



**Report of the Article 1716 Panel Concerning the Dispute Between
Mr. X, a Private Person from Quebec, and Ontario Regarding
a Crane Operator Certification**

23 February 2012

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ABBREVIATIONS

AIT Agreement on Internal Trade

TQAA Trades Qualification and Apprenticeship Act, R.S.O. 1990, c. T.17

1. INTRODUCTION

The following is the report of a dispute resolution panel (the “Panel”) established under the *Agreement on Internal Trade* (the “Agreement” or “AIT”)¹ to address a dispute submitted by a private person from Québec (the “Complainant”) pursuant to Article 1714 (1) (Request for a Panel) against Ontario (the “Respondent”) concerning the latter’s crane operator certification requirements.

The AIT was entered into in 1995 by the Government of Canada, ten (10) provincial governments and two (2) territorial governments to “*reduce and eliminate to the extent possible barriers to the free movement of persons, goods, services and investments within Canada and to establish an open, efficient and stable domestic market.*” All government parties to the AIT recognize and agree that enhancing trade and mobility within Canada would contribute to the attainment of this goal.

On July 18, 2008, the Premiers, through the Council of the Federation, agreed to amend the provisions on labour mobility in Canada to “*provide that any worker certified for an occupation by a regulatory authority of one province or territory, shall be recognized as qualified to practise that occupation by other provinces and territories*”. The result was a revised Chapter Seven, which entered into force on August 11, 2009.

Chapter Seven provides for persons certified in an occupation in one province or territory to be certified in that occupation other provinces and territories.

In November 2010, a private person requested Québec to initiate on his behalf consultations with the province of Ontario regarding a crane operator’s certification. Québec responded that it would not do so.

The Complainant therefore sought to initiate the process himself and in February 2011, a screener, having reviewed his grievance, gave him permission to commence his own proceedings against Ontario and he did so under Chapter Seventeen of the AIT (Dispute Resolution Procedures). Written submissions were filed by both parties and, as recounted in more detail below, an oral hearing was scheduled to be held in Toronto, Ontario. The Panel thereafter deliberated and has produced this Report.

As provided under the Chapter, this Panel Report contains:

- (a) findings of fact;
- (b) a determination, with reasons, as to whether the measure in question is or would be inconsistent with this Agreement;
- (c) if an affirmative determination has been made under (b), a determination, with reasons, as to whether the measure has impaired or would impair internal trade and has caused or would cause injury; and

¹ The *Agreement on Internal Trade*; Entered into force July 1, 1995. Unless otherwise specified, “Article” and “Annex” refer to the articles and annexes of the *Agreement*. A consolidated version of the Agreement is available at www.ait-aci.ca.

(d) recommendations, if requested by a Disputing Party, to assist in resolving the dispute;

2. THE COMPLAINT PROCESS

As noted above, in a letter dated November 11, 2010, the Government of Québec indicated to the Complainant that it would not pursue a dispute on his behalf. On January 21, 2011, the Secretariat and the Province of Ontario were notified by the private person from Québec that he was initiating a dispute under Article 1711(1). On January 25, 2011, the Screener for Québec was engaged to review the request.

On February 15, 2011, the Screener issued his report finding that the private person could proceed with his dispute.

On March 17, 2011, the Complainant initiated dispute resolution proceedings with the Respondent in relation to Chapter 7, Labour Mobility. In accordance with Article 1713(1) of the AIT, the Complainant requested consultations with the Respondent.

The Consultation period between the Complainant and the Respondent expired with no resolution of the dispute. On September 13, 2011, therefore, the Complainant formally requested that a dispute resolution panel be established under Article 1714(1) of the AIT.

On January 9, 2012, the Panel met in Toronto, Ontario to hear oral presentations from the Complainant and Respondent. The hearing was open to the public.

3. THE COMPLAINT²

Construction trade workers in Québec must hold a competency certificate issued by the Commission de la construction du Québec, which is the regulatory authority for the construction trades. Individuals to whom a certificate may be issued by the Commission include crane operators, who are identified as anyone who:

- (a) Operates all types of cranes such as elevator cranes, tower cranes, suspended cranes, derrick cranes, self-propelled cranes on locomotives or truck-mounted on wheels or tracks, with hydraulic, electric, mechanical and electro mechanical attachments [the underlining is ours];
- (b) Operates travelling cranes, boring machines, piledrivers and cranes equipped with piledriving equipment used to drive cement, tubular or other piles or sheetpiles.

