

Grocery Industry Code of Practice¹ Progress Report

The Grocery Industry Code of Practice Steering Committee is pleased to present this report to Ministers on its progress as of March 31, 2022. From our last report (December 17, 2021) we have made significant progress on all issues; in some cases, finding areas of emerging consensus, and in others understanding where we do not yet have agreement. In addition, we have launched a broader industry process to work through some of the unresolved issues and, where possible, help develop specific language for a draft Code.

This report will detail the progress we have made, outstanding issues, lessons learned, and the path forward. There are, of course, many challenges ahead, and much work to be done to refine the broad direction we now have into a specific set of proposals and an overall design of a Code. However, we feel confident that the work we have done to date represents a major step forward, and that – even if we haven’t found agreement on all issues yet – the pieces are in place for a robust and intensive consideration of the issues that will yield a Grocery Industry Code of Practice proposal. We intend to continue working on the process described below, and to broaden the tent of consulted parties to make sure that a broad range of stakeholder voices are heard, and that the Code responds to the needs of everyone affected by it, while delivering value to Canadian consumers. It is therefore our hope that ministers will continue to support these efforts and continue to play a vital convening role in making this joint work possible.

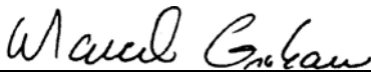
We thank you for your leadership and support and remain committed to working together toward a positive outcome accepted by all.



Denise Allen



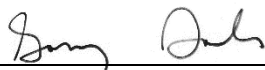
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¹ Grocery Industry Code of Practice (the actual name of the Code has not yet been confirmed)

Emerging consensus

We looked at several model codes – Australia, UK, Payments Code (Canada) – and had in-depth discussions of the type of code Canada should adopt, and the overall principles it should live up to. In general, we have achieved emerging agreement on:

Overall Structure

- We have made progress in developing an overall structure that is based on clear and transparent agreements (whether in writing or not, remains to be decided) which includes clear guidelines for practices like payments, fines, fees, and other areas. That is, the general shape of a prospective Code is one that puts guidelines around industry practices to ensure that they are conducted fairly and through mutual consent and is not just a series of blanket prohibitions.

Objectives

- Enabling a thriving industry.
- Promoting trust, fair dealing, and collaboration throughout the value chain.
- Increased commercial certainty.
- Effective, equitable dispute resolution.

Principles

- Transparency and certainty: the Code should promote transparency and help eliminate ambiguity in commercial relations.
- Fair dealing across the value chain and achieve reciprocity as required. The Code should apply equitably to all parties, and should not be designed to target any particular group exclusively. That said, we understand that the originating context for this work is FPT findings with respect to retail behaviour, which the Code will address, while also taking the opportunity to address other issues within the system.
- Timely dispute resolution: the Code needs to provide for flexible and efficient resolution
- Simplicity: Canada does not need a highly rules-bound, detailed approach, simple and clear is better.
- Promote growth for parties of all sizes in the Canadian marketplace.
- Include small to medium sized business throughout the supply chain, without adding administrative and contractual burdens which will add cost and time.
- The Code must complement and not disrupt existing trading systems, for example the Dispute Resolution Corporation.

Provisions

- Fair dealing: parties have an obligation to negotiate in good faith and in the spirit of fair dealing; this includes not altering contracts unilaterally, retroactively, or prospectively unless pre-existing agreement between the parties sets out clear and unambiguous terms for doing so; and also recognize the need to ensure fair and reliable supply.
- No reprisal: parties to the Code shall not undertake acts of retaliation for practices permitted by the Code.
- Contractual certainty: parties should follow trade rules provided in the Code and in agreements between parties.

Naturally, some of the specifics need to be further worked out, and will be addressed during the next phase of consultation and working group meetings (see: process, below). However, we feel confident that the big picture is coming together and that parties can ultimately agree on these important points.

Agreement in principle but need more detail and discussion

On the subject of how a Code might be brought into force and enforced, we achieved broad agreement that: the Code should have teeth (including the means by which it is enforceable), its application should be mandatory (no players opting out, understanding that the scope of the Code is not yet determined), it should be principles based and not overly prescriptive, and that the optimal means by which the Code should be implemented is through industry leadership and participation. It is too early to say definitively that a regulatory or non-regulatory route is required.

