed) • Property & Civil Rights → Insurance (prov.)	Restriction	**Issue:** Whether federal law with anti-combine provisions, and also provisions regulating hoarding and excessive prices of certain "necessaries of life" (food, clothing, and fuel), was valid. **Result**: Law invalid.	• Ancillary Theory – Trade and Commerce power can only be used as an ancillary power.[515] • Reiterated *Insurance Reference* (1916) case rule that federal government cannot regulate over matters that Canadians would be able to otherwise engage in within the province.[516]

[514] Citizens' Insurance Co. v. Parsons (1881) 7 App. Cas. 96, at 113.
[515] LASKIN, CANADIAN CONSTITUTIONAL LAW (Finkelstein 5th ed. 1986).
[516] Re Board of Commerce Act [1922] 1A.C. 191, 198.

Electric Commissioners v. Snyder → Privy Council	1925	• Int'l/Interprov. Trade & Commerce (fed) • Labor Law (fed) • Property & Civil Rights (prov.)	Restriction		• Reaffirmed the Ancillary Power Theory [517]
Lawson v. Interior Tree Fruit & Vegetable Committee of Direction	1931	• Int'l/Interprov. Trade & Commerce (fed) • Property & Civil Rights (prov.) • Agriculture (shared)	Expansion (fed)	**Issue:** whether provincial law regulating the marketing of tree fruits and vegetables produced intraprovince, regardless of destination, was valid. **Answer**: Law invalid.	• Law struck down because it caught produce that would be shipped and sold outside the province [518]
P.A.T.A. v. A.-G. Can. →Privy Council	1931	• Criminal Law (fed) • Property & Civil Rights (prov.)	Restriction		• Criticized "ancillary theory" est. in *Board of Commerce*, but did not cast doubt on outcomes in *Board of Commerce* and *Electric Commissioners.* [519] • Held that Trade and Commerce Clause is own independent federal power [520]
The King v. Eastern Term. Elevator Co. →Privy Council	1925	• Int'l/Interprov. Trade and Commerce (fed) • Marketing (fed) • Property & Civil Rights (prov.) • Agriculture → Grain Trade (shared)	Restriction	**Issue:** Whether federal law nationally regulating grain trade (an almost entirely interprovincial industry) was valid if it involved local operations, like licensing and regulating grain elevators. **Result:** Law invalid.	• Regulation of local works, such as elevators, made an entire scheme invalid. [521]
Natural Products Marketing Re → Privy Council	1937	• Int'l/Interprov. Trade and Commerce → Marketing (fed) • Property & Civil Rights (prov.)	Restriction	**Issue:** Whether law establishing "marketing schemes for those natural products whose principal market was outside the province of production, or some part of which was for export", was valid. [522] **Answer**: Law invalid.	• Law wholly invalid if it proscribes transactions that might be completed intraprovincially. [523]

[517] Electric Commissioners v. Snider [1925] A.C. 396, 410.
[518] Lawson v. Interior Tree Fruit and Vegetable Committee of Direction, [1931] S.C.R. 357.
[519] P.A.T.A. v. A.-G. Can. [1931] A.C. 310, 326.
[520] *Id.*
[521] The King v. Eastern Terminal Elevator Co. [1925] S.C.R. 434. Note, this decision was overcome by the federal government's use of the declaratory power in s. 92(10(c) to declare all grain elevators and warehouses to be for the general advantage of Canada. This has been upheld by Jorgenson v. A.-G. Can. [1971] S.C.R. 725 and Chamney v. The Queen [1975] 2 S.C.R. 151.
[522] HOGG, *supra* note 8, at ch. 20-5.
[523] A.-G. B.C. v. A.-G. Can. (Natural Products Marketing) [1937] A.C. 377.

Margarine Re →Privy Council	1951	• Int'l/Interprov. Trade and Commerce (fed) • Property & Civil Rights (prov.) • Agriculture (shared)	Restriction	**Issue:** Whether federal law banning manufacturing, sale, or possession of margarine in order to protect the entire dairy industry was valid. **Answer:** Law invalid	• Law wholly invalid if it proscribes transactions that might be completed intraprovincially.[524]
Ont. Farm Products Marketing Re → Supreme Court	1957	• Int'l/Interprov. Trade and Commerce (fed) • Property & Civil Rights (prov.) • Agriculture (shared)	Expansion	**Issue:** Whether provincial law regulating marketing of intraprovincial transactions was valid. **Answer**: Law valid.	• Court held, in dicta, that federal authority could implicate intraprovincial transactions.[525] However, never defined what that would look like.[526]
Murphy v. C.P.R. → Supreme Court	1958	• Int'l/Interprov. Trade and Commerce (fed) • Property & Civil Rights (prov.) • Agriculture (shared)	Expansion	**Issue:** Whether federal law requiring compulsory purchase of all grain destined for markets outside province of production and for marketing, pooling, equalization, and distribution of proceeds back to farmers was valid. **Answer**: Law valid, as challenged.	• Federal law, which may have issues intraprovincially, can remain valid if challenged on an interprovincial transaction and it prevails.[527]
R. v. Klassen → Manitoba Ct. Appeals	1959	• Int'l/Interprov. Trade and Commerce (fed) • Property & Civil Rights (prov.) • Agriculture (shared)	Expansion	**Issue:** Whether federal act was valid that established a quota system on producers—enforced through grain elevators and mills—to ensure equal access to interprovincial and export market since it also applied to local processing and sale in that it prevented local producers from selling excess produce in exchange for feed, seed, or flour. **Answer**: Law valid.	• Law is valid if the intraprovincial reach is "incidental" to the principal purpose, which is to regulate the interprovincial and export trade in grain.[528] • Closest Canadian courts have come to authorizing federal regulation of agriculture transactions

[524] Can. Federation of Agriculture v. A.-G. Que. [1951] A.C. 179.
[525] Ontario Farm Products Marketing Reference [1957] S.C.R. 198.
[526] *See* LAVKIN, CONSTITUTIONAL LAW OF CANADA 475.
[527] Murphy v. C.P.R. [1958] S.C.R. 626.
[528] R. v. Klassen (1959) 20 D.L.R. (2d) 406 (Man. C.a.).

Carnation v. Quebec Agriculture Marketing Board	1968	• Int'l/Interprov. Trade and Commerce (fed) • Property & Civil Rights (prov.) • Agriculture (shared)		**Issue:** Whether Quebec law that required the processing or skimming of milk inside the province, which impacted sales to Carnation, before sending it off to Ontario for processing is valid. **Answer:** Law valid. Purpose was to protect local producers by regulating intraprovincial sale to Carnation.	• Set out "object and purpose" test, whereby the effect is not seen as determinative of constitutional validity. Rather, court looks for the "aim" of the law.[529]
Caloil v. A-G. Can. → Supreme Court	1971	• Int'l/Interprov. Trade and Commerce (fed) • Oil Exports • Property & Civil Rights (prov.)	Expansion	**Issue:** Whether federal prohibition on sale of oil past a western boundary was valid. **Answer**: Law valid.	• Unanimously upheld *Klassen* rule regarding a law that had significant reach into intraprovincial transactions and involved a commodity (oil) that by and large flows across provincial lines.[530] • Along with *Klassen*, stands for proposition that if a market is substantially export driven, courts will uphold unilateral federal legislation.[531]
Re Agricultural Products Marketing Act → Supreme Court	1978	• Int'l/Interprov. Trade and Commerce → Marketing (fed) • Property & Civil Rights (prov.) • Agriculture (shared)	Further Defined	**Issue:** Whether federal law that: (1) established and empowered national and provincial egg marketing agencies; (2) controlled egg supply via provincial quotas that went down to intraprovincial producers; (3) provided for product surplus disposal; and (4) imposed levies on said producers to facilitate the scheme was valid given that 90% of all eggs were consumed intraprovincially.	• Praised a federal law that reached significantly into intraprovincial matters as a result of the coordinated effort it took with provinces.[532]

[529] Carnation v. Quebec Agriculture Marketing Board [1968] S.C.R. 238 (Martland K.).

[530] Caloil v. A-G. Can. [1971] S.C.R. 543, 551. For comment, *see* HOGG, *supra* note 8, ch. 20-7(b). Also, the federal government can regulate natural gas prices when sold outside the province. *See id.* at ch. 20-7(b), fn. 36; *see also* Sask. Power Corp. v. TransCan. Pipelines (1988) 56 D.L.R. (4th) 416 (Sask. C.A.). Conversely, the Supreme Court has significantly curtailed the provincial government's authority to regulate the marketing of goods imported into the province. *See* A.-G. Man. V. Man. Egg. And Poultry Assn. [1971] S.C.R. 689; Burns Foods v. A.-G. Man. [1975] 1 S.C.R. 494. The Court has done the same for the regulation of pricing of goods destined for outside the province. Can. Industrial Gas and Oil v. Govt. of Sask. [1978] 2 S.C.R. 545; Central Can. Potash v. Govt. of Sask. [1979] 1.S.C.R. 42.

[531] LASKIN, CANADIAN CONSTITUTIONAL LAW 476; *see also* Montana Mustard Seed Co. v. Continental Grain Co. [1974] 49 D.L.R. (3d) 72 (Sask. C.A.), affirmed [1976] 2 W.W.R. 768 (S.C.C.) (did not address constitutional question).

[532] Re Agricultural Products Marketing Act [1978] 2 S.C.R. 1198.

				Answer: Law valid.	
Federation des produceurs v. Pelland **→ Supreme Court**	2005	• Int'l/Interprov. Trade and Commerce → Marketing (fed) • Property & Civil Rights (prov.) • Agriculture (shared)	Refined	**Issue:** Whether quota system on chicken exports, passed in coordination with provinces, was valid. **Answer:** Law valid.	• Upheld rule set out in *Re Agricultural Products Marketing Act*[533]
Dominion Stores v. The Queen **→ Supreme Court**	1979	• Int'l/Interprov. Trade and Commerce → Marketing (fed) • Property & Civil Rights (prov.) • Agriculture (shared)	Restriction (maybe)	**Issue:** Whether federal law that made compulsory grade names for products marketed, which included intraprovincial, was valid. **Answer:** Law invalid.	• Went back to old Privy Council rule that federal government cannot regulate local trade.[534] • Criticized by constitutional scholars and even the Court itself.[535] • Held that Agricultural clause (s.95) loses applicability when Act regulates produce that has entered "commercial marketing conduits."[536]
Labatt Breweries v. A.-G. Can. **→ Supreme Court**	1979	• Int'l/Interprov. Trade and Commerce → Marketing (fed) • Property & Civil Rights (prov.)	Restriction	**Issue:** Whether federal law setting standards of production on an industry that is largely national/international and comprised of just a few producers is valid. **Answer:** Law invalid.	• Federal standards that do not regard whether a product crosses provincial lines will not be held valid.[537] • Reaffirmed rule in insurance cases, that federal government cannot regulate a single industry or trade, even if industry dominated by a few large firms who market their products nationally.[538]
Canada Standard Trade Mark **→ Privy Council**	1937	• General Trade and Commerce (fed) • Property and Civil (prov)	Expension	**Issue:** Whether a law establishing a voluntary national mark that if adopted intraprovincially required certain quality restrictions was valid. **Answer**: Law valid.	• A federal law could regulate intraprovincially traded products if the standard was voluntary.[539]

[533] Federation des produceurs v. Pelland [1980] 1 S.C.R. 844.
[534] Dominion Stores v. The Queen [1980] 1 S.C.R. 844, 846.
[535] [1980] 1 S.C.R. 844, 846 ("it may well be [that this ruling] is not now a correct description of the federal power under s.91(2)"); *see also* HOGG, *supra* note 8, at ch. 20-10(b).
[536] *Id.* at 866 ("I say no more than to point out that these apples clearly form no part of the process of agriculture once they have entered the commercial marketing conduits and therefore I believe the fate of these proceedings in no way turns upon the availability of s. 95").
[537] Labbatt Breweries v. A.-G. Can. [1980] 1 S.C.R. 914.
[538] *Id.* at 941. Of note is the fact that the breweries had manufacturing plants in every province. Thus, while the companies were national, each plant mostly shipped its beer within that province for consumption. *See* HOGG, *supra* note 8, at ch. 20(b), fn. 55.
[539] A.-G. Ont. V. A.-G. Can. (Canada Standard Trade Mark) [1937] A.C. 405.

MacDonald v. Vapor Canada	1976	• General Trade and Commerce (fed) • Property and Civil Rights →causes of action; contracts; torts (prov) •	Refined	**Issue:** Whether federal law which prohibited and provided civil remedies for business acts that were "contrary to honest industrial or commercial usage in Canada" was valid. **Answer**: Law invalid.	• Creating or expanding civil causes of action of an essentially contractual or tortuous character was a matter of provincial Property and Civil law.[540] • However, federal government could create such a remedy if it was incidental to an otherwise federal law.[541] • Generality of application across the nation is not enough to invoke the General Trade and Commerce authority over provincial authority in Property and Civil Rights.[542] • Laws created as part of regulatory scheme administered by a federally appointed agency, rather than chance of private redress without public monitoring and oversight, may fall closer to federal authority.[543]
Dominion Stores v. The Queen	1979	• General Trade and Commerce (fed)	Restriction	**Issue:** Whether federal law establishing grade names that required quality thresholds if voluntarily adopted for intraprovincial transactions was valid. **Answer:** Law invalid.	• The rule of *Canada Standard Trade Mark* was narrowed to only include situations where the mark or grade was vested in the crown.[544]
Labatt Breweries v. A.-G. Can.	1979	• General Trade and Commerce (fed) • Property and Civil (prov)	Refined	**Issue:** Whether law that set compositional standards if a produce used the term "light beer" was valid. **Answer:** Law invalid.	• Terms like "light beer" are common names. Thus, federal laws will be invalid if they try to regulate a common name, because it removes the voluntary nature of the act over the provinces.[545] • Conversely, fancy names are valid, under *Canada Standard Trade Mark*.[546]
Anti-Inflation Reference	1976	• Peace, Order, and Good Governance clause (fed) • General Trade and Commerce (fed) • Property and Civil (prov)	Expanded (slight)	**Issue:** Whether federal law regulating wage and price control using a federal regulatory scheme and administrative agency was	• One justice, noting in dicta, that he would have accepted the law under General Trade and Commerce clause.[547]

[540] MacDonald v. Vapor Canada [1977] 2 S.C.R. 134, 156.
[541] *Id.*
[542] *Id.*
[543] *Id.* at 165. *but see* HOGG, *supra* note 8, at 20-14 (noting that this has no other basis in case law).
[544] Dominion Stores v. The Queen [1980] 1 S.C.R. 844.
[545] Labatt Breweries v. A.-G. Can. [1980] 1 S.C.R. 914, 926.
[546] See HOGG, *supra* note 8, at Ch. 20.3.
[547] Anti-Inflation Reference [1976] 2 S.C.R. 373, 427-28.

				valid. **Answer**: Law valid, but under the Peace, Order, and Good Governance clause.	
General Motors v. City National Leasing **→ Supreme Court**	1989	• General Trade and Commerce (fed)	Expanded	**Issue:** Whether Competition Act's new addition that created a civil remedy was valid. **Answer**: Law valid.	• Competition cannot be regulated by focusing only on interprovincial trade. Intraprovincial trade is necessary.[548] • Created three prong test: (1) presence of general regulatory scheme; (2) oversight by regulatory agency; (3) concern with trade on a whole rather than a particular industry.[549] o *Possibly*: (4) provinces jointly or severally would be constitutionally unable to enact the legislation and (5) failure to include one or more province or locality would jeopardize the scheme/law's successful operation in other parts of country.[550]
Kirkbi v. Ritvik Holdings **→Supreme Court**	2005	• General Trade and Commerce (fed) • Trade Marks	Refined	**Issue:** Whether civil remedy created in the Trade Marks Act was valid. **Answer**: Law valid.	• Reaffirmed five part test set by *General Motors* by upholding the law.[551]

[548] General Motors v. City National Leasing [1989] 1 S.C.R. 641,679.
[549] General Motors v. City National Leasing [1989] 1 S.C.R. 641, 661.
[550] *Id.* at 662.
[551] Kirkbi v. Ritvik Holdings [2005] 3 S.C.R. 302.