The Complainant's grievance can be stated simply: he holds a crane operator ("grutier") certificate issued by the provincial regulator for the crane operator trade in Québec. Although the Complainant is entitled to operate not only mobile, but tower cranes, in Québec (and the evidence shows, in other provinces), he is not entitled to operate tower cranes in Ontario. This, he complains, is contrary to Ontario's obligations under the AIT and reduces his economic and professional prospects. .

² The Complainant's complaint is more fully described in his written submission to the Panel: 1) Letter dated October 28, 2011 and 2) Letter dated December 21, 2010 with attachments

In his submissions the Complainant also raised, albeit indirectly, the issue of the apportionment of Operational Costs of the proceeding in a person to government dispute. The issue was raised by the Complainant as a “financial means” issue.

4. THE RESPONSE³

Ontario contests the claims made by the Complainant.

Ontario contends that there is no occupation of “Crane Operator” in Ontario which is equivalent to that occupation in Quebec.

Ontario submits that in Ontario, no one may practice a trade subject to the *Trades Qualification and Apprenticeship Act* (the “TQAA”)⁴ unless that person holds a certificate of qualification issued by the regulatory authority under the TQAA. The Lieutenant Governor in Council may designate any trade as a certified trade for the purposes of the TQAA and may provide for separate branches or classifications within the trade.

Ontario submits that the trade of “hoisting engineer” is designated as a certified trade for the purposes of the TQAA and that the specific requirements for hoisting engineers are set out in Hoisting Engineer Regulation⁵ which establishes three branches of hoisting engineers:

1. **Branch 1, mobile crane operators** who maintain and operate mobile cranes that are capable of raising, lowering, or moving any material that weighs more than 16,000 pounds.
2. **Branch 2, mobile crane operators** who maintain and operate mobile cranes that are capable of raising, lowering, or moving only material that weighs more than 16,000 pounds but no more than 30,000 pounds.
3. **Branch 3, tower crane operators** who maintain and operate tower cranes

Essentially, Ontario submits that the occupation of “crane operator” does not exist in Ontario and that no equivalent certificate for such an occupation is issued in Ontario. There is no match between the Québec occupation of crane operator (“grutier”) and the Ontario occupation of tower crane operator

Ontario alleges that in Ontario there is no equivalent or corresponding occupation of “crane operator” in Ontario for which the Complainant can be issued a certificate. Ontario’s contention is that there is no provision in Chapter Seven of the AIT which requires Ontario to issue a certificate for an occupation in Québec where there is no matching or equivalent occupation which is certified in Ontario.

³ Ontario’s response is more fully described in its written submission to the Panel “Tower Crane Operator Person to Province Dispute – Submissions of the Province of Ontario”, December 12, 2011

⁴ *Trades Qualification and Apprenticeship Act*, R.S.O. 1990, c. T.17

⁵ Hoisting Engineer Regulation made under the *Trades Qualification and Apprenticeship Act*; R.R.O. 1990, Regulation 1060

Ontario's response on the issue of the apportionment of Operational Costs is that the Panel has no jurisdiction to apportion Operational Costs in the context of a person to government dispute.

5. PANEL FINDINGS

5.1 The Occupation(s)

As previously mentioned, the Complainant argues that all cranes, whether they be mobile or tower cranes, are equipment used for hoisting objects of considerable weight and that there are safety concerns associated with the operation of all cranes. The Complainant also contends that there is very little distinction in the training of crane operators from one province to another. The Complainant produced documentation showing that he is permitted to operate tower cranes in Québec⁶, Prince Edward Island⁷ and Alberta⁸ and he takes the position that that being the case, he should be allowed to operate a tower crane in Ontario.

Ontario does not dispute and it acknowledges that the certificate issued to the Complainant in Québec qualifies him to operate tower cranes in Québec. Ontario also did not take issue with the fact that other provinces have seen fit to permit the Complainant to operate tower cranes in their jurisdictions.

Ontario's position is not that a mobile crane operator has less responsibility than that of a tower crane operator nor that the training requirement for mobile crane operators is less than that of tower crane operators. Its submission rather is that under the Ontario regulatory regime, mobile and tower crane operators engage in different and distinct occupations. There is, in Ontario's view, no match between the two occupations even though other provinces, such as Québec, do regulate them as a single occupation.

