



Grocery Supply Code of Practice for Canada

2021 Proposal



Canada's food retail industry has a long history of dealing with strained relationships between retailers and suppliers. The issues stem from negotiation tactics around cost and fee increases that have created confusion and frustration among industry players on both sides of the equation for decades. In the end, these practices have also had challenging impacts on smaller, local suppliers, farmers and growers in Canada. Ultimately, they impact consumers, as well.

Food, Health and Consumer Products of Canada has long advocated for Government intervention. In October 2020, Michael Medline, President and CEO of Empire, was the first Canadian grocery CEO to come out and support a potential Code of Conduct to regulate the industry.

Since that time, a Federal-Provincial-Territorial (FPT) Working Group was created to study this important issue. FHCP and Empire have come together to agree on and prepare a formal, thoughtful submission to the Working Group, which includes a principles-based proposed Grocery Supply Code of Practice for Canada (the "Code").

Principles

The Code is rooted in five guiding principles:

1. To promote fair dealing at all times and in all commercial relationships between retailers and suppliers
2. To promote mutually-beneficial relationships where retailers and suppliers recognize each other's need for commercial certainty
3. To promote transparency between retailers and suppliers
4. To provide for an effective, equitable mechanism for resolving commercial disputes
5. To promote the efficiency, sustainability and competitiveness of the Canadian grocery supply chain, as well as to ensure that it delivers value and innovation to Canadian consumers

Contact

Jacquelin Weatherbee

VP, Communications & Corporate Affairs, Empire
416-200-0372

Jacquelin.weatherbee@sobeys.com

Anthony Fuchs

Director, Communications, FHCP
416-648-8808

Anthony.Fuchs@FHCP.ca

Objectives

The Code aims to:

- Strengthen commercial relationships based on good faith and fair dealing
- Promote transparency and certainty through written supply agreements
- Require reasonable notice for changes to commercial terms
- Discourage the use of unilateral, retroactive actions and penalties
- Establish effective, efficient, and fair dispute resolution models
- Create a common set of rules of engagement
- Promote collaboration in business planning and fair allocation of commercial risks
- Protect confidential information
- Foster investment and participation in mutually-beneficial programs

A legislated Grocery Supply Code of Practice for Canada will:

- Require negotiated agreements in writing between retailers and suppliers
- Ensure open negotiations between retailers and suppliers
- Create stability to encourage retailers and suppliers to work together to bring the best products, innovation and value to Canadians
- Require retailers to designate "Code Compliance Officers" to oversee Code compliance
- Introduce a government adjudication system to manage any complaints of unfair practices under the Code

The Code will NOT restrict robust, good-faith bargaining or limit flexibility in negotiating commercial terms.



Proposed Grocery Supply Code of Practice for Canada

The pages that follow include the draft code proposal as agreed to by the FHCP and Empire. This proposal has been formally submitted to the FPT Working Committee and we strongly encourage all other retailers and suppliers to come forward and present their perspective.

Purpose

The purpose of the Code is:

- (1) To promote fair dealing at all times and in all commercial relationships between Retailers and Suppliers such that each party conducts itself in good faith and without duress
- (2) To promote mutually beneficial relationships where Retailers and Suppliers recognize each other's need for commercial certainty as regards the risks and costs of trading, particularly in relation to production, delivery and payment issues
- (3) To promote transparency between Retailers and Suppliers, thereby minimizing disputes regarding commercial terms
- (4) To provide for an effective, equitable mechanism for resolving commercial disputes between Retailers and Suppliers
- (5) To promote the efficiency, sustainability and competitiveness of the Canadian grocery supply chain, as well as to ensure that it delivers value and innovation to Canadian consumers

Retailers and Suppliers should use commercially reasonable efforts to enter into a Supply Agreement. Any such Supply Agreement should provide transparency and clarity between the parties and should set out the obligations and duties of Suppliers on key items including, but not limited to: (i) the mechanism by which supplier terms and procedures may be amended and (ii) standards relating to key items including, but not limited to, delivery on time and in full (and the treatment of allocations), quality and product safety, compliance with labelling requirements, returns of damaged/unsellable goods and handling of product recalls. A Supply Agreement should also set out any penalties or consequences for failures by Suppliers to comply with their obligations. A Supplier's conduct, including any failures to comply with its obligations, will be considered in the context of any Code-related disputes to the extent relevant and applicable.