APPENDIX G: PRODUCE ASSET TRADE BALANCE BETWEEN U.S. AND CANADA

		2007	2008	2009	2010	2011
Saskatchewan	Total Exports	761,701,688	1,358,247,099	968,676,653	775,022,844	946,754,952
	Total Imports	47,122,705	98,353,713	61,632,806	54,486,689	49,755,004
	Trade Balance	**714,578,983**	**1,259,893,386**	**907,043,847**	**720,536,155**	**896,999,948**
Manitoba	Total Exports	481,487,536	761,990,029	563,940,297	489,948,006	517,165,750
	Total Imports	202,879,074	303,970,498	219,107,652	211,578,351	208,639,425
	Trade Balance	**278,608,462**	**458,019,531**	**344,832,645**	**278,369,655**	**308,526,325**
Prince Edward Island	Total Exports	36,089,993	48,591,633	37,788,987	31,307,625	54,789,171
	Total Imports	107,556	28,215	3,067	2,144	--
	Trade Balance	**35,982,437**	**48,563,418**	**37,785,920**	**31,305,481**	**54,789,171**
Alberta	Total Exports	368,722,428	747,078,271	477,601,035	296,598,429	463,009,644
	Total Imports	397,266,035	506,762,458	445,799,815	419,544,474	412,520,986
	Trade Balance	**-28,543,607**	**240,315,813**	**31,801,220**	**-122,946,045**	**50,488,658**
Nova Scotia	Total Exports	9,339,428	9,436,835	6,197,296	9,094,225	6,112,248
	Total Imports	413,407	34,251	119,022	192,200	1,394,774
	Trade Balance	**8,926,021**	**9,402,584**	**6,078,274**	**8,902,025**	**4,717,474**
Newfoundland and Labrador	Total Exports	9,353	--	8,168	10,415	--
	Total Imports	30,413	43,851	7,523	2,108	10,287
	Trade Balance	**-21,060**	**-43,851**	**645**	**8,307**	**-10,287**
New Brunswick	Total Exports	45,901,511	74,995,928	62,028,195	44,521,920	59,373,154

		2007	2008	2009	2010	2011
	Total Imports	44,671,917	59,001,229	67,612,300	60,598,567	67,629,316
	Trade Balance	**1,229,594**	**15,994,699**	**-5,584,105**	**-16,076,647**	**-8,256,162**
Quebec	Total Exports	119,515,994	173,581,609	142,052,868	166,637,701	206,897,420
	Total Imports	207,504,677	206,513,471	259,369,254	221,432,733	223,954,118
	Trade Balance	**-87,988,683**	**-32,931,862**	**-117,316,386**	**-54,795,032**	**-17,056,698**
British Columbia	Total Exports	132,835,407	146,312,035	135,725,385	119,746,824	129,849,330
	Total Imports	585,028,920	632,235,449	652,965,021	658,740,241	702,607,561
	Trade Balance	**-452,193,513**	**-485,923,414**	**-517,239,636**	**-538,993,417**	**-572,758,231**
Ontario	Total Exports	265,981,934	346,245,040	308,678,445	327,174,471	409,003,896
	Total Imports	1,808,011,119	2,011,302,434	2,087,559,751	1,908,763,452	2,052,461,500
	Trade Balance	**-1,542,029,185**	**-1,665,057,394**	**-1,778,881,306**	**-1,581,588,981**	**-1,643,457,604**
SUB-TOTAL	Total Exports	2,221,585,272	3,666,478,479	2,702,697,329	2,260,062,460	2,792,955,565
	Total Imports	3,293,035,823	3,818,245,569	3,794,176,211	3,535,340,959	3,718,972,971
	Trade Balance	**-1,071,450,551**	**-151,767,090**	**-1,091,478,882**	**-1,275,278,499**	**-926,017,406**
OTHERS	Total Exports	9,101,829,749	13,254,126,579	12,263,262,845	11,485,967,187	13,549,142,733
	Total Imports	2,266,728,700	2,493,504,244	2,696,795,246	2,914,508,466	3,345,130,702
	Trade Balance	**6,835,101,049**	**10,760,622,335**	**9,566,467,599**	**8,571,458,721**	**10,204,012,031**
TOTAL (ALL COUNTRIES)	**Total Exports**	11,323,415,021	16,920,605,058	14,965,960,174	13,746,029,647	16,342,098,298
	Total Imports	5,559,764,523	6,311,749,813	6,490,971,457	6,449,849,425	7,064,103,673
	Trade Balance	5,763,650,498	10,608,855,245	8,474,988,717	7,296,180,222	9,277,994,625

Source of data: Statistics Canada
Report Date: 16-Jul-2012

FPA
Fresh Produce Alliance

Securing Payments
and
Regulating Business Practices
for the Canadian
Fresh Fruit and Vegetable Industry

November 2012

Fresh Produce Alliance

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Section 1. Executive Summary

Legislative reform is needed in order to provide appropriate protections for suppliers of fresh fruits and vegetables to Canadian dealers in cases where the dealers fail to pay for those goods. In the United States, the problem of payment security has been solved through the deemed trust provisions of the *Perishable Agricultural Commodities Act* (*PACA*). Under the *PACA*, Canadians are protected when making sales to dealers in the United States. No such protection exists for sales to Canadian dealers, and the Canadian industry has been seeking similar protections for some time. The Regulatory Cooperation Council (RCC) process provides an opportunity to achieve this goal.

The business environment for the marketing of fresh fruits and vegetables has evolved considerably, from local sales to well-known buyers to a globally integrated marketplace. The consistent availability of a wide selection of fruits and vegetables has been achieved in the face of several challenges inherent to the product: its perishability, the volatility of its supply, the need for a highly integrated value chain, and the availability of imports. Dealers play a vital role in overcoming these challenges, particularly by transforming unpredictable supplies from individual farmers to the predictable supply expected by retailers. Several factors enable dealers to play this role. Particularly important is the limited capital required to be a dealer, with payments for purchases deferred until funds are available from the sale of the product. However, the factors which permit dealers to play this role also create opportunities for abuse, and occasions for abuse have become all too common. It would be natural to think that abuses can be controlled through diligence in selecting buyers, but sellers can be misled, even when exercising diligence. Furthermore, the perishability of the crop means that it must be sold, even if the best available buyer is known to be less than ideal. Thus, the challenges faced by sellers are structural in nature, and require a policy response.

The policy response cannot hope to eliminate the factors which create opportunities for abuse, since those factors are the same ones needed for dealers to play their vital role in the value chain. Instead, measures that understand and reinforce the mechanisms which make the value chain work are required. It is particularly important to reinforce the mechanisms that provide for security of payment, which benefit every member of the value chain – and their creditors. The Canadian policy environment has historically demonstrated some recognition of the need for payment security, but has met that need very imperfectly. Legislative change is required, and the natural model for that change is the American *Perishable Agricultural Commodities Act* (*PACA*). A deemed trust is established under that legislation to ensure that proceeds from the sales of fresh produce by dealers are first used to pay for that produce. The key significance of the *PACA* is as a model of good policy. However, it has more tangible effects, making the United States a first-choice destination for fresh fruit and vegetable sales, and providing greater protections for Canadian sellers than Canadian law provides for American sellers.

While the deemed trust is the natural focus of proposals for payment security, industry and government have examined a variety of alternative approaches, such as security agreements, common-law trusts, insurance, pooled funds, bonding, factoring and the use of clearinghouses. The mechanisms for payment security provided for other crops and other industries have also been considered, as well as the legislative provisions applicable to fresh produce itself. This analysis reinforces the attractive features of the deemed trust. In particular, the deemed trust integrates naturally into the actual practice of the fresh produce value chain, which defers payment for purchases until the produce is sold, and merely ensures that whatever funds are available from the sale are used to pay for the purchase.

Security of payment is the key issue, and the success of this RCC initiative depends on the creation of a deemed trust (or like mechanism). However, as a secondary priority, legislative reform regarding the regulation of other business practices in order to establish mandatory business practices and default contract terms is also imperative. **Other effective remedies, including mandatory arbitration, efficient enforcement of the deemed trust, and personal liability for deliberate breach are imperative**.

The current “dual licensing” system requires reform in order to ensure that all dealers are subject to the stricter standards that have been established through self-regulation via the Fruit & Vegetable Dispute Resolution Corporation (DRC). It should be clear that failure to observe required business practices is a relevant consideration in suspending, revoking or refusing to issue a licence. The exemption for dealers who purchase only within a single province should be removed for dealers that sell extra-provincially or for export. The licensing regime should also more thoroughly track the persons who are responsibly connected to a dealer. When dealers are required to post bonds in order to be licensed, the bonds should be available to satisfy claims of suppliers.

Implementing such measures would exhibit several hallmarks of good policy in relation to economic markets. It would contribute to the efficiency of the market, equity between market participants, properly address the structure of the market, provide for transparency and flexibility, harmonize with important trading partners, and take advantage of the ability of industry to set standards and pay for administration.

Implementation of these measures would have significant benefits for all stakeholders. Farmers would benefit from a fair opportunity to be paid for their produce. Dealers and retailers would benefit from no longer being a second-choice to American dealers, thus improving price, quality and availability of fresh produce. Those benefits would be significant for consumers as well. Banks and other creditors would benefit from the predictability of payment through the value chain. While they might lose by having a lower priority in the bankruptcy of the buyer, they would gain by avoiding the bankruptcy of the seller. Government would gain by fulfilling RCC objectives and contributing to the government's efforts to help business and increase trade.

Section 2. Introduction

2.1 Context

Since the January 1, 1994 implementation of the North American Free Trade Agreement (NAFTA), trade in fresh produce has increased between the United States (U.S.) and Canada exponentially. (Appendix 1)

NAFTA is a comprehensive trade agreement that, for the most part, has improved virtually all aspects of doing business within North America. Nearly all tariffs eliminated between the U.S. and Canada were eliminated by 1998, and many of the non-tariff barriers have also been removed.

Despite this Agreement’s successes, the U.S. and Canadian economies still contain inefficiencies. For the purpose of this discussion, differences in respective legal systems are called to attention. In particular, the two countries afford produce sellers different levels of rights to claim produce assets in the event that after delivery the purchaser does not pay for the goods. The U.S. affords interstate and foreign produce sellers significant rights in these scenarios. In Canada, similar protections do not exist. As a result, international and interprovincial produce sellers are discouraged from selling their goods into Canadian markets. In order to remedy this problem, legislative protections must be enacted in Canada.

For Canadians who market fresh fruits and vegetables to the U.S. market and enjoy access to a financial risk mitigation tool, it is unacceptable that no similar mechanism exists for their sales within their domestic marketplace. For those Americans who market fresh fruits and vegetables into Canada it is equally unacceptable that they do not enjoy similar financial risk mitigation benefits as provided to Canadians in the U.S. market place. Clearly, this is an inequity and potential trade irritant which requires resolution. It appears there is a moral obligation to resolve an outstanding non-tariff barrier of the nature which NAFTA sought to eliminate.

The U.S.-Canada Record of Understanding on Agriculture Trade signed on December 4, 1998 established an ongoing process of consultation that emphasizes early identification of problems and effective cooperation to resolve

them. In accordance with the Record of Understanding, a Consultative Committee on Agriculture (CCA) was established to provide a high-level forum to strengthen bilateral agriculture trade relations between Canada and the United States of America through cooperation and coordination. This particular matter has been brought to the CCA on numerous occasions. Our counterparts in the United States – at both the industry and government levels – have advocated for a resolution to the matter for some time and continue to do so.

2.2 Overview

The Canadian fresh produce industry operates in a dynamic business environment which enables a wide variety of fresh fruits and vegetables to be consistently available to consumers, despite the inherent perishability and volatility of their supply. Particular business practices have evolved in order to make this possible. However, the cost of these business practices is a fundamental insecurity of payment for sellers along the value chain, for both the farmer and for dealers.

In the United States, the problem of payment security has been solved through the deemed trust provisions of the *Perishable Agricultural Commodities Act* (PACA). Under the PACA, Canadians are protected when making sales to American dealers. No such protection exists for sales to Canadian dealers, and the Canadian industry has been seeking similar protections for some time.

On February 4, 2011, Prime Minister Harper and President Obama announced the creation of the Canada-United States Regulatory Cooperation Council (RCC) to better align the two countries' regulatory approaches. In December 2011, an Action Plan on Perimeter Security and Economic Competitiveness was announced. The Joint Action Plan sets out 29 initiatives where Canada and the U.S. will seek greater alignment in their regulatory approaches over the coming two years. These initiatives included reference to the provision of financial risk mitigation options for companies engaged in bilateral trade in perishable produce. Among the action items was a commitment to: "*Develop 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*." It further noted that "*the majority of growers and shippers of produce are small and moderate-size businesses that depend on prompt payment to meet their financial obligations. Having comparable financial risk mitigation tools available to these businesses in both Canada and the U.S. would level the playing field by minimizing the risks for shippers in the bilateral marketplace*." A joint commitment of this nature is unprecedented and the opportunity to align regimes and regulatory systems has never been better.

This document represents recommendations from the Fresh Produce Alliance (FPA) to the Financial Protection for Produce Sellers Working Group of the RCC Initiative. The FPA was established to identify and consolidate multi-stakeholder issues which are cross-sectorial in nature, validate potential solutions and facilitate the necessary action to generate change. As such, it brings together the Canadian Horticultural Council, the Canadian Produce Marketing Association and the Fruit & Vegetable Dispute Resolution Corporation in collaboration to facilitate an improved business climate for the fresh produce industry. It is noteworthy that the Fruit & Vegetable Dispute Resolution Corporation was born of an opportunity created under Article 707 of NAFTA. Counterparts in the U.S. are in full support.

Section 3. The business environment for fresh fruits and vegetables

It now seems unremarkable that consumers can purchase a wide selection of fresh fruits and vegetables throughout the year, across the country. Yet this is a relatively recent phenomenon. The global trade of fresh fruit and vegetables, a diversified cultural mosaic, and changing consumer demands have significantly transformed the business environment for fresh fruit and vegetables.

This transformation has been accomplished in the face of several distinctive issues inherent in the marketing of fresh fruits and vegetables: the challenge of perishability, the need for a highly integrated value chain, the volatility of supply and the availability of imports.

Dealers play a vital role in overcoming these challenges. Most importantly, they transform the unpredictable supply from various farmers to the consistent supply and price expected by retailers. There are several factors which enable dealers to play this necessary role: the informality and high volume of transactions, the interchangeability of the product, low barriers to entry, and low capital requirements. The low capital requirements for dealers are particularly significant, with payments for purchases deferred until funds are available from their sale. While these factors contribute to the necessary role played by dealers, they also make sellers vulnerable to the business practices of buyers, and several types of abuse have become all too common.

It would be natural to think that the abuses could be solved simply by exercising diligence in selecting buyers. However, even when exercising diligence, a seller may be misled. Furthermore, the perishability of the product requires that the crop be sold, even if the best available buyer is known to be less than ideal. Thus, the problem is a structural one, not just a question of diligence.

3.1 The evolution of fresh fruit and vegetable marketing

Traditionally, growers of fresh fruit and vegetables sold their product primarily locally, to well-known purchasers. Furthermore, a large portion of production was not for fresh consumption, but instead was canned, processed or frozen.

Now, there is an increased consumer demand for fresh fruit and vegetables all year round. Greater cultural diversity and consumer sophistication has created demand for a wider range of varieties, and specific taste and size profiles for fresh produce. More sophisticated transportation methods, such as the use of air freight, have widened marketing opportunities. Trade agreements, particularly the Canada-US Free Trade Agreement and NAFTA, have reduced barriers to trade. One measure of the significance of these changes is that trade in fresh fruit and vegetable trade between Canada and the United States has quadrupled between 1990 and 2009.[1]

3.2 The key drivers of the business environment

Consider how remarkable the business practices are which make this possible. The farmer only knows when the crop will be ready to be picked a few weeks in advance. Once picked, the crop must be sold within days, due to its perishability. It is often purchased and consumed by the consumer before the farmer has even generated an invoice, let alone received payment. In fact, there are a series of characteristics of the business environment for fresh fruit and vegetables that create a set of distinctive problems to overcome.

3.2.1 Perishability

The most obvious characteristic is the perishability of the product. Once picked, the crop must be sold in timely manner (for many crops, within a matter of days) or it has no value at all. This is very unlike other agricultural commodities like grain or beef, which can be stored for considerable time before sale. Because of the perishability of the product (among other reasons), the market is fundamentally a buyer's market. It is always the seller who is under more pressure to sell than the buyer to buy.

3.2.2 Integrated value chain

To fulfill demand for fresh fruit and vegetables despite the problems of perishability requires close cooperation along the value chain.

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[1] Miguel I. Gómez, Maleeha Rizwan and Katie Ricketts, *Origins Creation and Evolution of the Fruit & Vegetable Dispute Resolution Corporation*. 2012: Charles H. Dyson School of Applied Economics and Management, Cornell University. p. 10.

Consider the strawberry you ate with your lunch. It could just as easily been consumed a week earlier as it was coming out of the field. If you leave it for even a few more days it will no longer be so palatable. In a very short period of time the product is picked, sorted and packed at shipping point. It is then cooled and prepared for its journey to your table. It is placed in cartons, stacked onto pallets, and loaded into a truck for transport. Along the way the truck protects it from freezing in the mountains, or from heat in the desert. The fruit is thoroughly checked as it crosses international borders. Once the truck finally arrives at destination it is again exposed to differences in temperature and additional handling. The fruit may go to a retail outlet or a service provider such as a restaurant. In either case there is an additional exposure to temperature change and additional handling.

How can a tender, ready to eat, fruit be handled so many times and exposed to so many temperature changes and still look like something you want to eat? It requires every member of the supply chain to act quickly, from the time it is ready to be picked. You have enjoyed the fruit of the farmer's labour long before his invoice arrives for payment.

3.2.3 Volatility of supply

Yet it is not just that the product is perishable and must be handled quickly once picked. An additional issue is that the fruits and vegetables may become ready to pick at unscheduled moments, and the overall supply to the market is also volatile.

Most fresh fruit and vegetable farmers have very little control over the precise timing of production.[2] The farmer can plant only when the field is dry enough to cultivate. Once planted, seed germination depends on rain and soil temperature. It is not uncommon for a field to be replanted several times.

Once the plants are growing, yield will depend on rainfall and temperature during the growing season, which may shorten or lengthen the anticipated period until harvest by days and weeks. The growing conditions also determine size, yield, and quality. Once the product is ready for harvest, the exact timing of harvest again depends on the availability of dry fields. Yet once the product is ripe it must move quickly to market. Storage and harvest delays of even a few days are not options for most fresh fruits and vegetables. When delivery dates, quality, and quantity cannot be known until so late in the process, the kinds of contracts that other industries may be familiar with are not possible.

The impact of weather does not just create volatility in individual production. Drought or flood can create shortages across the whole sector, while ideal conditions can create a glut or oversupply. This volatile environment causes increased pressure on the farmer to harvest and sell quickly, whether to take advantage of good markets or avoid bad markets.

3.2.4 Trade

Further complicating the marketing of fresh produce is the seasonal nature of the business and the availability of imports. While buyers look for local product when available, they also must secure supplies all year long as consumers have come to expect strawberries and blueberries in the winter, not just during the summer when local product is available. When a farmer has an early or late harvest, he is competing with other production areas. While he has broccoli to sell, product from the United States or Mexico may still be entering the market, resulting in oversupply and depressed pricing. The marketplace has many suppliers and only a few buyers.

A further consequence of the expansion in trade is that no individual jurisdiction can have complete control over market conditions. Local farmers can export production, and foreign farmers can choose to sell elsewhere. Especially since implementation of the NAFTA, the North American market for fresh produce has become increasingly seamless.

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[2] Greenhouse operators have greater control than others, but still are subject to perishability once the crop is ripe.