Article 711 of the AIT sets out the definition of "occupation" as follows:

...a set of jobs which, with some variation, are similar in their main tasks or duties or in the type of work performed

Article 706(1) of the AIT, relating to the certification of workers, provides, in part, as follows:

...any worker certified for an occupation by a regulatory authority of a Party shall, upon application, be certified for that occupation by each other Party which regulates that occupation without any requirement for any material additional training, experience, examinations or assessments as part of that certification procedure. [the underlining is ours]

Ontario contends that because Ontario issues three distinct certificates for hoisting engineer occupations, Ontario has no single occupation that includes the "set of jobs" comprising the Crane Operator occupation in Québec and that the provisions of Article 706 (1) do not apply in these circumstances as the obligation under Article 706 (1) is that where an individual possesses a certificate from a Province to exercise an occupation, any other province must

⁶ Letter from the Commission de la construction du Québec to the Complainant, dated January 31, 2011

⁷ Letter from Prince Edward Island Innovation and Advanced Learning to the Complainant, dated February 17, 2011;

⁸ Letter from the Government of Alberta, Advanced Education and Technology to the Complainant, dated March 7, 2011

issue a certificate to the individual where that province's regulatory authority has an equivalent certificate for that same occupation.

In support of its position, Ontario argues that the regulatory distinctions that it has drawn for each of the three hoisting engineer designations speak to the fact that there is no match.

Mr. David Healey, the director of training and operations for the Operating Engineers Training Institute of Ontario was tendered to the Panel as an expert witness. He spoke in detail as to the 3 different hoisting engineer occupations for which one can be certified in Ontario.

Mr. Healey addressed the different training requirements associated with the issuance of each of the hoisting engineer certificates in Ontario and the functional differences between a mobile crane operator and tower crane operator.

He explained that none of the 3 Hoisting Engineer occupations in Ontario is seen as functionally equivalent to each other, in that certification in one occupation is not deemed to be sufficient to practice in another without completing additional apprentice training periods. Mr. Healey spoke about the operational characteristics specific to each of tower crane and mobile crane operators and distinctions in inspection, operation and maintenance between a mobile crane and a tower crane.

Ontario contended further at the hearing that the training and apprenticeship requirement in Québec are focused heavily if not exclusively on the operation, maintenance and functions of mobile cranes, to the exclusion of any specific requirements or training or experience in the operation of tower cranes.⁹ Ontario asserted that in Québec, while there is a supplementary course for tower crane operators this course is not specifically mentioned in the Québec training program for the crane operator certificate. Ontario recognizes that this course is not required for the issuance of Québec certificate for the "grutier" occupation which includes the operation of tower cranes. The Complainant's testimony is that there is no such course¹⁰.

While Mr. Healey spoke at length about the assembly and inspection of tower cranes and the distinctions between mobile cranes and tower cranes in that regard, when questioned by a member of the Panel he acknowledged that the assembly of the crane was done by the ironworker trade or the operating engineers trade rather than by the crane operator and that the burden of inspections, pre and post erection, was mostly incumbent upon the structural engineer rather than the crane operator.¹¹

Mr. Healey was asked by Ontario counsel whether a person who has received training and experience only in the operation of mobile cranes would have the knowledge and the ability to safely and effectively operate a tower crane. Mr. Healey responded that without training and exposure to the operation of a tower crane, the answer would be in the negative.

The Panel agrees with Mr. Healey that a person with no training or exposure to the operation of a tower crane should not be operating this equipment. There should be no doubt about the Panel's view in this regard. However, we are not here considering the position of someone who is not trained or experienced in operating tower cranes.

⁹ Transcript of the Panel hearing in Toronto on January 9, 2012 (pages 21 and 22).

¹⁰ Transcript of the Panel hearing in Toronto on January 9, 2012 (page 71).

¹¹ Transcript of the Panel hearing in Toronto on January 9, 2012 (pages 34 and 35).

It is a fact, as Ontario acknowledged, that although Ontario has seen fit to divide crane operations into three separate occupations, other provinces have not done so. A worker in Québec to whom a crane operator certificate has been issued, such as the Complainant, is permitted to operate a tower crane in Québec and has done so. It is also a fact that on the evidence before the Panel, a crane operator certificate issued to a worker in Québec would also qualify its holder to operate tower cranes in Prince Edward Island and in Alberta¹². Thus, from the perspective of other provincial regulators, tower crane operators are deemed to be involved in the same occupation as a mobile crane operator.

Ontario argues that a further distinction between the mobile crane operator and tower crane operator designation is found by considering the treatment of the Ontario Branch 3 Hoisting Engineer Tower Crane operator certificate under the Interprovincial Standards Red Seal Program and the bilateral agreements between Ontario and Québec.

The Red Seal program is an initiative among the provinces which is spearheaded by the federal government, Human Resources and Skills Development Canada. It seeks to create common standards for occupations across the provinces such that, having obtained a Red Seal certificate, an operator or tradesperson is able to move from one jurisdiction to the other without having to undergo retesting. In practical terms, this means that an individual with a Red Seal certificate in one province will be permitted to exercise that occupation in another province without being submitted to further testing. The only requirement for such an individual would be to go through the process of obtaining the license from the other jurisdiction upon presentation of his/her Red Seal certificate.