Code of Practice

1. Variation of Supply Agreements and terms of supply

- (1) A Retailer shall not vary any Supply Agreement retrospectively, and shall not request or Require that a Supplier consent to retrospective variations of any Supply Agreement unless the relevant Supply Agreement sets out clearly and unambiguously:
 - (a) any specific change of circumstances (such circumstances being outside the Retailer's control) that will allow for such adjustments to be made; and
 - (b) detailed rules that will be used as the basis for calculating the adjustment to the terms of supply.
- (2) If a Retailer has the right to vary a Supply Agreement unilaterally, it shall give Reasonable Notice of any such variation to the Supplier.

2. Changes to supply chain procedures

A Retailer shall not directly or indirectly Require a Supplier to change significantly any aspect of its supply chain procedures during the period of a Supply Agreement unless that Retailer either:

- (a) gives Reasonable Notice of such change to that Supplier in writing; or
- (b) fully compensates that Supplier for any net resulting costs incurred as a direct result of the failure to give Reasonable Notice.

3. Procedure for Payments and Deductions

- (1) A Retailer shall pay a Supplier for Groceries delivered to that Retailer's specification in accordance with the relevant Supply Agreement, and, in any case, within a reasonable time after the date of the Supplier's invoice.
- (2) A retailer must not make unilateral deductions unless the following process is applied:
 - (a) The proposed deduction must be documented in writing to the Supplier;
 - (b) The Retailer shall provide the Supplier with sufficient information to substantiate any proposed deduction;
 - (c) The Supplier must be given at least 30 days to challenge any proposed deduction; and
 - (d) Where a Supplier challenges a proposed deduction, the Retailer shall not deduct the disputed sum from the Supplier's trading account or otherwise from money owed to the Supplier for goods supplied until the challenge is resolved, unless the Retailer determines, acting reasonably, that the challenge is vexatious or wholly without merit.
- (3) A Retailer may not seek to initiate a proposed deduction more than 24 months after the date of the invoice in respect of which the deduction is sought, unless the basis for the deduction is fraud or intentional misrepresentation on the part of the Supplier.
- (4) The Retailer shall ensure that its internal processes facilitate the timely resolution of disputes related to pricing or payments, including, but not limited to implementing the following measures:
 - (a) Providing Suppliers with a designated point of contact to resolve any issues relating to pricing or payments; and
 - (b) Pricing errors must be resolved with urgency and as soon as reasonably practicable following notification by the Supplier to minimize the accumulation of financial impact.
- (5) The methodology for calculating any money due from suppliers, must be clearly set out in the Supply Agreement.

4. Contribution to Marketing Costs

A Retailer may only, directly or indirectly, Require a Supplier to make any Payment towards that Retailer's marketing costs to the extent provided for in the Supply Agreement.

Where a Supply Agreement provides that a Supplier shall make any Payment towards the marketing costs of a Retailer, this shall be set out in clear terms, including the basis for and amount of any such Payment.

5. No Payments for certain losses

A Supply Agreement shall not include provisions under which a Supplier makes Payments to a Retailer as compensation for losses that occur after Groceries are delivered to a Retailer's premises, are accepted by the Retailer, and arise not due to negligence or default of that Supplier, such as theft, loss or accounting error.

6. Payments for Unsellable Groceries

A Retailer may only directly or indirectly Require a Supplier to make any Payment to cover the costs associated with Groceries that become unsellable subsequent to the Retailer taking possession where:

- (a) the Groceries become unsellable due to the negligence or default of that Supplier, and the relevant Supply Agreement sets out expressly and unambiguously what will constitute negligence or default on the part of the Supplier; and
- (b) the basis of such Payment is set out in the Supply Agreement.

A Supply Agreement may set forth the basis for programs agreed to between a Retailer and a Supplier that are directed towards minimizing wastage of Groceries, such as those that collect reclamation funds.

7. Limited circumstances for Payments as a condition of being a Supplier

A Retailer may only directly or indirectly Require a Supplier to make any Payment as a condition of stocking or listing that Supplier's Grocery products where such Payment:

- (a) is made in relation to a Promotion;
- (b) is made in respect of Grocery products which have not been stocked, displayed or listed by that Retailer during the preceding 365 days in 25 per cent or more of its stores; or
- (c) is agreed to in a Supply Agreement as a reasonable reflection of the risk run by that Retailer in stocking, displaying or listing new Grocery products.