3.3 The role of dealers

Dealers play a vital role in overcoming the challenges inherent in marketing fresh fruit and vegetables. From the farmer's perspective, dealers provide an outlet for the unexpected (yet inevitable) occasions of oversupply, and also provide specialized services (and economies of scale) in dealing with retailers. From the retailer's perspective, dealers provide a consistency of supply and price that would not be available if purchasing from farmers directly.

3.3.1 The farmer's need for dealers

Consider the options available to the farmer for marketing fruits and vegetables.

- Some farmers enter into contracts in advance of production. However, this is more common for processing than for fresh produce. (Some farmers can divert crops between fresh markets and processing, but that decision is generally made when planting, since the varieties planted would be different). Furthermore, even with advance contracts, a farmer can easily end up with oversupply that needs to be marketed elsewhere (or undersupply that requires the farmer to obtain product elsewhere).
- In limited cases, there are marketing boards which purchase product and market it centrally. However, this is not common for fruits and vegetables – in most cases, the marketing boards are engaged in promotional and research activities, not the actual buying and selling.
- Famers can sell direct to consumers, by way of farmers' markets, road-side stands, and other arrangements. While a significant outlet for some small farms, it is not a significant proportion of the overall market.
- Some farmers continue to sell locally to known dealers with long relationships. Yet they may be left with supply that known dealers are unable to handle, which then must be sold elsewhere.
- Some farmers can sell directly to retailers or food service operators. However, most stores or restaurants prefer to work with dealers, for consistency of supply and price.
- Farmers can leave produce with a wholesaler or consignment terminal. However, this tends not to result in attractive pricing.

Thus, it is inevitable that the farmer will end up with unexpected supply, and need a business environment in which dealers are available to handle that supply on short notice.

Farmers also need dealers for practical reasons. Harvest is labor intensive and happens within a very short time frame. Many small farmers produce multiple crops and may not have a complete set of specialized equipment for each of their commodities, given the high cost of capital investment and the need for additional labour. As such, it is very common that farmers load their products from the field into bulk containers. These containers are picked up by a dealer who has the specialized packing equipment to meet buyer specifications, and the ability to consolidate product from multiple farmers to provide the volume required to effectively navigate the commercial marketplace. In addition, many farms are family operations. They simply do not have the staff to bring in the harvest and look for new buyers to handle oversupply at the same time.

3.3.2 The retailer's need for dealers

Some retailers and food service providers will deal directly with individual farmers. However, this has become relatively uncommon. Buyers are looking for consistent year round availability, which few individual Canadian farmers can supply. Only very large, well-financed farmers can source product to cover orders they cannot fill themselves. To ensure consistency of supply, the typical model is for retailers and restaurants to purchase from dealers, who in turn purchase from a variety of farmers.

There is a stark disparity between the inherent volatility of the fresh produce crop and the consistent supply which retailers (and consumers) expect. The resolution of this disparity requires considerable interdependence within the value chain from farmer to dealer, detailer to retailer, and retailer to consumer.

Thus, the dealer is a fundamental part of the integrated supply chain. The key economic function of dealers is to provide a buffer between supply and demand. In order to do this, dealers must be very nimble, given the inherent volatility of supply. Supplies which were expected to be available from one source may turn out not to be available, with little notice. Expected demand may fail to materialize. There may be no market for a bumper crop available from a long-standing supplier. Dealers must move quickly to find sellers and identify buyers.

This integrated supply chain framework does not come without cost. The question is how this cost is distributed, and whether there are good policy reasons to take measures to change the distribution of that cost.

3.4 The factors which enable dealers to play this role

There are several factors which make it possible for dealers to play their role in the value chain.

3.4.1 Informality and high volume of transactions

Transactions often take place quickly, without detailed written contracts. Often just price, quantity and delivery date are specified. There are also a very high volume of transactions.

3.4.2 Interchangeability of the product

Fruits and vegetables do not have serial numbers or unique identifiers, and are usually sold by farmers in bulk. Dealers can easily mix and repackage crops from various suppliers. It is also easy for a dealer to switch suppliers when needed.

3.4.3 Low barriers to entry

There are low barriers to entry. The only assets a dealer requires are a desk, fax, cell phone, truck, computer, and knowledge of the markets. Companies form and re-form in various configurations, under new names but often the same responsible parties.

3.4.4 Low capital requirements

It is particularly significant that there are low capital requirements for dealers. The produce industry is likely the most undercapitalized industry in the agricultural industry. Dealers are able to demand credit terms from farmers, often payment within 30 days.[3] Dealers buy at one price and hopefully sell at a higher price. They lack the assets to have major lines of credit. To pay for what they have purchased, dealers must collect from those to whom they have sold. When one of their buyers fails to pay them in a timely manner, they in turn cannot pay for what they have purchased. This trickles down to the farmer, who may not yet have been paid when a dealer several transactions removed goes bankrupt.

Of course, many businesses rely on their accounts receivable. However, the produce business has unique characteristics. When a farmer harvests his broccoli, the entire crop will come in within a few days, or possible weeks. It will typically be eaten by the consumer before the farmer is paid. By the time the farmer discovers a buyer may be in trouble financially, the product is gone and so is his income. There is no inventory in a warehouse to pick up or product rolling off the line to divert to other buyers. Buyers also often give their accounts receivables as collateral for loans. Yet this collateral is given on something that has not yet been paid for, the farmer's crop.

Everyone in the value chain relies on accounts receivable and lines of credit to operate, including the farmer.

[3] Between 25 and 34 days was the most common payment period found in one survey: Survey of the Commercial Practices in the Canadian Fresh Fruit and Vegetable Value Chain, Market Research and Analysis Section, Economic and Industry Analysis Division, Agriculture and Agri-Food Canada, October 7, 2008. pp.33.

Operating on an anticipated 3% to 5% margin, the farmer has borrowed hundreds, and in some instances – thousands, of dollars per acre to produce a crop. Those loans are due after harvest. A farmer who does not pay his loan on time cannot plant his next crop, which impacts not only his livelihood but the entire food system, including many local merchants who are his suppliers, the local economy in which the farmer operates, and in the end, the consumer.

3.5 The vulnerability of the seller

The role of the dealer in the value chain is necessary; both for the farmer and the retailer, and the factors identified above are needed for dealers to play this role. However, these factors also leave the seller vulnerable to the business practices of the buyer (whether the seller is a farmer or a dealer in a chain of transactions with other dealers). Several scenarios have become all too common:

- Dealers will sometimes deliberately buy large inventories just before bankruptcy, at prices seemingly favourable to the seller, but which the buyer does not expect to actually pay. Because of the difficulty in identifying or tracing perishable commodities, there are many opportunities for an unscrupulous buyer to benefit (even if the proceeds should be distributed in bankruptcy). Fruit and vegetables have no serial numbers and packaging can be generic or from a well know supplier whose label is everywhere. In any case, produce is readily sold in many places for cash. Produce can be dumped on the open market, creating price instability for the entire supply chain.
- There are also examples of dealers who will declare bankruptcy (or just disappear without liquidating in an orderly fashion) and then set up a new company, possibly disguising their involvement as the responsible party.
- Buyers have been known to demand price concessions post-sale, in nominally voluntary compromises that sellers may be in no position to refuse, given the difficulties that can arise in recovering anything. The buyer may threaten unjustified claims about the quality of produce to motivate concessions.
- A predatory dealer can pay promptly at first, to establish trust, and then engage in abusive practices later. One example consisted of a firm who began buying onions. At first all went well, with payment received in a timely manner. Soon 20 loads were at different stages of delivery to the buyer. Then the cheques started to bounce, and onions began to appear in the market at a 50% discount. The buyer never intended to pay the farmer, and sold the onions for cash in the wholesale market. The seller was not paid, but the costs were not limited to just the one seller. The availability of discounted onions destabilized the market, affecting anyone else trying to sell onions at that time as well. Of course, others could not just store their onions until market conditions improved—they had to be sold.
- Even long standing dealers can find themselves in trouble, and some will do anything to try to keep the lights on -- or worse, to try and get some cash together before the lights go out. These firms often have been in business for many years and their supplier has no reason to suspect anything is wrong. An unscrupulous failing firm may increase the volume of purchases on normal terms, but offer their customers discounted prices and deeper discounts for cash. By the time the invoice is past due, the product, the cash, and the firm are history.
- Even in a “normal” bankruptcy of the buyer, due to mere improvidence, the seller is in a vulnerable position. Given the typical undercapitalization of the industry, there is usually nothing left for suppliers once the secured creditors have been paid.

These are, unfortunately, common problems. In one survey, 50% reported at least one instance of non-payment in a year. Approximately two-thirds reported an instance of partial payment (half of which were unrelated to any dispute about quality). About 75% reported instances of delayed payments.[4] The total value lost was about 1.53% of gross revenue.[5]

[4] Survey of the Commercial Practices in the Canadian Fresh Fruit and Vegetable Value Chain, Market Research and Analysis Section, Economic and Industry Analysis Division, Agriculture and Agri-Food Canada, October 7, 2008. p. 7.
[5] *Ibid.*, p. 8.

3.6 The limitations of due diligence in selecting buyers

There are several steps a farmer can take to exercise good judgment in choosing who to sell to.

The farmer can do credit checks. There are specialized credit rating agencies for the produce industry, known as the “Red Book” and the “Blue Book”. These agencies provide information about the balance sheet of the buyer (if available), a survey of seller opinion, and the payment history of the buyer. However, this is historical information which may or may not reflect the current situation.

The farmer can check with neighbours or other references to determine the buyer's reputation. The farmer can also check the dealer's membership status with the Dispute Resolution Corporation.

However, even if farmers exercise due diligence, they may be misled. Furthermore, given the nature of the market, a farmer may have to deal with a buyer that is known not to be ideal. After all, the crop has no value if not sold quickly. For these reasons, due diligence is not a sufficient solution to the vulnerability of the seller. However, any solution should seek to ensure that due diligence remains relevant – that is, that the seller is not so well protected that the soundness of the buyer need not be considered.

Section 4. The need for a policy response

The opportunities for abuse in the fresh fruit and vegetable value chain call for a policy response, especially in light of the difficulties sellers experience in attempting to avoid those abuses through due diligence. However, the policy problem cannot be solved by eliminating the factors which create opportunities for abuse, since it is those factors which also allow dealers to play their vital role in the value chain. Instead, the policy response must understand and support the normal functioning of the value chain, reinforcing the mechanisms which make it work.

The key mechanism to reinforce is the way the value chain finances itself, by deferring payment through the chain until the produce is finally sold to the consumer. Every participant in the value chain – and their creditors – benefit from mechanisms which protect the integrity of these payments.

Historically, the Canadian policy environment has demonstrated some recognition of the need for payment security. However, this need has been met very imperfectly. Until 1974, arbitration for payment-related disputes was available via regulations under the *Canada Agricultural Products Act (CAP Act)*. However, a 1974 decision of the Federal Court ruled that this practice was not authorized by that Act. In the meantime, amendments to American legislation decisively provided for payment security via the establishment of a deemed trust in favour of suppliers of fresh fruits and vegetables. Canadian amendments to the *Bankruptcy and Insolvency Act* in 1992 provided some rights for suppliers, but they have been ineffective in the fresh produce industry.

The establishment of the Fruit and Vegetable Dispute Resolution Corporation (DRC) in 2000 as a self-regulating body for the fresh produce industry has had many good effects, especially in the resolution of disputes among members by arbitration. However, without legislative change, dealers can continue to operate under the less strict *CAP Act* licences, and the existence of the DRC does not affect priorities in bankruptcy.

It is, therefore, only legislative change that can deal with the policy problem. A natural model for legislative change is the American *Perishable Agricultural Commodities Act.* Its key significance is as an example of good policy, available for the solution of common problems. However, its mere existence is also significant, since its protections make the United States a preferred destination for sales of fresh fruits and vegetables, affecting price, quality and availability for Canadian buyers. Finally, the fact that the U.S. law protects Canadian farmers better than Canadian law protects American farmers is a trade irritant, and Canadian access to the *PACA* would be most securely preserved by passing Canadian legislation with similar protections. Yet the case for a similar policy response must still be made on its merits, as a solution to common problems.

4.1 The structure of the opportunities for abuse

It is striking that the factors which create the opportunities for dealers to abuse the vendors of fresh fruits and vegetables are the same factors which allow dealers to play their vital role in the value chain. Consider the list of factors developed above.

- The informality of transactions and their high volume flow from the inherent volatility of supply. If dealers are to smooth that volatility to provide consistent supply to retailers, one cannot hope that elaborately negotiated written agreements will become the norm.
- The interchangeability of the product is essential for dealers to be able to provide consistent supply, co-mingling shipments and switching suppliers when needed. Yet it is exactly this characteristic that creates the opportunity for dumping product on the market.
- The low barriers to entry and low capital requirements are economically efficient, especially given the low margins for dealers and growers alike. For the value chain to finance itself from the ultimate sale to the consumer back to the farmer is an efficient use of capital. However, it is exactly that form of financing that creates the opportunity for abuse, if it is left insecure.

It is, therefore, no accident that the fresh fruit and vegetable business environment is subject to abuse. The factors that allow dealers to play their necessary role in the value chain are the same factors that allow abuses to take place. Therefore, we cannot solve the problem by eliminating the factors which create the opportunity for abuse. Instead, we must reinforce the mechanisms which make the value chain function as it should.

4.2 Reinforcing the value chain

The key mechanism which must be reinforced is the way in which the value chain finances itself, by deferring payments throughout the chain until the final sale to the consumer. Every participant in the value chain – and their creditors – has an interest in protecting the integrity of that mechanism and its ability to function normally. Of course, when a dealer goes bankrupt, the dealer's creditors will prefer at that moment to be paid in preference to suppliers. However, the broader interest of dealers and creditors alike is a system that protects the security of payments along the value chain, so that dealers and their creditors can predict and rely upon cash flows, and prevent losses through bankruptcies that cascade through the chain.

Thus, the question of payment security is not just a matter of preventing abuses. Nor is it just a question of protecting farmers. Most of the value chain is both buyer and seller at different points. Produce often moves through multiple dealers before being sold to a retailer, so that dealers are both buyers and sellers. Even farmers are buyers on occasion, when needing extra supply to fulfill a commitment. So, the policy issue is the security of payments for all the participants in the entire value chain, for the benefit of each of them and of their creditors.

4.3 The history of the policy environment

The Canadian policy environment for fresh fruit and vegetables indicates some recognition of the need for mechanisms to protect payment security. However, this need has been met very imperfectly.

Until 1974, the *Licensing and Arbitration Regulations* under the *Canadian Agricultural Products Act* (*CAP Act*) provided for arbitration of payment-related disputes. This practice was, however, curtailed after the Federal Court ruled that the regulations providing for arbitration were not authorized by the *CAP Act*.[6] Since then, the *Act* and *Regulations* have retained some references to payment-related business practices as part of the licensing process, but without providing remedies to victims of non-payment.

In the meantime, the policy environment in the United States moved decisively towards dealing effectively

[6] *Steve Dart Co. v. Canada (Board of Arbitration)*, [1974] 2 F.C. 215 (T.D.).

with payment security, though 1984 amendments to the *Perishable Agricultural Commodities Act* (*PACA*).[7] The amendments put sellers of fresh fruits and vegetables in a position equivalent to that of a secured creditor, with effective remedies in cases of non-payment and priority in case of bankruptcy.

In Canada, 1992 reforms to the *Bankruptcy and Insolvency Act* (*BIA*) resulted in protections provided to suppliers generally (s. 81.1) and famers particularly (s. 81.2). These provisions demonstrate a policy concern for the position of farmers when their customers go bankrupt. However, those provisions have been ineffective in practice and require reform in order to achieve their purpose.

The question of the protections available for suppliers of fresh fruit and vegetables arose in the negotiation of NAFTA, since the protections available for Americans selling into Canada were far inferior to the protections available to Canadians selling into the United States. The result was the creation of a self-regulating body for fresh produce dealers, the Fruit and Vegetable Dispute Resolution Corporation. The DRC established standards for business practices, which were aligned with standards established under the *PACA*, and far stricter than the Canadian regulations. To encourage DRC membership, the regulations were amended in 2000 to provide an exemption from licensing under the *CAP Act* for DRC members. This had the effect of achieving as much payment-related security as possible without legislative amendment. Industry members migrated to the DRC from the CFIA because they achieved gains form the DRC arrangements, not available through the Canadian Food Inspection Agency (CFIA). But even the DRC cannot provide the protections equivalent to the *PACA*.

The DRC has been very successful, and by 2002, 90% of *CAP Act* licensees had become DRC members.[8] However, there are significant limits on what the DRC can accomplish without legislative change. The DRC processes do not affect priorities in bankruptcy, and dealers can choose to operate under the less strict *CAP Act* licences rather than taking out DRC membership.

Thus, the policy environment in Canada has shown some concern for questions of payment security, and taken some steps in that direction. However, the results have been ineffective, in ways in which only legislative change can cure.

4.4 The significance of the *PACA*

The existence of the *PACA* plays a particularly prominent role in the policy debate around payment security and the regulation of business practices for the fresh fruit and vegetable industry in Canada. It is important to distinguish between three ways in which the *PACA* is relevant to the Canadian policy situation.

First, and most importantly, the *PACA* represents an example of good policy, available for the solution of common policy problems for all members in the marketing chain.

Second, the payment security provided by the *PACA* makes the United States a preferable destination for fresh fruit and vegetable shipments, for Canadian, American and other farmers and dealers. This has tangible effects on the prices and quality offered to Canadian buyers. This perhaps helps explain why buyers have already, through the DRC, imposed a stricter regime on themselves than required by regulations under the *CAP Act*, and are seeking a stricter regime yet.

Third, the fact that better payment security is available to Canadians selling into the United States than Americans selling into Canada creates a trade irritant. At the moment, the U.S. recognize sufficient reciprocity in the two regimes to grant Canadians an exemption from the requirement to post a deposit to make a claim under the *PACA*. This recognition is far from inevitable, given the differences in the two systems. Furthermore, the access of foreign sellers to the *PACA* at all could be threatened if greater reciprocity of treatment is not achieved.