There is a Red Seal certificate for the occupation of mobile crane operator, which is accepted across the Provinces (everywhere save and except Nunavut). While an initiative is under way to develop a Red Seal occupational analysis as to what skills and abilities are required for the tower crane operator occupation, there is currently no Red Seal certificate for this occupation. Ontario argues that this is further evidence that the occupations of mobile crane operator and tower crane operator are distinct and unique occupations.

While there may not be a Red Seal certificate for the occupation of tower crane operator, one must remember that the purpose of the Red Seal program is to make certification “automatic”, without the need for retesting or further proof of skills or competencies. In the Panel’s view, concluding that the absence of a Red Seal certificate for the tower crane operation negates any obligation of Ontario pursuant to Article 706(1) would circumvent the very purpose of Chapter Seven. The absence of a Red Seal certificate for the tower crane cannot preclude the Complainant from challenging a regulatory distinction which acts as a barrier to the conduct of an occupation for which he has received the appropriate training in the view of his province of origin.

The whole purpose of Article 706(1) of the AIT, in the Panel’s view, is to reduce such barriers to labour mobility. Ontario is free to divide the occupation into three separate occupations for the purposes of qualifying persons in Ontario, but under its AIT obligations, it cannot use such distinctions to prevent a person duly qualified to practice all three of the sub-divided occupations in another province from pursuing his occupation in Ontario. Were this not to be the case, the AIT would simply employ the Red Seal certification process to address the labour certification issues, without including Article 706, which may be the subject of a Person to Party challenge.

¹² Ibid, notes 7 and 8

Lastly, Ontario contends that the lack of equivalency between the Québec Crane Operator certificate and the Ontario occupations can be found in the bilateral Ontario and Québec labour mobility related agreements, more particularly the following: *Agreement on Labour Mobility and Recognition of Qualifications, Skills and Work Experience in the Construction Industry (2006)* (the "Construction Industry Agreement") and the *Trade and Cooperation Agreement between Ontario and Québec* (the "Trade and Cooperation Agreement"), concluded in September 2009.

The purpose of the Construction Industry Agreement was to facilitate access to the construction labour markets in both provinces and provided that a worker from Ontario or Québec holding a certificate in one of a list of trades specified in Appendix 1 of the agreement was not required to obtain further certification in the other jurisdiction in order to work a trade. Appendix 1 to this Agreement lists Ontario's mobile crane operator (Red Seal) certificate as matching to Québec's "Opérateur de grue automotrice- sceau rouge" certificate but lists no identified match for Ontario's tower crane operator certificate.

The Trade and Cooperation Agreement was signed by Québec and Ontario in September 2009. Annex 6.2 of this agreement specifically identifies the professions and trades for which each province agreed it would ensure a worker certified in the other province would be certified in the other province with no requirement for additional training. Ontario points out that the only crane operator/hoisting engineer trades or occupation which the parties agreed matched sufficiently for the purpose of mutual certification were the Québec mobile crane operator (Red Seal) and Ontario's mobile crane operator, Branch 1 (Red Seal).

Ontario argues that the treatment afforded to the trades of mobile crane operator and tower crane operator in the Construction Industry Agreement and the Trade and Cooperation Agreement, which was contemporaneous with the amendments to Chapter Seven of the AIT, constitutes an acknowledgement among Québec and Ontario that the Québec crane operator certificate did not match the Ontario crane operator certificates.

While we are mindful of Ontario's arguments relating to the matching of the tower crane and mobile crane occupations, or lack thereof, under both bilateral agreements to which Ontario referred, we cannot conclude that this, of itself, stands for the proposition that there is an acknowledgement amongst Ontario and Québec that there is no match of the occupations. Ms. Linda Jones, the manager of standards and assessment with the Ministry of Training, Colleges and Universities provided information to the Panel during the hearing of this matter. This information was provided extemporaneously. Ms. Jones advised that she was in her current position at the time of the conclusion of the Trade and Cooperation Agreement in 2009 and oversaw the actual managing process that took place to review Québec's program against Ontario's program to determine if there was a match. Her position was that Ontario formed the determination that there was not a match, this position was shared with Québec and there was no objection from Québec on this point¹³.