8. Forecasting & Ordering

- (1) A Retailer shall prepare forecasts in good faith and with due care and following consultation with the Supplier. Further, a Retailer shall take all due care to ensure that when ordering Groceries from a Supplier at a promotional price in connection with an agreed retail promotion, it does not over order quantities beyond a reasonable margin above what it forecasts to sell through during the duration of the promotion.
- (2) A Retailer shall ensure that the basis on which it prepares any forecast has been communicated to the Supplier.
- (3) A Retailer shall make commercially reasonable attempts to work with the Supplier to resolve any stock issues caused by inaccurate forecasting.
- (4) To the extent a Retailer has over-ordered beyond its forecast beyond a reasonable margin of error, it shall not impose fines or penalties on a Supplier solely as a result of failing to deliver the excess quantities. A Supply Agreement should address the Parties' agreement in relation to situations where a party is unable to meet its obligations due to circumstances beyond its reasonable control.

9. Limited Circumstances for tying of Retailer or third-party supplied goods and services for Payment

- (1) A Retailer shall not directly or indirectly Require a Supplier to obtain any goods, services or property from the Retailer or any third party where that Retailer makes a profit from or obtains any Payment for this arrangement, unless the Supplier's alternative source for those goods, services or property:
- (a) fails to meet the reasonably objective standards relating to quality, timing and/or efficiency laid down for that Supplier by that Retailer for the supply of such goods, services or property; or
 - (b) charges more or provides a lesser return on investment than the Retailer or any other third party recommended by that Retailer for the supply of such goods, services or property of an equivalent quality and quantity.

10. Payments for better positioning of goods

A Retailer shall only be entitled to unilaterally impose on a Supplier, directly or indirectly, a requirement for Payment in order to secure better positioning or an increase in the allocation of shelf space for any Grocery products of that Supplier within a store where such Payment is made in relation to a Promotion.

11. Consumer complaints

A Retailer shall only directly or indirectly Require a Supplier to make any Payment for resolving a consumer complaint where:

- (a) that Retailer is satisfied on reasonable grounds that the consumer complaint is justifiable and attributable to negligence or default or breach of a Supply Agreement on the part of that Supplier;
- (b) the Retailer has provided the Supplier with adequate evidence of the fact that the consumer complaint is justifiable and attributable to negligence or default or breach of a Supply Agreement on the part of the Supplier; and
- (c) the Payment is reasonably related to that Retailer's costs arising from that complaint.

A Retailer may agree with a Supplier on an average figure for Payments for resolving customer complaints.

12. Duties in relation to De-listing

- (1) A Retailer may only De-list a Supplier for genuine commercial reasons. For the avoidance of doubt, the exercise by the Supplier of its rights under any Supply Agreement (including this Code) or the failure by a Retailer to fulfil its obligations under the Code or this Order will not be a genuine commercial reason to De-list a Supplier.
- (2) Prior to De-listing a Supplier, a Retailer shall:
- (a) provide Reasonable Notice to the Supplier of the Retailer's decision to De-list, including written reasons for the Retailer's decision. For the purposes of this paragraph 'Reasonable Notice' will include providing the Supplier with sufficient time to have the decision to De-list reviewed using the measures set out in paragraphs 16(2)(b) and 16(2)(c) below;
 - (b) inform the Supplier of its right to have the decision reviewed by a Senior Buyer, as described in paragraph 17 of this Code; and
 - (c) allow the Supplier to attend an interview with the Retailer's Code Compliance Officer to discuss the decision to De-list the Supplier.

13. Senior Buyer

- (1) A Retailer's Senior Buyer will, on receipt of a written request from a Supplier, review any decisions made by the Retailer in relation to the Code or this Order.

- (2) A Retailer shall ensure that a Supplier is made aware, as soon as reasonably practicable, of any change to the identity and/or contact details of the Senior Buyer for that Supplier.

14. Confidential Information

- (1) Except as required by law, a Retailer shall not request or Require a Supplier to disclose Confidential Information in connection with the supply of grocery products, unless for a purpose that is related to the supply of Groceries to that Retailer.
- (2) Where a Supplier discloses Confidential Information to a Retailer, the Retailer shall not use that information other than for a purpose for which it was disclosed and may only disclose such information or make it available or accessible to employees or agents of the Retailer who need to have that information in connection with that purpose.

Key Definitions

Adjudicator means a person appointed as the Grocery Supply Code of Practice Adjudicator, at any time when such office is in existence;

Code means the Grocery Supply Code of Practice;

Code Compliance Officer means the person appointed from time to time by a Designated Retailer to oversee compliance with the Code;

Confidential Information means commercially-sensitive, non-public Supplier information;

De-list means to cease to purchase Groceries for resale from a Supplier or significantly reduce the volume of purchases made from that Supplier other than for genuine commercial reasons.