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[7] 7 USC §499e et seq.
[8] Gómez, Rizwan and Ricketts, *Origins Creation and Evolution of the Fruit & Vegetable Dispute Resolution Corporation*, p. 45.

That being said, it remains that the greatest significance of the *PACA* is as an example of good policy, and the case for a policy response to payment security and the regulation of business practices can be made in terms of common problems.

Section 5. Mechanisms to secure payment

Given the success of the *PACA* deemed trust and its broad acceptance in the U.S. marketplace for fresh fruits and vegetables, it is a natural focus for analysis. However, it is important to understand the attractive features of the deemed trust in light of the other policy mechanisms that could be considered to achieve payment security.

Various generally-available mechanisms to secure payments have been considered and found to be inadequate as solutions for the fresh produce industry (e.g. security agreements, common-law trusts, insurance, pooled funds, bonding, factoring, and clearinghouses). Payment security is addressed by several schemes specific to agriculture, such as the *Canada Grain Act*, the use of marketing boards, and the advance payments available under the *Agricultural Marketing Programs Act (AMPA)*. While they are not feasible solutions for fresh produce, they do illustrate the kind of policy response considered appropriate for analogous problems. There are also payment security schemes for other industries that provide examples, such as the construction hold-back and deemed trust, and the priority for unpaid wages and pension deductions in bankruptcy. The provisions that are, in principle, applicable to fresh produce are the *CAP Act* and ss. 81.1 and 81.2 of the *Bankruptcy and Insolvency Act (CIA)*. Yet neither of these provides a satisfactory solution to the policy problem.

Having reviewed the various alternatives and analogous schemes, the advantages of the *PACA*-style deemed trust are clear. It integrates into the actual practice of the fresh produce industry of deferring payment until product is sold, and merely ensures that whatever funds are available from the sale are actually used to pay for the product.

5.1 The failure of generally available security mechanisms

There are a variety of generally available mechanisms which could be considered for securing payments. However, none are satisfactory solutions for the fresh fruit and vegetable value chain.

5.1.1 Security agreements

A seller might ordinarily insist on becoming a secured creditor under generally available mechanisms such as the *Personal Property Security Act* (*PPSA*) legislation enacted in each province. However, it is often not feasible for suppliers to become secured creditors, as is demonstrated by the need for ss. 81.1 and 81.2 of the *Bankruptcy and Insolvency Act* (BIA).

In the fresh produce context, there are particular reasons why *PPSA*-style mechanisms do not work. First, the interchangeability of the produce and its typical co-mingling will mean that the legislative requirements for proceeds to be “identifiable” and “traceable” will generally not be met. Second, the documentation requirements of the *PPSA* will be difficult to meet in the context of transactions which take place quickly, often without written contracts. Of course, some documentation will be needed in any solution for orderly resolution of disputes and to provide notice to other interested parties (e.g. other creditors). However, the requirements of the *PPSA* would be too onerous. Finally, any solution that relies on negotiation between buyer and seller will tend to fail. Buyers would tend to prefer to deal with sellers who did not demand a security interest, if they have a choice – and they would have a choice, since the market is fundamentally a buyer's market with global opportunities to procure product. Essentially, Canadian producers would have to take a lower price to make such arrangements, and pay more for the privilege.

5.1.2 Common-law trusts

In principle, a common-law trust could be created by contract. However, dealers would tend to deal with buyers who do not demand such terms. Also, a common-law trust does not provide security in bankruptcy unless the trust funds are actually segregated. To require actual segregation of funds would not preserve the economic efficiency of the use of credit in the value chain. In any event, a solution that depended on actual segregation would be fragile and subject to abuse.

5.1.3 Insurance

In principle, sellers can insure their accounts receivable. However, accounts receivable insurance tends to be expensive, relative to the actual risk levels, since it is difficult for insurance companies to accurately estimate risk levels. Insurance could also encourage risky behaviour, reducing the level of good business practice and due diligence conducted by the seller. Furthermore, the cost of insurance would fall on sellers. Given the very low margins characteristic of the industry, it would be difficult to absorb that cost. In any event, it would be an undesirable policy for sellers to absorb the cost if other alternatives are available, since the real issue is the business practices of the buyer.

5.1.4 Pooled funds

There are contexts in which a pooled fund has been created to help deal with payment problems. In principle, this avoids the overcharging needed in the insurance context to deal with the difficulty in estimating risk – the pooled fund simply pays the actual losses. However, the pooled fund can run out of money, and that has happened in practice.

There would also be considerable administrative complexity in implementing a pooled fund. The question of who contributes to the fund would need to be addressed. The more than 400 different kinds of fresh produce sold in the Canadian marketplace would create complex management challenges. Furthermore, the low margins characteristic of the industry would make it difficult to set up a substantial check-off. Even if collected from buyers, the cost of a pooled fund would ultimately be passed on to sellers or consumers. Neither is a desirable policy outcome if other options are available.

5.1.5 Bonding

Bonding is a useful regulatory option for certain buyers where there is a particular concern about payment security, but not sufficient reason to deny a licence outright. However, there are several problems with bonding if imposed on all buyers, rather than as a targeted measure.

Bonding would tie up the limited capital of buyers, and unnecessarily so in the case of buyers with a good payment record. To the extent that bonding makes the buyer uncompetitive, it can drive sales to other jurisdictions which do not require routine bonding. Measures that leave more of the buyer's capital free would be preferable, if effective in securing payment.

5.1.6 Factoring

Factoring involves the sale of accounts receivable to another company, at a discount which reflects the risk in collecting the accounts receivable. It is not often used in the agricultural context. It would share difficulties with insurance. Since it is difficult to estimate the risk of collection, the factoring company would need to exaggerate the discount, relative to the real risk. Given the low margins characteristic of the industry, it would be impossible to absorb that cost.

5.1.7 Clearinghouses

A clearinghouse provides a gateway between buyer and seller, guaranteeing delivery and quality to the buyer, and payment to the seller. However, administrative costs and security would be burdensome, and would require

centralization that is inconsistent with the diversity inherent in over 400 products, and the flexibility required for the proper functioning of the fresh fruit and vegetable value chain.

Each of these possibilities places the cost back to the farmer. The marketing chain is in a position to push any and all costs back to that level. As well, any remaining risk falls back to the farmer.

5.2 The feasibility of mechanisms designed for other crops

There are payment-related protections that apply to other kinds of agricultural crops. These demonstrate the kind of policy response that has been considered appropriate to deal with analogous problems. However, none are suitable for the fresh produce industry.

5.2.1 *Canada Grain Act*

The *Canada Grain Act* represents a vigorous policy response to the particular conditions of grain marketing.

The interchangeability and intermingling of grain is handled through a grading and storage system, in which farmers can get appropriate credit for the quantity and grade of grain they deliver, despite the fact that no one can trace their particular grain. Delivery into central storage is, of course, not practical for the fruit and vegetable industry, given the perishability of their product. However, it illustrates the kind of conditions that call for a vigorous policy response.

The *Canada Grain Act* also deals with payment security through its bonding scheme. The Canada Grain Commission can require dealers to post bonds to secure "the potential obligations for the payment of money or the delivery of grain to producers of grain".[9] Unlike the bonds which can be required under the *CAP Act*, the *Canada Grain Act* bonds can benefit the unpaid supplier (rather than just money owing to government).

5.2.2 Marketing Boards

Payment security is not a significant problem for supply-managed commodities with centralized purchase and sale by a marketing board. However, it is doubtful whether a centralized marketing agency would be sufficiently nimble to fill the role of dealers in the fresh fruit and vegetable value chain. In any event, requiring such a radical change to the business environment would be poor policy if other options are available.

5.2.3 Advance Payments

For some commodities, the advance payments available under Part I of the *Agricultural Marketing Programs Act* (AMPA) give the farmer more control over the timing of sale. However, obtaining an advance does not relieve the farmer from the pressures created by perishability. If the crop becomes unmarketable, the farmer is still liable to repay the advance.[10] Thus, the farmer is still under the same pressure to sell once a crop is harvested. Furthermore, there is nothing in AMPA which relieves the farmer of liability if the farmer is not paid for a crop that is sold. Thus, advance payments are not a significant solution to the problem of payment security for the fresh produce industry.

5.3 The example of mechanisms designed for other industries

There are many examples of legislation providing for security of payment in other industries. Of particular interest are the construction deemed trust and the priority for unpaid wages and pension deductions under the *Bankruptcy and Insolvency Act*.

[9] s. 45(1)(b).
[10] s. 11.

5.3.1 Construction lien, hold-back and deemed trust

While the economic structure of the construction industry is clearly very different than for fresh produce, it is subject to some analogous problems. There is a "value pyramid" in the construction industry, consisting of general contractors, subcontractors, and further subcontractors. The subcontractors at the bottom of the pyramid are vulnerable to payment failures anywhere above them in the pyramid. Each part of the pyramid must cooperate make a construction project succeed, but the costs of failure in cooperation fall particularly on a vulnerable group, which requires special protection.

An example of the policy response is the Ontario *Construction Lien Act*.[11] It gives the subcontractor a lien against the property, and requires each stage of the pyramid to hold-back 10% of payments until 45 days after the project is completed, to ensure that funds are available to pay sub-trades. After 45 days, it is presumed that sub-trades have been paid, unless steps have been taken to extend their liens. Furthermore, any funds received by contractors are to be held in trust to satisfy the claims of subcontractors.

What the construction lien illustrates is that analogous circumstances in other industries have led to a vigorous policy response that prefers the interests of vulnerable members of a value chain (or pyramid) over other creditors.

5.3.2 Unpaid wages and pension deductions

Sections 81.3 and 81.4 of the BIA provide security (against all current assets of the bankrupt) for unpaid wages in the six months preceding bankruptcy, though to a limit of $2,000.

Section 81.5 and 81.6 of the BIA provide security (against all current assets of the bankrupt) for pension source deductions, without limit.

These sections provide an example of the kinds of claims that have been given priority in bankruptcy.

5.4 The existing policy responses for fresh produce

There are mechanisms for payment under the *Bankruptcy and Insolvency Act* and the *CAP Act* which, in principle, apply to fresh produce. However, they have been ineffective in practice.

5.4.1 *Bankruptcy and Insolvency Act*

Sections 81.1 and 81.2 of the *Bankruptcy and Insolvency Act* aim towards payment security for suppliers. However, they are ineffective in practice for the fresh produce industry.

5.4.1.1 Section 81.1

Section 81.1 provides rights for suppliers generally (not limited to agriculture). However, it only allows repossession of the inventory itself – it provides no rights where the product has been resold, or is no longer identifiable or in the same state. Given how quickly product is resold by a dealer, it will be very rare that fresh fruits and vegetables will be available for repossession under s. 81.1 where bankruptcy occurs.

5.4.1.2 Section 81.2

Section 81.2 provides specific rights to farmers, fishermen and aquaculturalists. It provides a priority interest over all inventories where products were delivered in the 15 days before bankruptcy and have not been paid for. This has also failed to be helpful in the fresh produce industry, for several reasons.

[11] R.S.O. 1990, c. C-30.

The 15 day period before bankruptcy is too short to handle the 30 day payment terms typical for fresh and vegetables. It places the farmer in the position of needing to collect within 15 days or lose priority in bankruptcy. It would be reasonable in any policy response to place some time limit on actions the farmer takes to collect (or, at least, a time limit in which to provide notice of default). However, 15 days is too short, given typical credit practices in the value chain.

The limitation of s. 81.2 to farmers fails to protect the entire chain of transactions from farmer to dealer to dealer to retailer. A policy response for fresh produce could be reasonably limited to some buyers (for instance, buyers who are licensed). However, farmers should not be the only ones protected. Even if one's primary policy interest were to protect farmers, farmers benefit by keeping the entire chain of transactions intact.

The limitation of s. 81.2 to inventory at the moment of bankruptcy is ineffective in the fresh produce context. Even though s. 81.2 applies to all inventory (rather than just the inventory provided by the farmer), there will typically be no inventory left when a dealer becomes bankrupt. An effective measure for payment security must extend to proceeds, even if co-mingled.

5.4.2 *Canada Agricultural Products Act* and its regulations

The *Canada Agricultural Products Act* (*CAP Act*) and the *Licensing and Arbitration Regulations* made pursuant to the *CAP Act*, both show some concern for the question of the dealer's business practices. However, neither now provides an actual mechanism for protecting sellers.

The Minister may require dealers to post a bond to show financial responsibility.[12] However, unlike the similar provisions in the *Canada Grain Act*, there is no ability for a seller to access the bond. It is only accessible by the government, to satisfy amounts owed to the government.

Complaints before the Board of Arbitration must relate to a violation of "regulations relating to grades, standards or marketing of prescribed agricultural products in import, export or interprovincial trade."[13] However, the regulations do not require the dealers to pay their suppliers. It is no violation of the regulations to refuse to pay.

5.5 The advantages of a deemed trust

A deemed trust, such as is created by the U.S. *Perishable Agricultural Commodities Act,* would give unpaid suppliers of fruits and vegetables a trust interest in the buyer's accounts receivable, proceeds or inventory derived from the sale of supplied produce. Even if the inventory or proceeds are co-mingled by the buyer, it is deemed by the legislation to be held separately for the supplier. If the buyer goes bankrupt before paying the supplier, the supplier has priority over other creditors with respect to the unpaid trust balance.

The deemed trust has the virtue of integrating with the actual credit practices of the value chain, without introducing extraneous elements such as insurance, pooled funds, or other kinds of administrative complexity. It simply protects the mechanism the value chain already uses to finance itself – deferring payment until the produce is sold. The trust does not guarantee payment. It only ensures that whatever funds are available from the sale of the produce are used to pay for the produce.

This structure avoids the problems that have been identified with other solutions. Procedures and documentation requirements can be established that fit the business practices required for fresh produce. The buyer need not actually segregate funds or tie up capital by posting a bond. The trust applies whether or not bankruptcy intervenes. No risk premium for insurance or factoring need leave the value chain. There is no pooled fund to be funded (and possibly dissipated). There is little administrative complexity.

[12] See s. 31 and s. 32(b)(v) of the *CAP Act*.
[13] CAP Act, s. 9(1).

Section 6. Regulating business practices

The discussion thus far has focused on payment security, which is the key issue. However, the larger question is the regulation of business practices. There are some business practices which are so harmful to the proper functioning of the value chain that they should be prohibited outright. Other matters can be dealt with by establishing a default contract, which parties can vary as they need.

6.1 Mandatory business practices

There are some business practices which are so harmful to the proper functioning of the value chain that they should not be allowed, even if agreed to between the parties.

Under the *CAP Act*, s. 32(l)(i) allows for regulations "establishing the terms and conditions governing that marketing" (of "any fresh or processed fruit or vegetable in import, export or interprovincial trade"). However, the terms and conditions imposed by the *Licensing and Arbitration Regulations* do not impose significant mandatory business practices on dealers.

The mandatory business requirements imposed upon the DRC members are stricter. They include prohibitions against such practices as:

- Unfair, unreasonable or deceptive practices in connection with weighing or determining the quantity of products;
- Rejecting deliveries without reasonable cause;
- Discarding, dumping or destroying commodities without reasonable cause;
- Making misleading statements for a fraudulent purpose;
- Refusing to make prompt payment;
- Misrepresenting the character, grade, quantity or other characteristics of produce;
- Providing payment instruments without sufficient funds.

6.2 Default contracts

There are other matters which are not sufficiently essential to be mandatory, but which are useful as part of a default contract. Providing for a default contract helps to maintain an efficient marketplace. It lets many transactions proceed on the basis of minimal documentation, while allowing parties to enter into more complex arrangements where that is desired.

The *Licensing and Arbitration Regulations* provide for some default contract provisions, in Schedule IV, Part III ("Standard Rules and Definitions of Trade Terms for the Fresh Fruit and Vegetable Industry"). However, they do not deal with business practices.

In contrast, the default contract which applies to DRC members is more comprehensive, deals with matters such as payment terms, rights and responsibilities of each party, required records, proof of claim, and breaches of contract.

Section 7. Remedies

Even with appropriate substantive protections for payment security and for the regulation of other business practices, specialized remedies would also need to be available to the fresh produce industry.

7.1 The need for special remedies

There are several reasons why special remedies are required, in addition to those ordinarily available for breach of contract. Disputes between buyers and sellers arise in a specialized context, requiring specialized knowledge of the fruit and vegetable industry to resolve. Disputes must be resolved quickly. The seller is at a considerable disadvantage in any dispute, since the buyer will generally be in possession of both the disputed product and the disputed funds. For all these reasons, special remedies need to be made available to resolve disputes between sellers and buyers.

7.2 Particular remedies

Several remedies would be important for the proper functioning of the fresh produce value chain.

7.2.1 Arbitration

Arbitration under the *CAP Act* is currently limited to disputes concerning matters such as grade and condition. It does not cover disputes related to payment or other business practices.

For DRC members, agreement to submit disputes to binding arbitration is a condition of membership, and includes disputes related to payment and other business practices.

7.2.2 Special trust enforcement actions

The *PACA* provides for special actions to enforce the trust, including appointing a receiver or obtaining temporary restraining orders preventing the dissipation of assets. In creating a similar deemed trust in Canadian law, it would be important to assess whether general trust remedies provide equivalent protection, or whether special remedies to enforce the trust are required.

7.2.3 Personal liability

A significant element of the remedies available under the *PACA* is the personal liability of directors, officers, trustees and receivers for deliberate breach of the trust provisions.

7.3 Relationship to licensing

The remedies considered here are remedies for individual sellers. There are other remedies which belong in the discussion of licensing, such as revocation or suspension of a license, or the requirement to post a bond.

Section 8. Licensing

Even with appropriate measures for payment security, regulation of business practices, and individual remedies, there would still be gaps that only licensing can fill. Yet the current licensing system under the *CAP Act* has several shortcomings. The dual-licensing regime (giving dealers a choice between a DRC membership and a license under the *CAP Act* was a useful mechanism to do as much as possible without amending the *CAP Act*. However, the existence of two parallel systems creates opportunities for unscrupulous dealers. A unified licensing system should be established, adopting the stricter DRC standards.