While the Canadian market may have some similarities to the markets with mature Codes (UK, Australia), there are some key differences that will require a “Made in Canada” solution which supports a principles-based, industry-driven solution within the uniquely Canadian federal, provincial and territorial jurisdictional context. That said, there are useful similarities between Canada and these international leaders – the UK has market dynamics very much like those of Canada – and there are practices we can adopt. There is more work to be done in analysing measures from other jurisdictions and bringing them into a Canadian model.

Whatever direction is taken on Code implementation and dispute resolution will involve legal and regulatory design considerations that go well beyond grocery industry expertise. It is likely that as the design project progresses, we will have to bring in new expertise to advise on these questions. In addition, the design requirements of any dispute resolution system will depend on the elements of the Code currently being developed.

Process to move forward

In addition to progress on the content of a Code, we have also made progress on a process to further refine ideas and ensure inclusive stakeholder representation in the process. First, we identified that a robust process that would be acceptable to stakeholders, and that would bring the right expertise to bear, required participation beyond the Steering Committee itself.

Therefore, we have formed a cross-industry working group made up of experts drawn from the membership of our respective organizations. These participants will be able to review ideas on the table and provide perspectives and practical design advice based on their expert knowledge of how the industry works at a detailed level. Starting in April, we plan to host a series of working group meetings, facilitated by the Intersol group, and with a neutral competition lawyer present, to tackle the major subjects of the Code:

- **Scope** – what products should be included, and what entities should be subject to the Code?
- **Defining Agreements** – what is the definition of a commercial agreement, from the perspective of the Code, and how should the Code treat the common industry practice of non-written agreements? This in the context of not wishing to create undue administrative burden for small and medium enterprises in particular.
- **Payments, Deductions, and Fees** – what types of activities should be covered, and what should the rules be? These are the key provisions to ensure contractual certainty and define fair dealing in practical terms, while taking care not to limit competition in the marketplace.
- **Other Elements (de-listing, forecasting, and others)** – other practices a code should cover, or not? The effect of technologies (e.g. forecasting systems) and how they interact with the system?

For each of these (excepting the scope question, where the views around the table differ substantially), we have provided some proposed ideas to kickstart discussion, and a framework to ask questions and help working group participants form views and provide us with advice. We have already initiated this process with bilingual orientation sessions for working group members, and a comprehensive discussion document to help guide their participation. This process will ensure that a wide variety of stakeholders have their say, and that all perspectives are accounted for in designing a Code that makes sense at high level, and that is actually implementable and enforceable in practice.

Finally, we can anticipate a further phase of bringing a draft Code to a broader audience for feedback and comment. It will be crucial to seek input from many stakeholders and ensure a representative process of different interests having a voice in Code development.

Lessons learned

As part of our report, we would like to reflect on some lessons we have learned as a group in the last four months that have informed our decision-making process, and that should be useful going forward.

- An inclusive process is critical. We have recognized the need to slow down our design process, to ensure that as many stakeholder voices as possible have an opportunity to be heard. Because of the complexity and wide-ranging nature of a Code, there are many affected parties and perspectives with an important bearing on how the Code is designed and implemented. This includes not just the present design phase, but also consulting widely on a draft Code, when it is available.
- The Canadian Code must bring together all key stakeholders in the grocery value chain. The details and the extent to which different stakeholders are affected by the provisions of a Code are still under review, but will be part and parcel of the discussions with industry working group representatives.
- Paper is different than practice. Already we know that things may look good on paper but may be very different on the ground. Making sure that Canada's Code reflects the on-the-ground reality will be critical for designing a system that works in the real world.
- Due to the complexity of jurisdictions and contractual law, discussion on scope (what entities and products are affected) should not slow down the timelines or goals of supporting the food industry in the development of a Code.
- Limits of a Code. Any Code such as this sits in the context of overall competition law. We have found in our discussions several areas where competition law experts have advised us that a provision might seem reasonable on its face, but could have unintended anti-competitive implications. Therefore, we have learned that a Code is not the right tool to achieve larger goals like leveling the economic playing field between different parties, or combating inflation. A Code can surely have an impact, but it can't do everything.