Ms. Jones did not purport to speak for Québec on this matter and no representative of Québec was present at the hearing so as to be able to convey Québec's position to the Panel. In such circumstances, while the Panel has no reason to doubt Ms. Jones' view of what has occurred between the two provinces, insofar as the practice of regulating crane operators in Québec is concerned, it is at variance with Ontario's position and the Panel is hesitant to base its decision on Québec's apparent acquiescence in the bilateral discussions when it, at the same time, permits its own operators to perform both mobile and tower crane operations. It is difficult to see

¹³ Transcript of the Panel hearing in Toronto on January 9, 2012 (page 61).

how, in Québec's view, it is permissible for its own operators to do so yet to at the same time agree that its training certification for tower operators does not match Ontario's Hoisting Engineer, Branch 3, tower crane operator occupation.

It warrants noting that the AIT's drafters were careful to retain each party's right to set standards at a level that might otherwise be in breach of Article 706(1), so long as they could be justified under Chapter Seven's Legitimate Objectives article.

Thus, Article 708 provides for exceptions to the obligation set out in Article 706 (1) where a legitimate objective is sought to be achieved. Article 708 reads as follows:

Article 708 Legitimate Objectives

1. *Where it is established that a measure falling within the scope and coverage of this Chapter is inconsistent with Article 401, Article 402, Article 403 or Article 705, or paragraphs 1, 2 or 5 of Article 706, that measure is still permissible under this Chapter where it can be demonstrated that:*
 - (a) *The purpose of the measure is to achieve a legitimate objective;*
 - (b) *The measure is not more restrictive to labour mobility than necessary to achieve that legitimate objective; and*
 - (c) *The measure does not create a disguised restriction to labour mobility*

2. *For greater certainty, for the purposes of the application of paragraph 1(b) of Article 708 to paragraph 1, 2 or 5 of Article 706, a mere difference between the certification requirements of a Party related to academic credentials, education, training, experience, examination or assessment methods and those of any other Party is not, by itself, sufficient to justify the imposition of additional education, training, experience, examination or assessment requirements as necessary to achieve a legitimate objective. In the case of a difference related to academic credentials, education, training or experience, the Party seeking to impose an additional requirement must be able to demonstrate that any such difference results in an actual material deficiency in skill, area of knowledge or ability. As an example, the imposition of a requirement for additional education, training or experience may be justified under paragraph 1(b) where a Party can demonstrate that:*
 - (a) *There is a material difference between the scope of practice of the occupation for which the worker is seeking to be certified in its territory and the scope of practice of the occupation for which the worker has been certified by the regulatory authority of another Party; and*
 - (b) *As a result of that difference, the worker lacks a critical skill, area of knowledge or ability required to perform the scope of practice of the occupation for which the worker seeks to be certified.*

.....

In light of Mr. Healey's presentation relating to the functional and operational distinctions between mobile cranes and tower cranes and his assertion that an individual who has received training and experience only in the operation of a mobile crane would not have the knowledge and ability to safely and effectively operate a tower crane, Ontario's assertions appear to be raising an issue which is addressed in the legitimate objectives provision in the AIT.

However, Ontario specifically did not invoke the legitimate objectives exception set out in Article 708. Not only did it not invoke Article 708, in its written submission Ontario argued that the

legitimate objectives provisions of the AIT were not relevant to this dispute.¹⁴ This position was confirmed by counsel during the hearing¹⁵. Accordingly, the Panel does not consider whether Ontario's creation of three distinct crane operator occupations could be justified under Article 708.

Ontario recognizes that the purpose of the AIT is to increase labour mobility among provinces, to allow workers who are certified in an occupation in one province to practice that occupation in another province, despite the fact that there may be differences in training requirements for certification requirements among the provinces, but it argues that that is not what is at issue here. The Panel does not agree.

Overall, the evidence received by this Panel is that while mobile crane operators and tower crane operators may operate under different circumstances, not all provincial regulators take that position; rather, the basic functions are seen to be the same. The Panel took careful note of Mr. Healey's testimony, but its view was ultimately influenced by the position taken by the Complainant's province of origin and the acceptance of that view by other provinces.

In Chapter One of the AIT and more particularly Article 100 thereof, the objectives of the Parties to the AIT are set out in the following terms:

Article 100: Objective

It is the objective of the Parties to reduce and eliminate, to the extent possible, barriers to the free movement of persons, goods, services and investments within Canada and to establish an open, efficient and stable domestic market. All Parties recognize and agree that enhancing trade and mobility within Canada would contribute to the attainment of this goal.

In Article 701 of Chapter Seven of the AIT, which deals with Labour Mobility, the general purpose of Chapter Seven is set out in the following terms:

Article 701: Purpose

The purpose of this Chapter is to eliminate or reduce measures adopted or maintained by the Parties that restrict or impair labour mobility in Canada and, in particular, to enable any worker certified for an occupation by a regulatory authority of one Party to be recognized as qualified for that occupation by all other Parties.