8.1 The need for licensing in relation to business practices

The matters discussed thus far -- payment security via a deemed trust, the regulation of business practices, and effective individual remedies – could, in principle, be provided for apart from a licensing system. However, doing so would leave significant gaps which only a licensing system can address.

Without licensing, enforcement is left in the hands of individual remedies sought by particular suppliers. This is sufficient to handle dealers who only occasionally engage in improper business practices. However, a more general sanction is required for those who are consistent or high-risk offenders. A licensing system can deal effectively with those situations, by suspending or revoking licences, or requiring bonds. Licensing also acts as an effective screening tool for those wishing to enter the industry, reducing risk within the marketplace and thereby minimizing the need for other sanctions.

8.2 Shortcomings of the current licensing system

However, the current licensing system has several shortcomings which should be addressed.

8.2.1 Dual licensing

When the Dispute Resolution Corporation was established in 2000, the *Licensing and Arbitration Regulations* were amended to provide DRC members with an exemption from licensing under the regulations. This was, at the time, an efficient way to encourage adoption of the more strict DRC rules without requiring amendments to the *CAP Act*.

However, a dual-licensing system of this kind is not a good solution in the long-term. It creates confusion, since dealers are subject to very different rules depending on whether they are licensees under the regulations or DRC members. This leads to opportunities for unscrupulous buyers. The licensing system should be unified in a manner that makes all dealers subject to the stricter DRC standards.

8.2.2 The relevance of business practices

In the DRC process, it is clear that business practices are relevant considerations in revoking, suspending or refusing membership. This should be the case under the regulations as well.

8.2.3 The "B" exemption

Section 2.2(2)(b) of the regulations[14] exempts from licencing "dealers who market only agricultural products purchased within the province where their business is located." This appears to be an attempt to stay within the constitutional basis of the *CAP Act* in inter-provincial and export trade. However, it goes farther than required for that purpose. Many dealers buy only within a single province, but then sell inter-provincially or internationally. There is no constitutional reason why they must be exempted from licensing. The existence of this exemption creates a significant gap, which should be eliminated.

8.2.4 Tracking responsibly connected persons

The regulations require that applicants disclose the names of all directors and officers, shareholders holding more than 10 per cent of the shares, and whether any of those persons are connected to another licensed dealer.[15] In principle, this helps to track cases where unscrupulous actors form new companies and attempt to disguise their involvement.

However, the regulations leave gaps in tracking responsibly connected persons, which should be filled in a manner similar to the requirements of the DRC bylaws. Those bylaws provide for a wider class of responsibly connected persons, and consider the past conduct of those persons in evaluating applications for membership.

[14] *Licensing and Arbitration Regulations*, SOR/84-432.
[15] s. 3(3).

8.2.5 Bonding

The regulations permit the Minister to require bonds from dealers where there is reason to believe that the dealer may not fulfill financial obligations. However, the benefit of the bond is only available to the government under the regulations. It should also be available to suppliers of agricultural products, as is the case in the similar system under the *Canada Grain Act*.

Section 9. Policy considerations

The measures discussed thus far in relation to payment security, regulation of business practices, remedies and licensing would, if undertaken, exhibit several hallmarks of good public policy in relation to economic markets. An absolute imperative is to preserve and, more importantly, enhance competitiveness. Furthermore, Canada must not risk losing the reciprocity currently enjoyed on transactions in the U.S. as a result of inaction or an inability to resolve the issue.

9.1 Market efficiency

Policy ought to facilitate the efficiency of the market. The nimbleness with which business is transacted in the fresh produce marketplace is a good thing, and necessary to ensure the consistent availability of a perishable product with volatile supply. The informality and speed of transactions are also necessary. It would be bad policy to impose rigid business practices that interfere with the task of providing fresh produce efficiently to consumers.

9.2 Market equity

Policy ought to aim for market equity. The costs of the business environment should not fall inequitably on the farmer. It is the proper role of government to aim to reduce the incidence of abusive behaviour in the marketplace.

9.3 Market structures

Policy should consider the overall structural equilibrium achieved by reforms, rather than isolated effects. For instance, the effects on creditors should be evaluated considering their interests from the decision to lend to the various scenarios that result in repayment or non-repayment, rather than only evaluating their interests at the moment of bankruptcy.

9.4 Market transparency

Policy should encourage transparency in pricing. Purchasing at exaggerated nominal prices, and dumping product just before bankruptcy, provide misleading price signals to the market, and should be discouraged. Undue pressures for price concessions after delivery also send misleading price signals. Standard contractual terms would help in price comparisons.

9.5 Market flexibility

Policy should aim at maintaining a dynamic and independent business environment. It should not force massive restructuring or create undue barriers to entry.

9.6 Market harmonization

Policy should facilitate harmonization with protections offered by major trading partners, so that Canada is not a second-choice destination for fresh fruits and vegetables.

9.7 Market participation

Policy should take advantage the demonstrated ability of the industry to set and enforce its own standards, through the work of the DRC.

9.8 Market costs

Policy should favour solutions whose cost is borne by industry itself, rather than by government.

Section 10. Recommendations

The recommended measures flowing from this discussion fall into three groups: (a) payment security; (b) regulation of business practices; and (c) unification of the licensing system. It is the recommendations with respect to payment security (the deemed trust) that are the FPA's highest priority. While the other recommendations also critical they may be addressed and resolved independent of but concurrent with the RCC Initiative (i.e.: greater dependency on the CFIA's Modernization Initiative, particularly with respect to licensing). The RCC provides an essential vehicle to taking a holistic approach to financial risk mitigation and a unified licensing and dispute resolution system. For example, if as recommended, the DRC and its Trading Standards become the mandatory prerequisite for firms who purchase or sell fresh fruit and vegetables interprovincially or internationally, most if not all of the recommendations for unified licensing and regulation of minimum business standards would be met.

If the recommendations with respect to payment security are implemented, the FPA would consider this process to be a success vis-à-vis the RCC commitment. Recognition of the DRC and its Trading Standards will improve the business climate in Canada between solvent firms. However without recourse for sellers who have not been paid by insolvent firms the RCC to "develop 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." will not be achieved.

10.1 Payment security

Establishing payment security measures similar to the *PACA* deemed trust is the FPA's highest priority. A detailed check-list for legislative provisions is set out in Appendix E, and the needed measures can be summarized as outlined below.

10.1.1 Deemed trust

Legislative amendments should give unpaid suppliers of fruit and vegetables a trust interest in the accounts receivable, proceeds or inventory derived from the sale of supplied produce, similar to the deemed trust created by the *PACA*.

The trust should come into existence upon sale of fresh fruits or vegetables to a licensed dealer (or a dealer otherwise covered by the regulations). The trust should not be limited to farmers – it should also be available to dealers (or other persons) who sell to dealers.

The trust should be recognized in bankruptcy (or reorganization) as a deemed trust, even if the proceeds have been co-mingled. No actual segregation of funds should be required.

10.1.2 Scope

The policy rationale for the deemed trust is specific to perishable commodities. Thus, one route would be to enact measures which relate to perishable commodities particularly (in contrast to s. 81.1 of the *Bankruptcy and Insolvency Act*, which deals with suppliers generally, and s. 81.2, which deals with farmers generally). Of course, there may also be general reasons to reform s. 81.2, but there are policy considerations which apply to fresh produce that

require action even if s. 81.2 is left as it is for others.

There may be some transactions that ought to be exempt from the deemed trust. For instance, government may want to exempt non-arm's length transactions (for instance, if a dealer sells to a subsidiary company), or require that such transactions be made at fair market value.

Transactions between cooperative organization and its members could also be exempt, as they are under the *PACA*.

10.1.3 Procedure

The legislative amendments should provide for formalities in order to engage the deemed trust, to provide notice to the buyer that the trust provisions apply. This could be done by requiring prescribed wording to be present on the invoice sent to the buyer (as is done under *PACA*), and possibly notification to be made to an administrator (such as the DRC). That would have the additional effect of allowing creditors or receivers (when appointed) to quickly make an estimate of the trust claims.

The trust procedures should ensure that trust claims are not outstanding indefinitely. To this end, the deemed trust should only apply where payment was due no later than 30 days from acceptance of the goods. Furthermore, once the buyer is in default, the seller should be required to provide notice of default and preservation of trust rights within a further 30 days. This notice should be provided to the buyer, and possibly to the licensing authority as well.

Limitation periods on the ultimate enforcement of the trust could also be considered. For instance, a shortened limitation period could be considered (instead of the standard two or six-year limitation periods that would ordinarily apply, depending on the jurisdiction).

10.1.4 Remedies

Trust enforcement actions such as temporary restraining orders and the appointment of a receiver should be available to suppliers to enforce the deemed trust. It may be sufficient to rely on generally available trust remedies. If not, special remedies should be included in legislative amendments.

There should be personal liability for directors, officers, and receivers if the deemed trust is deliberately violated, requiring the return of trust assets diverted to personal use.

Foreign claimants from jurisdictions that do not provide reciprocal protection to Canadian suppliers should be required to post a bond to cover costs before engaging a trust enforcement procedure.

10.2 Regulating business practices

The recommendations relating to the regulation of business practices would be useful, but are secondary to the primary recommendations relating to payment security (the deemed trust).

10.2.1 Mandatory practices

Legislative amendments should allow for regulations that set out mandatory business practices for fruit and vegetable dealers, which cannot be varied by contract. Alternatively, the regulations could set out mandatory terms which would be deemed to be included in all contracts. Such regulations would prohibit practices such as those described in section 6.1 of this report: unfair, unreasonable and deceptive practices, misrepresentations, and various actions without reasonable cause.

Violation of the mandatory business practices should be addressed by licensing sanctions, and by arbitration awards in favour of anyone suffering harm through the violation.

10.2.2 Default contract

Legislative amendments should allow for regulations that set up a default contract which applies to the sale of fruits and vegetables to a dealer. The preferred mechanism would be through the incorporation by reference of standards already set by the DRC. It should be possible for the parties to vary the terms of the default contract.

10.2.3 Remedies

An efficient and legally binding dispute resolution mechanism should be available to resolve disputes arising from the sale of fruits and vegetables to dealers, including disputes arising with respect to payment or other business practices. The preferred mechanism would be a requirement that parties submit disputes to arbitration mechanisms such as those established by the DRC. The DRC and *PACA* share equivalent dispute resolution procedures that are much more efficient, timely and less costly than the Board of Arbitration process under the *CAP Act*.

The awards issued as a result of the dispute resolution mechanism should be easily enforceable in any jurisdiction that is signatory to an international agreement recognizing arbitration mechanisms. DRC arbitration is currently compatible with and in compliance with provincial, national, and international arbitration legislation and treaties.

Foreign claimants from jurisdictions that do not provide reciprocal protection to Canadian suppliers should be required to post a bond to cover costs before engaging a trust enforcement procedure.

10.3 Licensing

The recommendations relating to the licensing system will further strengthen the success of this initiative.

10.3.1 Unified licensing

The distinction between the license under the *CAP Act* and the DRC membership should be eliminated, in such a way that all dealers are subject to the more strict standards that have been imposed by the DRC.

This could be accomplished in a variety of ways. One method would be for the legislation to require dealers in fruit and vegetables to be DRC members. Another option would be to strengthen the licence under the *CAP Act* in order to match the stricter requirements imposed on dealers by the DRC.

10.3.2 The relevance of business practices

Legislative amendments should permit the licencing authority to apply sanctions for violation of mandatory business practices, such as revoking, suspending, or refusing to grant a licence, or requiring a bond to be posted. Given the rapid nature of the transactional environment and therefore the ability to create significant liabilities in a short period of time, interim suspensions should be immediately available.

10.3.3 The “B” exemption

The exemption for dealers who buy product only within one province should be eliminated. Any exemption based on the location of transactions should apply only where both sales and purchases are exclusively within one province.

10.3.4. Responsibly connected persons

Legislative amendments should provide for more comprehensive tracking of the persons responsibly connected to a dealer, and consideration of the history of those persons when making licensing decisions. The definition of responsibly connected person should extend beyond company principals to include those with authority to make purchasing decisions. We would recommend the adoption of the DRC definition for responsibly connected person.

10.3.5 Bonding

Where the licensing authority requires a dealer to post a bond (or similar security), it should be available for suppliers who are harmed by a failure of the dealer to respect mandatory business practices. The amount of the bond should not be subject to a fixed maximum, but instead assessed against potential marketplace risk according to the past history of the dealer.

10.4 The role of the DRC

The DRC fills two roles within the North American fresh produce trading environment: first, as a standards-setting organization; and second, as a service provider.

10.4.1 Standards setting

The DRC has been successful in developing standards for business practices. There is value in relying on industry organizations to perform this role. It would be possible to continue to rely on the DRC to do this, through one of several mechanisms. Dealers could be required to join the DRC in order to maintain a licence, thus making them subject to mandatory rules set by the DRC. Alternatively, the mandatory business practices and default contract could be established by incorporating DRC standards by reference. The *Safe Food for Canadians Act*, if enacted to replace the *CAP Act*, contains robust provisions dealing with incorporation by reference.

10.4.2 Service provider

Mechanisms could provide for the DRC to play a role in the dispute resolution process, the licensing process, and (if needed) the administration of the procedures surrounding the deemed trust. Notwithstanding the potential for a separate legislative framework to support these recommendations, the DRC and CFIA will need to work closely in order to craft a delivery model that accounts for the possible passage of the *Safe Food for Canadians Act*, Inspection Modernization and current thinking with respect to Regulatory Modernization.

10.4.3 Liability

It is difficult for a non-profit industry organization playing a self-regulating role to manage liability claims that can be made against it, sometimes frivolously. Legislative amendments or service agreements that provide a role for the DRC should provide support or protection from liability for regulatory actions taken in good faith.

10.4.4 Costs

All regulatory delivery options to address these recommendations should be based on full cost recovery, and should be delivered by experienced and competent third party service providers, such as the DRC.

Section 11. Managing legal considerations

There are several legal considerations which government will need to resolve to its satisfaction in implementing a proposal of this kind. This submission is not the appropriate context in which to develop the legal arguments themselves. However, it would be useful to provide survey of known issues, and the ways in which their resolution would affect the design of a policy response.

11.1 Division of powers

With respect to the division of powers, the clearest consideration is that any measure which would provide a priority for deemed trusts in bankruptcy must be enacted federally. A province could establish a trust recognized in bankruptcy if the trust met the common law definition of a trust. However, that would not be feasible in the case of a deemed trust for fresh produce suppliers, because it would require the purchaser to actually segregate the trust funds (which would be inefficient), and would provide an inadequate remedy when the purchaser failed to do so (since the priority would be lost).

Whether the priority for the deemed trust is provided for by amendment to the *Bankruptcy and Insolvency Act* itself or by reference to the *BIA* in another statute is a drafting question government lawyers can resolve. What is clear is that some amendment to federal statutes would be needed to provide a special priority in bankruptcy.

The next question is where the authority to provide for payment security and regulated business practices lies in situations short of bankruptcy. There are three heads of power to consider: the agriculture power (with concurrent jurisdiction), the federal trade and commerce power, and the provincial power over property and civil rights.

The orthodox interpretation of the agriculture power confines it to farming practices, and excludes questions of marketing. This proposal is squarely aimed at questions of marketing, and thus would normally be thought to be outside the agriculture power (unless one was relying on some incipient development or innovation in the understanding of that power).

Considering the trade and commerce power, the orthodox interpretation would provide for federal jurisdiction over transactions in interprovincial and export trade. This, for instance, provides for the general boundaries of the *CAP Act*. Of course, the provincial jurisdiction over property and civil rights applies to contracts and trusts considered generally. However, the heads of power are not watertight compartments. If the federal government is genuinely exercising authority over interprovincial or export trade, it can provide for such things as default contracts, deemed trusts, dispute resolution, licenses and other regulated business practices.

The more interesting question is how purely intra-provincial transactions could be brought within a unified scheme. The usual method would be to rely on legislation in each province to incorporate the scheme as defined federally, either using incorporation by reference or an inter-delegation to an administrative body or some other such technique.

Alternatively, one might develop an argument which would permit federal regulation of purely intra-provincial transactions as being ancillary to a scheme which, considered as a whole, is within federal jurisdiction. If government lawyers were to be comfortable with such an argument, a purely federal scheme might be possible. However, it is perhaps more likely that provincial legislation would be required to extend the federal scheme to intra-provincial transactions.

In theory, another possibility would be to rely on provincial legislation to define the scheme, in application to intra-provincial transactions, and enact federal legislation which recognizes the provincial schemes for application to extra-provincial and export transactions, and for the purposes of bankruptcy. However, this would be needlessly complex and is not desirable.

11.2 Statutory considerations

It would be necessary to review any legislative proposal in the light of the 1974 Federal Court decision in *Steve Dart*.[16] The central holding of *Steve Dart* is that the *CAP Act,* as it was then worded, did not provide authority to create an arbitration tribunal by regulation. Any legislative proposal would therefore either need to provide for arbitration in the legislation itself, or clearly authorize regulations to do so.

The Court in *Steve Dart* also engaged in some speculation on the relationship between the trade and commerce power and the provincial power over property and civil rights in a province. However, that is not the central holding of the case, and in any event it has been overtaken by more recent developments in the understanding of the trade and commerce power. An analysis of the constitutional considerations raised by this proposal is clearly needed, but it would not be constrained by the comments in *Steve Dart*.

The role of the DRC would also require some legal policy analysis. At the moment, the reference to the DRC in the regulations is very cursory. DRC members are exempt from the licensing requirement, but there is no specification of the governance of the DRC or enumeration of its powers. This is appropriate in a context where DRC membership is voluntary, and dealers have other alternatives for licensing under the *CAP Act*. However, further analysis would be required if the DRC were given a mandatory role—making DRC membership mandatory, or providing it a power to set mandatory standards for business practices, or providing it with enforcement powers. In that circumstance, one could expect the statute to deal more specifically with the governance of the DRC and enumerate its powers. Alternatively, one might provide a power to CFIA to delegate the relevant powers to a class which includes the DRC, and rely on the CFIA to exercise appropriate policy controls in making and continuing the delegation.