Groceries [Note: the precise definition of this term is to be developed with reference to the definition of "Retailer" to include those products typically sold by grocery and drugstore retailers, with certain listed exemptions (for example gasoline)];

Payment or Payments means any monetary compensation or credit in relation thereto or similar inducement in any form;

Promotion means any customer-facing offer that is made on a limited time basis;

Reasonable Notice means a period of notice, the reasonableness of which will depend on the circumstances of the individual case including, but not limited to factors, such as:

- (a) the duration of the Supply Agreement to which the notice relates, or the frequency with which orders are placed by the Retailer for relevant Groceries;
- (b) the characteristics of the relevant Groceries including durability, seasonality and external factors affecting their production;
- (c) the value of any relevant order relative to the turnover of the Supplier in question; and
- (d) the nature of the matter in respect of which notice is being given;

Require A Retailer will “Require” an action by a Supplier where the Retailer directly or indirectly pressures the Supplier to agree to that action through means other than ordinary commercial pressure. Where the commercial pressure is in any way attributable to the Retailer, it will only constitute ordinary commercial pressure where such pressure does not constitute duress (including economic duress) and is objectively justifiable, transparent and consistent with the treatment of similar commercial situations. The onus is on the Retailer to demonstrate that, on a balance of probabilities, an action was not Required by the Retailer;

Retailer means any person carrying on a business in Canada for the retail supply of Groceries whether in-store or online or a buying group that negotiates the supply of Groceries on behalf of multiple Retailers, including all relevant subsidiaries and banners; [Note: The criteria for specific business formats, size of business and product categories to be developed, with the intent that ‘Retailer’ shall include all major resellers of Groceries, regardless of format or channel.]

Senior Buyer means, in relation to any individual Supplier, an employee within a Retailer’s buying or merchandising group who manages other buyers for that Supplier (or is otherwise at a higher level than the other buyers within the management structure of the Retailer);

Supplier means any person carrying on (or actively seeking to carry on) a business in the direct supply to any Retailer of Groceries for resale in Canada; and

Supply Agreement means any agreement between a Retailer and a Supplier for the supply of Groceries and which must be recorded in writing.

Framework for Key Supporting Provisions

1. Supply Agreements

Supply Agreements to be in writing (including any subsequent amendments or modifications) and be readily accessible to Suppliers. The terms of a Supply Agreement cannot attempt to circumvent or exclude the application of the Code.

2. Code Compliance Officer

The Code Compliance Officer must have a sufficient degree of independence from the buying or merchandising group and be charged with impartially overseeing compliance with the Code and resolving Supplier complaints under the Code. The Code Compliance Officer must have access to appropriate resources, information and the buying or merchandising group to ensure they can effectively fulfil their intended role under the Code.

3. Compliance Obligations

Retailers covered by the Code (“Designated Retailers”) must provide the members of their buying or merchandising group with a copy of the Code and compliance training on an ongoing basis.

As requested by the Adjudicator, Designated Retailers must provide a compliance report that is approved by senior management to the Adjudicator. Designated Retailers are required to provide Suppliers with contact information for their Senior Buyer(s) and the Code Compliance Officers, as well as access to the Designated Retailer’s dispute resolution process.

4. Adjudicator

An independent Adjudicator will be appointed to oversee compliance with the Code. The Adjudicator shall have the ability to require Designated Retailers and Suppliers to provide such information as the Adjudicator reasonably requires to fulfil their role.

The Adjudicator shall have the ability to determine whether a Retailer meets the definition of a Designated Retailer and shall have the ability to require a Retailer to provide such information as the Adjudicator may reasonably require to make this determination.

Information provided to the Adjudicator and/or an arbitrator designated by the Adjudicator shall be treated as confidential and not disclosed other than to a Canadian law enforcement agency or for the purposes of the administration and enforcement of the Code.

Where there has been a contravention of the Code, the Adjudicator shall have the ability and discretion to impose penalties, damages or costs where the Adjudicator believes it is reasonable to do so. In determining the amount of any monetary penalty, the Adjudicator shall consider all relevant factors, with the primary purpose of any monetary penalty being to promote compliance with the Code.

5. Dispute Resolution Process

Parties should attempt to resolve disputes under the Code on their own in good faith. Where a dispute under the Code cannot be resolved by the Code Compliance Officer, the dispute can be submitted for binding arbitration overseen either by the Adjudicator or by an arbitrator designated by the Adjudicator. An arbitrator shall have the ability to award an amount for compensation and/or costs of the arbitration where the arbitrator believes it is reasonable to do so.