We are of the view that the substantive obligation set out in Article 706 (1) must be read in light of the general purpose of Chapter Seven, as set out in Article 701, and with the overall mutually agreed objectives of the Parties who are signatories to the AIT. Reading the substantive obligation set out in Article 706(1) in a manner which is consistent with the purpose of Chapter Seven, which is to increase labour mobility, we must conclude that, pursuant to Article 706(1) Ontario is obliged to issue a certificate confirming that the Complainant is certified in Ontario as a Branch 3 Hoisting Engineer (Tower Crane Operator).

5.2 Operational Costs

As previously mentioned, the issue of apportionment of Operational Costs was raised, indirectly, by the Complainant as a financial means issue. The Complainant argued that he should not be subject to payment of any Operational Costs, regardless of the outcome of the proceeding. In

¹⁴ Respondent's Submission, page 7, paragraph 29

¹⁵ Transcript of the Panel hearing in Toronto on January 9, 2012 (page 57).

its submissions, Ontario has taken the position that, under the provisions of Chapter Seventeen of the AIT the Panel has no jurisdiction to apportion Operational Costs in a Person to Government dispute.

The Dispute Resolution Procedures governing Government to Government and Person to Government Disputes are found in Chapter Seventeen of the AIT. Part A of Chapter Seventeen, comprising Articles 1702 to 1709, governs the Government to Government Disputes, whereas Person to Government Disputes are governed by Part B of Chapter Seventeen, comprising Articles 1710 to 1718.

1706(3) sets out the matters on which a Panel may issue a report in a government to government dispute:

Article 1706: Report of Panel

....

3. *The Report shall contain:*

- (a) Findings of fact;*
- (b) a determination, with reasons, as to whether the measure in question is or would be inconsistent with this Agreement;*
- (c) if an affirmative determination has been made under (b), a determination, with reasons, as to whether the measure has impaired or would impair internal trade and has caused or would cause injury;*
- (d) recommendations, if requested by a Disputing Party, to assist in resolving the dispute;*
- (e) where applicable, and at the discretion of the Panel, a stipulation of the period within which the Complaint Recipient must comply with this Agreement, and*
- (f) a determination as to apportionment of Operational Costs as provided in Annex 1705(1) (Rules of Procedure)*

In contrast, Article 1716(2) of the AIT sets out the matters on which a Panel may issue a report in a Person to Government dispute:

Article 1716: Report of Panel

....

2. *The Report shall contain:*

- (a) findings of fact;*
- (b) a determination, with reasons, as to whether the actual measure in question is inconsistent with this Agreement;*
- (c) a determination, with reasons, as to whether the actual measure has impaired internal trade and has caused injury; and*
- (d) recommendations, if requested by either the person or the Party complained against, to assist in resolving the dispute;*

Ontario takes the position that in a Person to Government dispute, Article 1716(2) does not authorize the Panel to make a determination as to apportionment of Operational Costs. Ontario argues that this is a clear indication that the drafters of the AIT did not intend Operational Costs to be apportioned to either of the disputants in a Person to Government dispute

A Panel established pursuant to Chapter Seventeen must not only comply with the provisions therein but also with the rules set out in Annex 1705(1) to Chapter Seventeen entitled "*Panel, Compliance Panel and Appellate Panel Rules of Procedure*". Annex 1705(1) consists of rules intended to give effect to the provisions of Chapter Seventeen.

Operational costs are dealt with in rules 55 to 57 of Annex 1705(1):

Payment of Presiding Body Operational Costs

54 For the purposes of Rules 55 to 57:

Operational Costs means all per diem fees and other disbursements payable to Presiding Body members for the performance of their duties as Presiding Body members, fees and disbursements of experts retained by the Presiding Body pursuant to Article 1705 and costs of third Party facilities and equipment used for meetings or hearings involving the Presiding Body.

55. Unless otherwise specified, the panel may apportion Operational Costs to the participating Parties at its discretion. In exercising its discretion, the Presiding Body may consider:

- (a) Whether the Disputants complied with Article 1700;
- (b) The outcome of the Proceedings; and
- (c) Other relevant considerations that may justify assessing a major part of the responsibility for Operational Costs to one of the Disputants.

....

57. Nothing in these rules shall be construed as preventing a Party in its discretion from assuming full or partial liability for the share of Operational Costs for which a person of that Party is liable under Rule 55.