These legal considerations, and no doubt others, can be resolved in a variety of ways, depending on how government lawyers are most comfortable. The discussion here is not meant to resolve these issues, but only to demonstrate that it will be possible to implement a satisfactory scheme, no matter how the legal issues are resolved.

Section 12: Benefits

If implemented, the measures recommended in this submission would have benefits for every stakeholder.

12.1 Farmers

Farmers would have access to effective methods to secure payments, even in situations of bankruptcy. There would, of course, be no guarantee of payment. The farmer would still have to exercise good business judgment in selecting buyers. However, the scheme would give the farmer a fair chance to be paid.

From the perspective of access to credit, the scheme would eliminate the existing gap which results when the farmer extends credit to buyers. The farmer would no longer be in the situation where he neither has payment nor effective rights over the product.

The scheme would also ensure continued access to the U.S. *PACA* system, which will be threatened if no similar Canadian scheme is available to Americans. It would be unfortunate if Canadian farmers were to continue to lack domestic protections and lose access to the protections available to them when selling to American markets.

12.2 Dealers

Canadian dealers would benefit by no longer being a second-choice to American dealers. This would improve price, quality, and the availability of product. Furthermore, since dealers are also sellers, they would benefit directly

[16] *Steve Dart Co. v. Canada (Board of Arbitration)*, [1974] 2 F.C. 215 (T.D.)

from greater security of payment.

These benefits are so notable that dealers are among the primary advocates for a regulatory scheme that imposes stricter requirements on themselves than the current law.

12.3 Retailers

Canadian retailers (i.e. supermarkets and restaurants) would benefit by no longer being a second-choice to the American market, thus improving price, quality and availability. The importance of this benefit is reflected in the

choice of many retailers to become DRC members, on the basis that doing so enhances their reputation as reliable customers.[17]

12.4 Consumers

Consumers would benefit from improvements in the price, quality and availability of fresh fruits and vegetables. It can also be observed that fresh fruits and vegetables are nutritionally important. Thus, improvements in price, quality and availability have nutritional significance as well.

12.5 Banks and other creditors

There is a sense in which other creditors, particularly banks, bear the cost of a deemed trust, since it is their claims that are given a lower priority. However, the American experience with *PACA* is that the banks have not opposed the deemed trust. They are, after all, lenders to the seller as well as the buyer. What they might lose in the bankruptcy of the buyer is offset by their gain in avoiding the bankruptcy of the seller.

Furthermore, that considers the matter only after the fact. In terms of the decision to become a creditor, the provision for a deemed trust merely changes the creditor's calculation of available collateral. Because of the deemed trust, the buyer has less available collateral, and the seller more. Creditors can make appropriate lending decisions in light of those calculations.

In fact, by making payments more predictable throughout the value chain, from farmer to dealer to dealer to retailer, a deemed trust makes it easier for lenders to predict the cash flows available to repay loans to every part of the value chain. Increased predictability makes lending easier, not harder.

12.6 Government

Implementation of the recommended scheme would have several benefits for government. It would fulfill the RCC objectives, and contribute to the government's efforts to help businesses and increase trade. The solution provides a form of innovative and non-traditional safety net to the sector at no cost.

For farmers who participate in the AgriStability program, bad debts are an element which will tend to increase variation in profitability, which will tend to increase government payments. Policy which reduces bad debts will therefore tend to reduce AgriStability payments.

[17] Gómez, Rizwan and Ricketts, *Origins Creation and Evolution of the Fruit & Vegetable Dispute Resolution Corporation*, p. 55.

Appendix A

Canada – U.S. Trade in Fresh Fruits and Vegetables: Overview

Canada's Exports

Cropés	Value ($ Million)	Rank	%
Fresh Vegetables	1,032.3	1	98
Greenhouse Vegetables*	589,742.3	1	99
Potatoes and Potato Products	931.9	1	82
Fresh Fruit	303.5	1	60

Canada's Imports

Crop/s	Value ($ Million)	Rank	%
Fresh Vegetables	1,481	1	65
Greenhouse Vegetables *	20,795.3	** 2	9
Potatoes and Potato Products	240.9	1	95
Fresh Fruit	1,944	1	95

* Value ($000)
** # 1 - Mexico

Canada's Exports of Fresh Field Vegetables
Top Ten Countries

Country	2011 Value ($Million)	% Total Exports
United States	**1,032.3**	**98.06%**
Japan	8.4	0.80%
Australia	4.6	0.43%
France	3.0	0.28%
Switzerland	1.3	0.13%
Netherlands	0.9	0.08%
China	0.8	0.07%
Thailand	0.5	0.05%
Saint Pierre and Miquelon	0.5	0.05%
Mexico	0.5	0.05%
Total	**1,052.7**	

Source: *Statistics Canada (CATSNet, April 2012)*

Canada's Imports of Fresh Field Vegetables
Top Ten Countries

Country	2011 Value ($Million)	% Total Imports
United States	**1,481**	**64.82%**
Mexico	587	25.67%
China	100	4.37%
Peru	41	1.78%
Spain	21	0.93%
Guatemala	17	0.76%
Netherlands	13	0.57%
Belgium	9	0.39%
Israel	8	0.36%
India	8	0.34%
Total	**2,285**	

Source: *Statistics Canada (CATSNet, April 2012)*

Canada's Exports of Greenhouse Vegetables Top Ten Countries		
Country	2011 Value ($ 000)	% Total Exports
United States	589,742.3	99.88%
Japan	590.1	0.10%
Germany	57.5	0.01%
Taiwan	28.5	0.00%
France	17.3	0.00%
Hong Kong	1.2	0.00%
Dominican Republic	0.6	0.00%
Saint Pierre and Miquelon	0.4	0.00%
Burkina Faso	0.2	0.00%
Haiti	0.2	0.00%
Total	590,438.2	

Source: *Statistics Canada (CATSNet, April 2012)*

Canada's Imports of Greenhouse Vegetables Top Ten Countries		
Country	2011 Value ($ 000)	% Total Imports
Mexico	193,151.2	82.43%
United States	20,795.3	8.87%
Spain	6,943.1	2.96%
Israel	3,429.9	1.46%
Belgium	3,006.0	1.28%
Netherlands	2,464.7	1.05%
Honduras	1,656.7	0.71%
Guatemala	1,211.6	0.52%
Dominican Republic	462.5	0.20%
Jordan	363.5	0.16%
Total	234,323.4	

Source: *Statistics Canada (CATSNet, April 2012)*

Canada's Exports of Potatoes and Potato Products * to Top Ten Countries		
Country	2011 Value ($Million)	% Total Exports
United States	**931.9**	**81.50%**
Japan	33.5	2.93%
Mexico	30.8	2.69%
Philippines	16.7	1.46%
Venezuela	11.2	0.98%
Indonesia	10.6	0.93%
Russian Federation	8.5	0.74%
Costa Rica	8.4	0.73%
Thailand	8.3	0.73%
China	7.8	0.68%
Total	1,143.4	

Source: *Statistics Canada (CATSNet, April 2012)*
* Chips, dried, starch, canned and potato salad

Canada's Imports of Potatoes and Potato Products * to Ten Countries		
Country	2011 Value ($Million)	% Total Imports
United States	**249.0**	**95.43%**
Mexico	3.6	1.38%
Netherlands	3.5	1.34%
Germany	1.0	0.40%
Denmark	0.7	0.28%
Switzerland	0.5	0.21%
United Kingdom	0.4	0.15%
Belgium	0.3	0.13%
India	0.3	0.10%
France	0.2	0.09%
Total	260.9	

Source: *Statistics Canada (CATSNet, April 2012)*
* Chips, dried, starch, canned and potato salad

Canada's Exports of Fresh Fruit Top Ten Countries		
Country	2011 Value ($Million)	% Total Exports
United States	**303.5**	**59.96%**
Germany	35.5	6.96%
Japan	34.6	6.80%
Netherlands	25.1	4.93%
China	15.4	3.02%
France	13.4	2.62%
United Kingdom	12.4	2.44%
Taiwan	11.2	2.20%
Belgium	10.3	2.01%
Hong Kong	10.2	2.00%
Total	509.5	

Source: *Statistics Canada (CATSNet, April 2012)*

Canada's Imports of Fresh Fruit Top Ten Countries		
Country	2011 Value ($Million)	% Total Imports
United States	**1,944**	**49.46%**
Mexico	371	9.44%
Chile	346	8.79%
Costa Rica	186	4.74%
Guatemala	145	3.70%
Ecuador	103	2.61%
Turkey	101	2.56%
South Africa	78	1.99%
China	74	1.88%
Colombia	71	1.79%
Total	3,930	

Source: *Statistics Canada (CATSNet, April 2012)*

Appendix B Regulatory Cooperation Council Commitment

The Regulatory Cooperation Council Commitment

Develop comparable approaches to financial risk mitigation tools to protect Canadian and U.Ss fruit and vegetable suppliers from buyers that default on their payment obligations.

Fresh Produce Alliance (FPA) Position

The FPA is supportive of the RCC commitment. Contrary to some other RCC initiatives, this is a situation where there is clear need for Canada to move towards the U.S. model. However, in order for Canada to achieve ***true parity*** with the U.S. there are two ***separate*** priorities that need to be established in the Canadian system.

Priority 1 The creation of a tool that provides financial protection for produce sellers in the Canadian marketplace in the case of the buyer going out of business or defaulting on payments.

Priority 2 The creation of a single licensing and arbitration system for dealers of fresh produce in Canada, thus creating the basis for an orderly system that will align Canada's trading practices with those of the U.S.

U.S. Approach

The *Perishable Agricultural Commodities Act* (*PACA*) provides financial risk mitigation tools to the produce sector in the U.S. – including both a single licensing system and financial protection for produce sellers. Canada does not have a comparable tool for its dealers.

The PACA IS

- A licensing program for fruit and vegetable buyers and sellers, based on legal requirements to meet contractual obligations and abide by fair trading practices.
- A statutory deemed trust that protects unpaid produce sellers in the case of buyer insolvency or bankruptcy.
- A legislative mechanism that requires that account receivables, cash and inventory derived from the sale of the produce be held separately for the benefit of the unpaid seller.

The PACA IS NOT

- A 'pool of funds' from which produce sellers draw upon in case of buyer insolvency or bankruptcy.
- A government-supported safety net.

Canadian Approach

In Canada, fresh produce dealers must obtain either a 'license' from the Canadian Food Inspection Agency (CFIA) or a 'membership' in the Fruit and Vegetable Dispute Resolution Corporation (DRC).

A license with the CFIA provides limited support to dealers in the case of a buyer/seller disputes on regulated standards (e.g. grading).

A membership with DRC provides support to dealers beyond regulated standards, including condition, contract and payment issues.

The Canadian system does not provide payment protection in the case of buyer insolvency or bankruptcy.

Priority 1

The creation of a tool that provides financial protection for produce sellers in the Canadian and U.S. marketplace in the case of the buyer going out of business or defaulting on payments - thus making Canada a desirable and credible trading partner.

Background

- Presently in Canada, if a produce buyer becomes insolvent or bankrupt the produce sellers have to stand at the end of the line behind secured creditors for payments and often receive no money for their produce.
- In the U.S. – under PACA – the government provides produce sellers with the most potent collection tool afforded any industry – a trust.
- This trust is quite simply a legislative mechanism that requires that account receivables, cash and inventory derived from the sale of the produce be held separately for the benefit of the unpaid seller.
- The U.S. offers Canadian sellers PACA protection when selling to U.S. buyers.

Why and Why Now

- Resolution of this issue is a very high priority for the Canadian produce sector – the Canadian government needs to make sure their farmers get paid.
- The RCC presents an excellent vehicle within which to move these long desired amendments forward.
- The Canadian produce sector is innovative and competitive and a major player in the trade relations with the U.S.
- The U.S. government has tools in place to ensure Canadian farmers get paid for their produce yet the Canadian government does not provide that protection tool to its own farmers.
- This tool would add significant financial stability to Canadian fruit and vegetable sector, allowing for expansions of operations and increased trade opportunities that translate into job creation.
- This solution is of little to no-cost to government.

Current Status

- The RCC working group is currently exploring opportunities under the *Bankruptcy and Insolvency Act* and/or other producer payment security models.
- These approaches may be too narrow in scope to address the payment protection requirements of the fresh produce value chain.

Proposed Solution

- While FPA considers the creation of this tool an essential element to creating a common approach with the U.S., it is not prescriptive on what mechanism the government of Canada may use to achieve this - however a solution that is timely and comparable is critical to the competiveness of the sector.

Consequences of Not Delivering BOTH Tools

- Default on the RCC Commitment.
- Unnecessary trade impediments for the Canadian and U.S. produce sectors.
- Increased number of bankruptcies of credible Canadian companies due to lack of protection from fraudulent or irresponsible buyers.
- Increasing cost of fresh produce to consumers as sellers raise prices to compensate for business losses.
- Erosion of Canada's reputation as a credible and desirable trading partner.
- Unnecessary financial instability in the Canadian produce sector impacting competitiveness and innovation.
- Potential of the U.S. removing reciprocal recognition for Canada under the *PACA* which provides Canadian shippers with benefits when utilizing the *PACA* dispute resolution services in dealing with delinquent U.S. buyers.

Priority 2

The creation of a single licensing and arbitration system for dealers of fresh produce in Canada, thus creating the basis for an orderly system that will align Canada's trading practices with those of the US.

Background

- Fresh produce buyers and sellers in Canada and the U.S. are required to obtain a license to conduct business.
- In the U.S. under the *PACA* - there is a single licensing and arbitration system which provides the basis for an orderly marketing regime.
- However, in Canada there is a dual system which results in two sets of trading rules.

Why and Why Now

- Resolution of this issue is a very high priority for the Canadian produce sector.
- The RCC presents an excellent vehicle within which to move these long desired amendments forward.
- In 2000, when the DRC was established and the dual system was first created, it made sense because the neither government nor industry was positioned to move to a strictly private licensing system.
- Today, industry and government recognize that the dual system does not support orderly marketing based on consistent, fair and ethical trading rules.
- The DRC is the preferred option for the sector with 90% of produce dealers being members. The CFIA license program is being provided for the 10% of the sector that are non-DRC members, at a negative cost benefit which is detracting from the Agency's core business objective of food safety.
- The existing system has created two sets of trading rules thus allowing for less credible industry players to work the system to their advantage but at the cost of the sector's reputation.
- Establishment of a single system will streamline and simplify the Canadian system, enhance confidence in the Canadian market, and bring a stable financial environment that will translate into increased economic activity through the value chain, from gate to plate (farmers, processors, transporters, retailers).

Current Status

- The creation of a single license and arbitration system is being examined by a RCC working group. Subcommittees established by the working group are examining how best to deliver on this commitment.

Proposed Solution

- The FPA supports the work being done through the RCC process and stands ready to assist on this front. It is important, however, to understand that while this is a critical tool – it is only half of the overall solution.

Appendix C Questions and Answers

1. *What are the required tools of a financial risk mitigation program that will provide a competitive and productive environment for the Canadian produce sector?*

In order for Canada to achieve ***true parity*** with the U.S. there are two separate tools that need to be established in the Canadian system.

Priority 1 The creation of a program that provides financial protection for produce sellers in the Canadian marketplace in the case of the buyer going out of business or defaulting on payments

Priority 2 The creation of a single licensing and arbitration system for dealers of fresh produce in Canada, thus creating the basis for an orderly system that will align Canada's trading practices with those of the U.S.

2. *What is the existing Canadian financial risk mitigation system?*

In Canada, fresh produce dealers must obtain either a 'license' from the Canadian Food Inspection Agency (CFIA) or a 'membership' in the Fruit and Vegetable Dispute Resolution Corporation (DRC).

A license with the CFIA provides limited support to dealers in the case of buyer/seller disputes on regulated standards (e.g. grading). A membership with DRC provides support to dealers beyond regulated standards, including condition, contract and payment issues. This dual system creates confusion and does not support orderly marketing.

In the case of a produce buyer insolvency or bankruptcy, the Canadian system provides no payment protection for the seller.

3. *Why does the Canadian sector want these new tools?*

• **Financial Protection**
A financial risk mitigation tool in the case of buyer insolvency or bankruptcy would add significant financial stability to Canadian fruit and vegetable sector, allowing for expansion of operations and increased trade opportunities which then translates into job creation.

This solution is of little to no-cost to government.

A payment protection tool will ensure that in the case of buyer insolvency or bankruptcy those Canadian farmers are paid.

• **Single Licensing**
While a dual system was necessary at the time of establishment of the DRC in 1999, the industry and government now recognize that the dual system does not support orderly marketing based on consistent, fair and ethical trading rules.

The DRC is the preferred option for the sector with 90% of produce dealers being members. The CFIA license program is being provided for the 10% of the sector that are non-DRC members, at a negative cost benefit which is detracting from the Agency's core business objective of food safety.

The existing system has created two sets of trading rules thus allowing for less credible industry players to work the system to their advantage at the cost of the sector's reputation.

Adopting the DRC system as the single system available to Canadians dealers will simplify the system, enhance confidence in the Canadian market, and bring a stable financial environment that will translate into increased economic activity through the value chain, from gate to plate (producers, processors, transporters, retailers).

4. *Why is this the right time to move forward with these amendments?*

Resolution of this issue is a very high priority for the Canadian produce sector. It is also a very high priority for the U.S. produce sector.

It has been identified as a Regulatory Cooperation Council (RCC) priority: 'Develop 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.' As such, it is a priority for the governments of both Canada and the United States.

The RCC presents an excellent vehicle within which to move these long desired amendments forward.

5. *Does the U.S. have these tools?*

The *Perishable Agricultural Commodities Act* (*PACA*) provides financial risk mitigation tools to the produce sector in the U.S. – including both a single licensing system and financial protection for produce sellers. Canada does not have a comparable system and thus the drive behind the RCC commitment.

6. *What is the PACA?*

The *PACA* is a licensing and arbitration program for fruit and vegetable buyers and sellers, based on legal requirements to meet contractual obligations and abide by fair trading practices.

A statutory deemed trust that protects unpaid produce sellers in the case of buyer insolvency or bankruptcy.

A legislative mechanism that requires that accounts receivables, cash and inventory derived from the sale of the produce be held separately for the benefit of the unpaid seller.

The *PACA* is not a 'pool of funds' from which produce sellers draw upon in case of buyer insolvency or bankruptcy nor is it a government-supported safety net.

7. *Is the request for these tools in Canada simply a result of demands from the U.S. produce sector?*

No. Resolution of this issue is a very high priority for the Canadian produce sector and has a direct impact on its ability to be sustainable and competitive.

It is unacceptable that Canadian farmers are provided financial protection by the U.S. but not by their own government.

The U.S. produce sector has indicated its strong desire to see these amendments made in order to secure and enhance their trading relationship with Canada.

8.	*Are these policies, regulatory or legislative amendments?*	Presently, the authorities rest within the *Licensing and Arbitration Regulations*, *Canada Agricultural Products (CAP) Act* however the *CAP Act* does not provide adequate enabling authorities to address the issues required to achieve parity with the U.S. The DRC has a number of policies and guidelines that provide support to dealers beyond regulated standards, including condition, contract and payment issues. With regards to bankruptcy and insolvency, the general authority is provided via the Bankruptcy and Insolvency Act but it is not relevant as there are no special provisions for the fresh produce sector. The FPA stands ready to work with the Canadian government to find timely and sustainable solutions to the identified challenges. The FPA is not prescriptive on what mechanism the government of Canada may use to achieve this objective.
9.	*Why does Canada have a dual licensing system? Does this proposed new system create a monopoly?*	In 2000, when the DRC was established and the dual system was first created, it made sense because neither the government nor industry was positioned to move to a strictly private licensing system. The DRC was agreed upon as a suitable vehicle by the governments of Canada, the U.S. and Mexico during the NAFTA negotiations.
10.	*What does a Canadian seller do now in the case of buyer insolvency or bankruptcy?*	Presently in Canada, if a produce buyer becomes insolvent or bankrupt the producer sellers have to stand at the end of the line behind secured creditors for payments and often receive no money for their produce. However, if that Canadian seller sold to a U.S. based company that went insolvent, they can access the *PACA* trust provisions on an equal footing with American sellers.
11.	*What other options are there for financial protection other than a PACA-like trust? (i.e.: insurance, polling and bonding, other models)?*	The RCC Working Group has examined other options to a *PACA*-like trust – such as a pool, bonding and insurance. However, after sufficient examination, it has been determined that these options are not viable alternatives for the fruit and vegetable sector due to its diversity and limited margins.
12.	*Why does the produce (fresh fruit and vegetable) sector need this type of financial protection?*	Produce is a unique sector due to the highly perishable nature of the products. Contracts are made quickly and often are verbal due to the fast paced nature of the fresh produce business. Due to the perishability of fresh fruit and vegetables it is very difficult for sellers to retrieve or draw upon any of the assets in the case of insolvency or bankruptcy as the produce has either been sold or rotted.
13.	*Do the proposed amendments relieve the industry of the responsibility to make sound business decisions?*	No. These amendments in fact create an environment to promote credible business dealings and close loop holes for fraudulent and non-credible players.

14.	*Do other agriculture commodities have this type of protection? If not – why?*	Yes, other commodities such as cattle have financial risk mitigation tools that are specific to the nature of their business models and asset composition. The fruit and vegetable sector is asking for a system that reflects its unique realities.
15.	*Are the tools being requested from the sector federal or provincial jurisdiction?*	The Federal government has taken a leadership position on this matter through the RCC initiative. The sector's priority is that the federal government creates a payment protection tool which is accessible through the federal licensing regime (DRC). Provinces can then create created either links or references to the federal tool in order to support intra-provincial buyers and sellers. Provincial support is important and the sector is confident that provincial support for this initiative will be present. The *PACA* is a federal piece of legislation.
16.	*What are the impacts on consumers in regard to the requested changes? Are there any impacts on food safety?*	The produce industry continues to provide safe food to Canadians and these amendments would not change that. The amendments would, however, remove a trade irritant between Canada and the U.S. that could translate into a more varied selection of produce in Canada at lower costs.
17.	*What is the economic impact of the proposed changes?*	Establishment of a single license system will simplify the Canadian system, enhance confidence in the Canadian market, and bring a stable financial environment that will translate into increased economic activity through the value chain, from gate to plate (producers, processors, transporters, retailers). A payment protection tool in the case of buyer insolvency or bankruptcy would add significant financial stability to the Canadian fruit and vegetable sector, allowing for expansions of operations and increased trade opportunities which then translate into job creation. This tool ensures Canadian farmers get paid and thus provides the right to be competitive and the opportunity to be innovative.
18.	*What is the value of the Canadian sector and the value of the trade relations with the U.S?*	In 2010, Canadian fruit and vegetable exports to the U.S. were valued at over $2 billion and Canadian fruit and vegetable imports from the U.S. were valued at over $3 billion.
19.	*What are the potential consequences if Canada does make these amendments in a timely manner?*	There would continue to be a number of bankruptcies of credible Canadian companies due to lack of protection from fraudulent or irresponsible buyers. Increasing cost of fresh produce to consumers would also be a consequence as sellers raise prices to compensate for business losses.

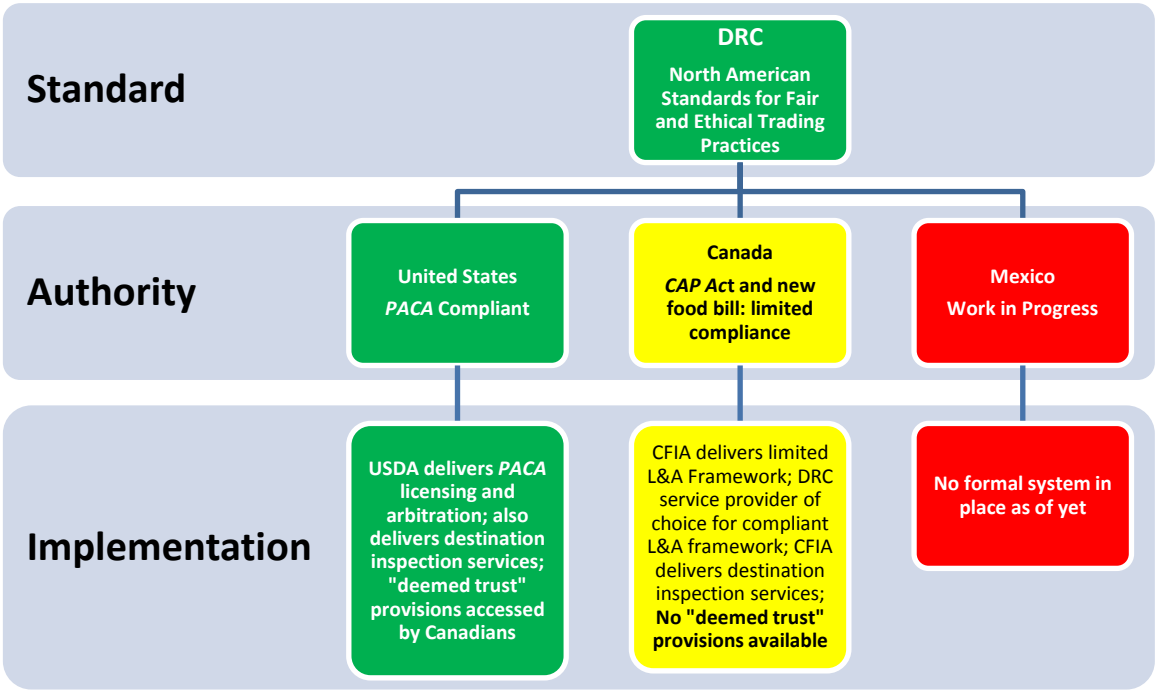
		Non-action would erode Canada's reputation as credible and desirable trading partner in the produce sector and create unnecessary financial instability of sector impacting competitiveness and innovation. Most significantly, non-action will result in the U.S. removing reciprocal recognition for Canada under the *PACA* which provides Canadian shippers with payment protection when selling to U.S. buyers. This would have an extremely negative impact on the Canadian sector.
20.	*Is there any opposition anticipated to implementing proposed changes?*	There is no opposition to the proposed changes. In fact, it is only the non-credible and fraudulent players in the sector that will be negatively impacted by these changes.

Appendix D North American Model for Fair and Ethical Trading in Fresh Produce

North American Model for Fair and Ethical Trading in Fresh Produce

In anticipation of the expected increase in trade disputes arising from market integration, the NAFTA produce industry and governments envisioned the creation of a unified system for fruit and vegetable trade that would avoid trade irritants and facilitate effective trade dispute resolution. As a result, the Fruit and Vegetable Dispute Resolution Corporation (DRC) was established in February 2000 pursuant to Article 707 of NAFTA, which provided for the creation of a private commercial dispute resolution body for trade in agricultural commodities.

The North American Model and Current Status



The DRC was not only created as a standard setter, but also as a service provider and is supported by a NAFTA based Board of Directors including representation from all three governments. As of today, the U.S. has functional implementation of all financial risk mitigation elements listed below, Canada is well on its way to full implementation by working to address the "insolvency recovery" element and a single Licensing and Arbitration service provider, Mexico is a work in progress and will be the focus once the Canadian situation is finalized.

Elements to Support Implementation

Implementation of the following components determines equivalence with the DRC's North American Model for Fair and Ethical Trading in Fresh Produce:

Licensing Framework

- Mandatory to buy and sell across State/Provincial/International lines
- Entry point to access financial risk mitigation tools;
- Licensing requirements must enhance marketplace security and due diligence;
- Must have bonding provisions to mitigate risk created by participants with history of creating challenges in the marketplace in order to remain accessible.
- Framework must be cost recovered
- Framework must be supported by legislation or regulation and must be enforceable
- Framework must be accessible to provinces/states should they wish to utilize the benefits of the licensing framework to supplement their own regulatory and trade policies

Fair Trading Practices

- DRC Establishes baseline trading rules and practices (default contract) in support of prompt payment
- Country specific adoption of rules/standards by incorporation or by reference, which in turn, creates a domestic "default contract"
- Unless otherwise specified, "default Contract" used as basis for settling disputes

Arbitration/Mediation Framework

- Should promote continued trade among participants/disputants
- Incorporates both formal and informal processes and access to both arbitration and mediation
- Can address cases of no-pay/slow-pay and/or contract specifications between solvent participants
- Process must be rapid, cost recovered and subject to service standards
- Must be accessible to producers/individuals not subject to licensing across jurisdictions
- Awards must be recognized by the judicial system of the participating country
- Disputant primarily responsible for enforcing their award, federal government should be able to enforce as a last resort.
- Arbitrators/mediators must have experience in the fresh produce industry

Quality Inspection Services

- Must be accessible to all those with a financial interest in the shipment
- Must be fair and impartial
- Competent federal authorities or their designates are the service providers of choice and are only source of *prima facie* evidence
- Must provide participants freedom to choose their own service provider (must be mutually agreed by involved parties)
- Inspections must meet "Inspection standards" to be considered as evidence in resolving disputes
- Inspection must be performed based on recognized commodity standards (grades or other), unless otherwise agreed to by parties

Insolvency Recovery Provisions

- In cases of insolvency, must provide special status to licensees and primary producers
- Those with special status can only access accounts receivable, cash and inventory directly linked to the sale of fresh produce
- Only accessible by licensees and primary producers
- Must incorporate "notification" requirements to secure priority status with respect to value of product sold
- Those accessing the privilege must pursue matters to preserve priority status
- Priority status cannot be claimed with respect to shipments over nine (9) months old.

Injunctive relief

- Participants should be able to access injunctive relief mechanisms to prevent disbursement of monies to non-participants.
- The preferred form of injunctive relief is a Temporary Restraining Order (TRO) against an advisories assets and bank accounts.
- TRO is the preferred option to force rapid movement and closure on the issue
- The DRC model would prefer that TROs not be issued on an *ex parte* basis
- These mechanism should be initiated by the disputant at their expense
- These tools can be used in support of an arbitration/mediation award subject to timing

Reciprocity (mutual recognition/access)

- Allows participants to freely move produce across international lines and/or provides access to arbitration/mediation framework and financial risk mitigation tools across recognized jurisdictions.

Lack of reciprocity

- No recognition of elements in other countries and no access by foreign nationals to domestic services or financial risk mitigation tools

Partial reciprocity

- Can recognize certain or all elements in other countries
- Can provide foreign nationals with access to financial risk mitigation tools in full or in part
- Can establish parameters for access by foreign nationals

Full reciprocity

- Recognition of all elements in other countries (for example, Canadian and *PACA* licences would be equivalent for import
- Foreign nationals have full access to financial risk mitigation tools without conditions

Appendix E Priority 1: Drafting Instructions Checklist for Payment Security

Legislative amendments to provide payment security for suppliers of perishable commodities should be assessed against the following checklist:

____ The scheme should be broadly similar to the deemed trust provided by the American *PACA* legislation, so that it can be effectively presented as providing equivalent protection for suppliers of perishable commodities.

____ The trust should be limited to the sale of perishable commodities, defined to mean fresh and chilled fruits and vegetables, fresh cuts, edible fungi and herbs, but excluding any fruit and vegetable which has been frozen or planted as seed.

____ The trust interest should arise upon the sale of perishable commodities to a dealer licenced (or otherwise regulated) under the *CAP Act*.

____ The trust should be available to any supplier, not just farmers.

____ The trust should only apply to inter-provincial and international sales (except where a province has made it apply to intra-provincial sales as well).

____ There should be a clear mechanism for provinces to use if they wish to make the trust provisions applicable to intra-provincial sales.

____ There should be prescribed wording which the supplier must include on invoices in order for the trust to apply.

____ The trust should arise only if payment is owing to the supplier within 30 days of acceptance of the perishable commodities.

____ The value of the trust should be equal to the amount owing to the supplier.

____ If the dealer does not make payment by the due date, the supplier should be required to give notice to the dealer and to an administrator within 30 days of default in order to preserve the trust rights.

____ The trust should apply initially to the perishable commodities themselves. Upon sale of the perishable commodities by the dealer, the trust should apply to any cash proceeds, accounts receivable, or inventory derived from the sale.

____ Cash proceeds or inventory derived from the sale of perishable commodities subject to the trust should be deemed to be held separately for the benefit of the supplier. The trust should continue to apply even if the funds or inventory are co-mingled.

____ The trust funds (whether held separately or co-mingled) should not form part of the dealer's estate in bankruptcy, but should instead be paid to the supplier in preference to other creditors.

____ In the case of a receivership or a reorganization (rather than a bankruptcy), the suppliers with a trust interest should be in no worse position than a secured creditor.

____ Suppliers should be able to obtain temporary restraining orders to prevent dealers from breaching the trust.

____ Suppliers should be able to appoint receivers in cases where dealers have breached the trust.

____ Directors, officers, receivers or trustees who deliberately breach the trust should be personally liable for the loss.

____ Proceedings to enforce the trust should be subject to a limitation period shorter than the standard two or six years.

____ Sales which are not at arms-length should qualify for the trust only if made at fair market value.

____ Transactions between cooperative associations and their members should not be subject to the trust.

Appendix F Priority 2. Drafting Instructions Checklist for a Unified Licensing System

For purpose of this document, licensing is defined as the mandatory registration/participation of dealers in fresh produce as historically required by the *Licensing and Arbitration Regulations* (LAR) and its exemption for members of the Fruit and Vegetable Dispute Resolution Corporation. It is recognized that this may change within the Canadian Food Inspection Agency (CFIA) modernization initiative currently underway and does not preclude other licensing requirements which may be created by the CFIA.

A unified licensing model should consider the relevance of business practices to licensing discipline (note: refer to section 10.3.2 Relevance of Business Practices). The system should be designed so that provincial authorities may easily adapt or directly access the system for intra-provincial use, if desired. In order to maintain reciprocity the framework must be supported by legislation or regulation and must be enforceable, awards must be recognized by the judicial system of the participating country, arbitrators/mediators must have experience in the fresh produce industry

Checklist for a single license based on a robust screening system

____ Licensing requirements must enhance marketplace security and due diligence.

____ Licensing system must include bonding provisions to mitigate risk created by participants with history of financial challenges.

____ Bonds should be constructed so as to allow for distribution to creditors in the event of default or payment failure.

____ Framework must be cost recovered.

____ License is an entry point to access financial risk mitigation tools.

____ All firms who purchase or sell fresh fruits and vegetables across national or provincial boundaries which they have not grown themselves should be included under the regulations. This refers to the “B” exemption.

____ Track “responsibly connected” persons beyond company principals.

Unified Licensing supporting mandatory financial risk mitigation tools

Standards Setting

____ Recognition of the DRC rules and standards as “**default contract**” and trading practices, which are currently the standard for DRC members trading within the NAFTA region.

____ There must be minimum required payment terms. Parties may specify other terms as mutually agreed by contract.

____ Rules and standards should be incorporated by reference in order to make them adaptable and relevant to

evolving regulatory and technological changes in this diverse industry.

Dispute Resolution Service Provider Model

____ DRC membership should be a provision of “licensing” services or be a pre-requisite to licensing

____ All segments of the fresh fruit and vegetable marketing chain should have access to dispute resolution services, including those who sell only products they have grown themselves (fee for access model).

____ All firms should be required to participate in good faith mediations and required to proceed to binding arbitration when mediation is not successful within a reasonable time.