In the determination of the issue raised by Ontario, one must be mindful of the defining provisions in Chapter Two of the AIT which read in part as follows:

Article 200: Definitions of General Application

In this Agreement, except as otherwise provided:

...

Party means a party to this Agreement;

....

person means a natural person or an enterprise;

person of a Party means:

- (a) A natural person resident in the territory of a Party; or
- (b) An enterprise of a Party

While rule 57 clearly contemplates that Operational Costs could be assessed against an individual given the fact that it recognizes that a Party may assume full or partial liability for the share of Operational Costs for which a person of that Party is liable under Rule 55, the introductory paragraph in Annex 1705 (1) provides the following:.

Annex 1705(1) Panel, Compliance Panel and Appellate Panel Rules of Procedure

These rules are intended to give effect to the provisions of Chapter Seventeen with respect to the Panel, Compliance Panel and Appellate Panel Proceedings conducted pursuant to that Chapter. These rules should not be construed to extend or limit the jurisdiction of Presiding Bodies

...

Consequently, the jurisdiction of the Panel to apportion Operational Costs in a person to government dispute must be found within the provisions of Chapter Seventeen and not within Annex 1705(1). Absent any such jurisdiction in Chapter Seventeen, Annex 1705(1) cannot confer upon the Panel a jurisdiction which is absent in Chapter Seventeen.

In the determination of this issue, it is equally important to note that Chapter Seventeen was amended by the 10th protocol of amendment, on October 7, 2009, a month or so subsequent to the amendments to Chapter Seven of the AIT.

Prior to the October 2009 amendments, the jurisdiction of a Panel in Government to Government disputes was set out in Article 1706 in the following terms:

1706 Report of Panel

...

2. *The report shall contain:*

- (a) findings of fact;*
- (b) a determination, with reasons, as to whether the measure in question is or would be inconsistent with this Agreement;*
- (c) a determination, with reasons, as to whether the measure has impaired or would impair internal trade and has caused or would cause injury; and*
- (d) recommendations, if requested, by a disputing Party to assist in resolving the dispute.*

and the jurisdiction of the Panel in person to government disputes was set out in Article 1716, the terms of which were identical to that of Article 1706.

In addition, prior to the October 2009 amendments, Annex 1705.1 entitled "*Panel Rules of Procedure*", and more particularly Rule 50 thereof, provided that Operational Costs be apportioned equally unless apportionment was justified taking into account certain considerations:

Payment of panel operational costs

.....

50. *Operational costs shall be divided equally between disputants. However the panel may apportion operational costs otherwise where justified by the following considerations:*

- (a) whether the disputants complied with Article 1700;*
- (b) the outcome of the panel proceedings; and*
- (c) other relevant considerations that may justify assessing a major part of the responsibility for costs to one of the disputants*

In comparing the provisions of Article 1706 pre and post the October 2009 amendments, we note that paragraphs a), b), c), and d) are identical and the following paragraphs are added to the current version of Article 1706, namely:

- e) where applicable, and at the discretion of the Panel, a stipulation of the period within which the Complaint Recipient must comply with this Agreement*

and perhaps most significantly:

- f) a determination as to apportionment of Operational Costs as provided in Annex 1705(1)*

The above provisions are not found in Article 1716 which sets out the Panel's jurisdiction in Person to Government disputes. Indeed, the provisions of Article 1716 subsequent to the October 2009 amendments are identical to the provisions set out in that Article prior to such amendments. While there is a clear acknowledgement of a Panel's jurisdiction to apportion Operational Costs in a Government to Government dispute there is no such acknowledgement in the case of a Person to Government dispute.

Despite the fact that Rule 57 set out in Annex 1705(1) clearly contemplates that a "person of a Party" could be liable for Operational Costs, absent clear provisions in Chapter Seventeen conferring upon a Panel the jurisdiction to apportion Operational Costs in a person to government dispute, this Panel must conclude that it has no jurisdiction to apportion Operational Costs in such circumstances.

6. DETERMINATION OF IMPAIRMENT OF TRADE AND INJURY

Article 1716 requires that the Panel's report contain a determination, with reasons as to whether the measures under review have impaired internal trade and caused injury.

The essence of the Complainant's complaint is that Ontario's measures in the issuance of certificates relating to the occupation of Hoisting Engineer, Branch 3, Tower Crane Operator have restricted internal trade by restricting the mobility of qualified tower crane operators in Québec through a licensing regime which prevents such operators from offering their services to clients in Ontario. As these restrictions deny access to a major Canadian construction market, the Complainant alleges that he has suffered injury.