____ Regulations must support awards addressing both payment and private contract issues.

Appendix F Financial Risk Mitigation Legal Gap Analysis

	United States	Canada					
Legal Mechanisms	***Perishable Agricultural Commodities Act* Mechanisms**	**Dispute Resolution Corporation**		**Provincial Mechanisms**		**Federal Mechanisms**	
		Existing Mechanisms	**Potential Mechanisms**	**Existing Mechanisms**	**Potential Mechanisms**	**Existing Mechanisms**	**Potential Mechanisms**
Licensing	Requirement that all commission merchants, dealers and brokers obtain a license. 7 U.S.C. 499c(a).	Requirement under the *Canada Agricultural Products Act* for dealers to obtain a license from the Canadian Food Inspection Agency, unless exempted due to membership in the Dispute Resolution Corporation.	The *Canada Agricultural Products Act* should be amended to require that all produce dealers, merchants and brokers obtain DRC membership / recognition.	The Ontario *Farm Products Marketing Act* s.7(1) states that the Ontario Farm Products Marketing Commission has the power to license producers marketers and processors.		Section 32 of the *Canada Agricultural Products Act* authorizes the Minister to establish terms and conditions governing the marketing of any fresh or processed fruit or vegetable in import, export, or interprovincial trade and to control the consignment of fresh fruits and vegetables. Requirement under the *Canada Agricultural Products Act* for dealers to obtain a license from the Canadian Food Inspection Agency, unless exempted due to membership in the DRC. The *Canada Agricultural Products Act* has several exemptions from licensing. Individuals who are Dispute Resolution Corporation members, dealers who sell directly to consumers and earn less than $230,000 and dealers who purchase all of their produce from within their province are not subject to licensing.	Elimination of the dual licensing system and creation of a mandatory licensing requirement for any business engaged in the interprovincial or international trade of produce. Require membership/recognition by the Dispute Resolution Corporation as a condition of licencing and remove the exemption for those dealers who purchase solely from within the province with the intent to sell across provincial borders.

Legal Mechanisms	*Perishable Agricultural Commodities Act* Mechanisms	Dispute Resolution Corporation		Provincial Mechanisms		Federal Mechanisms	
		Existing Mechanisms	Potential Mechanisms	Existing Mechanisms	Potential Mechanisms	Existing Mechanisms	Potential Mechanisms
Licensing	Suspension of license for failure to pay a reparation award. 7 U.S.C. 499g(d). Suspension or revocation of license for failure to make full payment promptly for produce purchased. 7 U.S.C. 499h(a).	Failure to meet Dispute Resolution Corporation membership conditions could result in discipline to the member, potentially even revocation of membership privileges. Although expelled from the Dispute Resolution Corporation, individuals can continue to create risk in the marketplace by obtaining a license from the Canadian Food Inspection Agency.		The Ontario *Farm Products Marketing Act* s. 7(1) states that the Ontario Farm Products Marketing Commission has the power revoke the license of producers, marketers and processors.		Licensees who do not meet the conditions of the licences or requirements of the Licensing and Arbitration Regulations under the *Canada Agricultural Products Act*, maybe subject to enforcement such as suspension or cancellation of their licence and may be required to post a bond for license renewal or issuance of a new license.	Allow/enable Federal and Provincial agreements for the business conduct of fresh fruit and vegetable dealers under pooled powers of the two orders of government to include explicit recognition within regulations of ethical business practices within the industry and the requirements for license denial. Elimination of the dual licensing system and creation of a mandatory licensing requirement for any business engaged in the interprovincial or international trade of produce. Require membership/recognition by the Dispute Resolution Corporation as a condition of licencing and remove the exemption for those dealers who purchase solely from within the province.

Legal Mechanisms	*Perishable Agricultural Commodities Act* Mechanisms	Dispute Resolution Corporation		Provincial Mechanisms		Federal Mechanisms	
		Existing Mechanisms	Potential Mechanisms	Existing Mechanisms	Potential Mechanisms	Existing Mechanisms	Potential Mechanisms
Exemptions to Licensing	Transactions between a cooperative association and members of the marketing cooperative. 7 U.S.C. 499e(c)(2).					Section 2.2(2)(b) of the *Licensing and Arbitration Regulations* exempts dealers who market only agricultural products within the province where their business is located.	The exemption created by section 2.2(2)(b) of the Licensing and Arbitration Regulations does not adequately deal with the reality of the produce market. Dealers who buy within the province but then sell inter-provincially or internationally should not be exempt. There is no constitutional basis for their exemption and it creates a significant gap which should be eliminated. The *Canada Agricultural Products Act* or any new legislation should cover those dealers currently exempt, while transactions between cooperative organizations and its members should be exempt.
Responsibly Connected Persons	Responsibly connect persons include those affiliated or connected with a dealer, broker or commission merchant as partner in a partnership or officer or holder of more than 10 percent of the outstanding stock of a corporation or association, and actively involved in the business. 7 U.S.C. 499a(9).	The Dispute Resolution Corporation by-laws establish responsibly connected persons as individual owners, partners, members, officer, directors or holders of more than 10% of the outstanding stock of the business and any individuals who function in an executive or managerial capacity.				Section 3(3) of the *Licensing and Arbitration Regulations* require that applicants disclose the names of all directors and officers, shareholders holding more than 10% of the shares and whether any of those persons are connected to another licensed dealer.	Any new legislation or amendment to existing legislation should cover the entire value chain. The amendment or new legislations should cover "agricultural suppliers", those who sell agricultural products to a dealer and are able to access the trust and maintain existing definitions for "dealers" found in the *Canada Agricultural Products Act*. Any new legislation or amendment to existing legislation should provide for a wider class of responsibly connected persons and should consider the past conduct of those persons in evaluating applications for membership.

Legal Mechanisms	*Perishable Agricultural Commodities Act* Mechanisms	Dispute Resolution Corporation		Provincial Mechanisms		Federal Mechanisms	
		Existing Mechanisms	Potential Mechanisms	Existing Mechanisms	Potential Mechanisms	Existing Mechanisms	Potential Mechanisms
Default Contracts	Standardized or Default Contracts	The default contract which applies to Dispute Resolution Corporation members is comprehensive and deals with payment terms, rights and responsibilities of each party, required record, proof of claim and breaches of contract. Country specific adoption of rules/standards by incorporation or by reference, which in turn creates a domestic "default contract", unless otherwise specified the "default contract" is used as a basis for settling disputes.			Standardized contracts for sale of perishable commodities including clear terms of payment, determination of when default occurs and inclusion of security provisions which give security interest in the buyer's assets until full payment has been received. Allow deemed trusts to be established as a component of the default contract in intra-provincial trade.	The *Licensing and Arbitration Regulations* do provide for a limited default contract, which does not provide a definition for prompt payment and lack authority under the *Canada Agricultural Products Act* to prescribe certain conditions and business practices.	Amend the *Canada Agricultural Products Act* to provide a legal basis for establishing a default contract whenever no other written contract is in place, as well as setting out clear bonding requirements based on business history and regulations for default contracts. Allow a deemed trust to be established as a component of default contracts for international and interprovincial trade. Any new legislation or regulation and/or any amendment to existing legislation or regulation should recognize Dispute Resolution Corporation rules and standards in order to establish a default Canadian contract equivalent to the *Perishable Agricultural Commodities Act*.
Payment Term Restrictions	Standard payment terms set forth in Regulations. 7 C.F.R. 46.2(aa). Only transactions with payment terms of 30 days from receipt and acceptance or less, are eligible for the trust.	The Dispute Resolution Corporation By-laws concerning trading standards provide multiple payment term restrictions for various trading relationships.				Section 81.1 of the *Bankruptcy and Insolvency Act* affirms the right of the unpaid seller to repossess their goods delivered 30 days prior to the buyers bankruptcy. However the right to repossess goods expires 10 days after the trustee, receiver or purchaser has confirmed it.	The *Canada Agricultural Products Act* or any new legislation should include a requirement that only transactions with payment terms of no more than 30 days will be eligible for trust protection

Legal Mechanisms	*Perishable Agricultural Commodities Act* Mechanisms	Dispute Resolution Corporation		Provincial Mechanisms		Federal Mechanisms	
		Existing Mechanisms	Potential Mechanisms	Existing Mechanisms	Potential Mechanisms	Existing Mechanisms	Potential Mechanisms
	Payment terms beyond "prompt" (10 days after receipt and acceptance) must be agreed to before the transaction, in writing, with a copy of the agreement retained in the files of each party and disclosed on the invoice or billing statement. 7 U.S.C. 499e(c)(3).	The Dispute Resolution Corporation by-laws establish "prompt" payments as payment of net proceeds for produce received on consignment or the pro-rata share of the net profits for produce received on joint account, within 10 days after the date of final sale with respect to each shipment, or within 20 days from the date the goods are accepted at destination, whichever comes first.				Section 81.2 of the *Bankruptcy and Insolvency Act* provides first charge on buyer's inventory if farmers, fishermen or aqua culturist's products were delivered 15 days preceding the bankruptcy.	The *Canada Agricultural Products Act* or new legislation should include a section determining that payment by a dealer for agriculture products imported from outside the dealers province shall be promptly to the agriculture supplier, unless otherwise specified in a written contract.
Arbitration	Dispute Resolution: Adjudication and Mediation	The Dispute Resolution Corporation has a system equivalent to *Perishable Agricultural Commodities Act* for handling disputes ranging from informal mediation to formal arbitration. The disputes involve condition, transportation, contract and payment issues.		The Prince Edward Island *Natural Products Act* states that the Prince Edward Island Marketing Council has the power to arbitrate disputes between producers, processors, distributors and transporters of natural products.		The Board of Arbitration set up under the *Canada Agricultural Products Act* has no statutory authority to set up through an order in counsel any sort of systems of tribunals for adjudicating disputes among licensees under s.101 of the *Constitution Act 1867*. Arbitration between disputing parties is voluntary and can only hear complaints based on issues related to standards such as grades. The Board can, if necessary, obtain outside expertise in order to help it resolve a dispute.	The *Canada Agricultural Products Act* should be amended to provide for an adjudicative body to oversee licensing of market participants and to settle disputes arising from transactions between licensed parties. Any new legislation or legislative amendments which provide for a non-profit industry organization to play a regulatory role should contain provisions to manage liability claims against it.

Legal Mechanisms	*Perishable Agricultural Commodities Act* Mechanisms	Dispute Resolution Corporation		Provincial Mechanisms		Federal Mechanisms	
		Existing Mechanisms	Potential Mechanisms	Existing Mechanisms	Potential Mechanisms	Existing Mechanisms	Potential Mechanisms
	Binding order form the Secretary requiring the respondent licensee to pay reparation to the complainant. 7 U.S.C. 499g(a)	If a Dispute Resolution Corporation award is not paid the supplier must use a court with jurisdiction over the offender's assets and use the courts available remedies to place a lien on or freeze the assets. The Dispute Resolution Corporation has the authority to enforce an unpaid award by de-listing the "offender" from membership, requiring a bond or attaching other conditions to membership / recognition. As well the Dispute Resolution Corporation can use bonds to pay out awards.				Awards can be filed by the holder in a federal court. Canadian Food Inspection Agency can use non-payment to discipline a Licensee. Canadian Food Inspection Agency bonds cannot be used to pay out awards and can only be used to pay related Canadian Food Inspection Agency fees or forfeited to the crown.	The *Canada Agricultural Products Act* should be amended to provide for an adjudicative body to oversee licensing of market participants and to settle disputes arising from transactions between licensed parties. Any new legislation or legislative amendments should provide for effective actions enforceable in a court with the appropriate jurisdiction to enforce any award resulting from arbitration. Any new legislation or legislative amendments which provide for a non-profit industry organization to play a regulatory role should contain provisions to manage liability claims against it.

Legal Mechanisms	*Perishable Agricultural Commodities Act* Mechanisms	Dispute Resolution Corporation		Provincial Mechanisms		Federal Mechanisms	
		Existing Mechanisms	Potential Mechanisms	Existing Mechanisms	Potential Mechanisms	Existing Mechanisms	Potential Mechanisms
Statutory Trust	The *Act* states perishable agricultural commodities, inventories of food or other derivative products and any receivables or proceeds from the sale of such commodities shall be held in trust. 7 U.S.C. 499e(c)(2). The trust has been judicially determined to be a non-segregated floating trust.			If a trust is created by contract under provincial contract law and the buyer of goods does intermingle a fund, which should have been held in trust, the beneficiary has claim for breach of trust, which can recover those assets. However this remedy only gives rise to an unsecured claim which is worth little in an insolvency situation.	Provinces cannot create priorities between creditors or change the scheme of distribution on bankruptcy. However, a provincial statutory trust would grant the unpaid seller secured creditor status in the event of bankruptcy as contained with section 136 of the *Bankruptcy and Insolvency Act*.	The establishment of a deemed trust through amendment to the *Canada Agricultural Products Act* or new legislation would conflict with their right to repossession under section 81.1 of the *Bankruptcy and Insolvency Act* and the super priority given to the goods sold by farmers, fisherman and aquaculturalists and the proceeds collected therefrom, under section 81.2 of the *Bankruptcy and Insolvency Act*.	New legislation or amendment to existing legislation should create a statutory deemed trust and tracing provisions allowing for the accounting of all unpaid goods with the proceeds of sale placed in trust for the benefit of unpaid sellers. The deemed trust should cover inventory, related accounts receivable and the proceeds thereof. The conflict between the legislation establishing a deemed trust and sections 81.1 and 81.2 of the *Bankruptcy and Insolvency Act* could be remedied with a notwithstanding clause.
	Trust assets are not property of the debtor and are not available for distribution to general creditors until all valid produce claims have been satisfied. 7 U.S.C. 499e(c)(4).						Preclude secured creditors from obtaining security on any goods delivered within 90 days prior to bankruptcy.

Legal Mechanisms	*Perishable Agricultural Commodities Act* Mechanisms	Dispute Resolution Corporation		Provincial Mechanisms		Federal Mechanisms	
		Existing Mechanisms	Potential Mechanisms	Existing Mechanisms	Potential Mechanisms	Existing Mechanisms	Potential Mechanisms
	Trust creditors can petition the court to turn over the debtors trust related assets or request that the court oversee the liquidation of the inventory and collection of receivables and disburse of trust proceeds to trust creditors.						Amendments to existing legislation or the creation of new legislation should include deemed trust provisions covering international and interprovincial trade.
Written Notice	To preserve trust benefits the unpaid seller must give written notice of intent to preserve the trust within 30 calendar days after payment is due.					Section 81.1 of the *Bankruptcy and Insolvency Act* requires the seller to make a written demand for the goods within 30 days after delivery to the buyer and the buyer has to be bankrupt or in receivership at the time the demand is made.	Amendments to existing legislation or the creation of new legislation should include the responsibility of the agriculture supplier to notify the dealer of intention to preserve the benefits of the trust within 30 calendar days after payment is due.
	Perishable Agriculture Commodities Act Licensee may provide notice of intent to preserve trust benefits by including specific language as part of billing or invoice statements. 7 U.S.C. 499e(c)(4).						Any new legislation or amendment to existing legislation or regulation should provide for formalities in order to provide notice to the buyer that the trust provisions apply and to subsequently engage the deemed trust. This could be done by requiring prescribed wording to be present on the invoice sent to the buyer or notification to be made to an administrator.

Legal Mechanisms	*Perishable Agricultural Commodities Act* Mechanisms	Dispute Resolution Corporation		Provincial Mechanisms		Federal Mechanisms	
		Existing Mechanisms	Potential Mechanisms	Existing Mechanisms	Potential Mechanisms	Existing Mechanisms	Potential Mechanisms
Trust Enforcement Actions	Temporary restraining order to freeze the bank accounts of a buyer until the trust creditor is paid.			The Ontario *Sale of Goods Act* allows a seller to place a lien on securable property. However the lien is lost when the seller gains possession. If the unpaid seller retains possession and gives notice to the buyer of intention to resell, the buyer must pay within a reasonable time or risk rescission of the contract. The seller can then recover damages for breach of contract.			Any new legislation or amendment to existing legislation or regulation should provide for temporary restraining orders to freeze the accounts of debtors until the trust beneficiaries are paid.

Legal Mechanisms	*Perishable Agricultural Commodities Act* Mechanisms	Dispute Resolution Corporation		Provincial Mechanisms		Federal Mechanisms	
		Existing Mechanisms	Potential Mechanisms	Existing Mechanisms	Potential Mechanisms	Existing Mechanisms	Potential Mechanisms
Trust Enforcement Actions	Court actions by trust beneficiaries to enforce payment from the trust. 7 U.S.C. 499e(c)(5).					Section 81.1 of the *Bankruptcy and Insolvency Act* affirms the right of the seller to repossess their property; however the goods must be used in relation to the buyers business and in the possession of the receiver, trustee or buyer. The goods must also be identifiable, not fully paid for, in the same state as they were on delivery and not resold at arm's length or subject to an agreement for sale. The right to repossession ranks ahead of all other claims in respect of those goods other than a claim by a bona fide buyer for value without notice of claim. Section 81.2 of the *Bankruptcy and Insolvency Act* gives a charge on all inventory of the purchaser in relation to products for which they had not received full payment. This right takes priority over all other charges except unpaid sellers exercising the right of repossession under s.81.1 of the *Bankruptcy and Insolvency Act*. Section 81.2 of the *Bankruptcy and Insolvency Act* prevents dissipation of inventory by the trustee or receiver by extending the sellers charge to the proceeds of sale, less realization costs.	The trust provisions contained within legislative amendments or the creation of new legislation should address insolvency, receivership and reorganization by extending the concept of the deemed trust to include these scenarios. Implications of the deemed trust provisions on the *Bankruptcy and Insolvency Act* as well as the *Companies Creditors Arrangement Act* should be considered. The *Canadian Agricultural Products Act* should be amended or new legislation created to establish actions by trust beneficiaries to enforce payment from the trust and to prevent and restrain dissipation of the trust. Any new legislation or amendment to existing legislation should contain provisions to allow for swift court actions to enforce payment from the trust.

Legal Mechanisms	*Perishable Agricultural Commodities Act* Mechanisms	Dispute Resolution Corporation		Provincial Mechanisms		Federal Mechanisms	
		Existing Mechanisms	Potential Mechanisms	Existing Mechanisms	Potential Mechanisms	Existing Mechanisms	Potential Mechanisms
Liability of Officers and Directors	Individuals in control over trust assets who breach their duty to preserve those assets can be held personally liable.						Directors, trustees, receivers etc. should be held personally liable when debtors fail to comply with statutory trust provisions.