As noted earlier in this report, the Panel has found that Ontario's measures related to the issuance of certificates for the occupations of Hoisting Engineer, Branch 3 (Tower Crane Operator), as applied to the Complainant who is recognized in Québec as a crane operator ("Grutier") and duly qualified to operate tower cranes, are inconsistent with the Agreement. To the extent that they do not recognize the competencies of the Complainant which have been recognized as qualifying him to operate tower cranes in other jurisdictions, the measures are an impairment of internal trade.

As to the issue of injury, the Panel is mindful of the determination of the Farmers Dairy/New Brunswick Panel, the relevant part of which reads as follows on page 28 of its report:

"With respect to injury Complainant alleges that the denial of a fluid milk distribution license in New Brunswick has caused significant injury to Complainant's prospects for growth and eroded its capability to respond to competition in the future. Complainant admits that it is difficult to quantify the extent of injury and submitted no documentation in that regard. The Panel notes that a complainant is not required under the Agreement to prove a demonstrable dollar amount to establish injury, nor is a Panel required to rule on the extent of injury. It is the view of the Panel that the denial of the opportunity to be considered for a fluid milk distribution license in a manner that is fair and consistent with the Agreement is injury in itself, as is the denial of the opportunity to participate on an equal footing in the New Brunswick market."¹⁶

¹⁶ Report of the Article 1716 Panel Concerning the Dispute Between Farmers Co-operative Dairy Limited of Nova Scotia and New Brunswick Regarding New Brunswick's Fluid Milk Distribution Licensing Measures, September 13, 2002; see also Report of the Article 1716 Panel Concerning the Dispute Between the Certified General Accountants Association of New Brunswick and Québec Regarding Québec's Measures Governing the Practice of Public Accounting, August 19, 2005

We agree with the statements of the Panel in that case and the Panel adopts the same reasoning in the present case. In our view, the Complainant has demonstrated that to the extent that he is qualified to operate tower cranes in Québec, he has been injured by Ontario's measures relating to the issuance of the certificate authorizing individuals to operate tower cranes in Ontario.

6. SUMMARY OF PANEL FINDINGS

The summary of Panel findings below is provided for convenience only. The actual findings in the Report above and the reasoning and context within which they are made should be considered authoritative. Accordingly the Panel makes the following findings:

1. The Québec occupation of crane operator ("Grutier") matches the Ontario occupation of Hoisting Engineer, Branch 3 (Tower Crane Operator).
2. Ontario's measures that restrict access to the practice of the occupation of Hoisting Engineer, Branch 3 (Tower Crane Operator) by the Complainant, a person recognized in Québec (and other jurisdictions) as qualified to operate tower cranes, have impaired internal trade and have caused injury to the Complainant.
3. The Panel has no jurisdiction to apportion Operational Costs in person to government disputes.

7. AWARD OF COSTS

Article 1716 (3) provides that the Panel "*may award Tariff Costs to a person in accordance with Annex 1706.1(4)(b) and 1716(3).*"

Annex 1706.1(4)(b) and 1716(3) provides that Tariff Costs may be awarded at the discretion of the Panel to a successful person in a panel Proceeding.¹⁷ While the Complainant has not submitted a statement of costs, this is not a bar to an award of Tariff Costs in a panel Proceeding.¹⁸

Having considered the provisions of Rules 2, 4 and 6 of Annex 1706.1(4)(b) and 1716(3), the Panel is of the view that an award of costs to the Complainant is justified in this case.

The Panel awards costs to the Complainant in the amount of \$1,500.00 to be paid by the Respondent.



Denise Ann Leblanc (chair) (March 8, 2012)

¹⁷ Rules 1 and 2, Annex 1706.1(4)(b) and 1716(3)

¹⁸ Rule 3 Annex 1706.1(4) (b) and 1716(3)

APPENDIX A:

Crane Operator Panel Hearing – List of Participants

Panel

Denise Ann LeBlanc (chair)

Phyllis Smith

J. Christopher Thomas

A Private Person from Quebec

Ontario

Spokesperson

Darrell Kloeze, Counsel, Crown Law Office – Civil, Ministry of the Attorney General

Presenter

Dave Healey, Operating Engineers Training Institute of Ontario

Other Participants

Jeremy Fortier, Senior Policy Advisor, Strategic Policy & Initiatives Branch, Ministry of Training, Colleges & Universities

Richard Caine, Manager, Trade & International Policy, Ministry of Economic Development & Innovation

Michelle Pottruff, Counsel, Legal Services Branch; Ministry of Education and Ministry of Training, Colleges and Universities

Elisabeth Scarff, Legal Counsel, Ministry of Education and Ministry of Training, Colleges & Universities

Linda Jones, Manager of Standards and Assessment, Ministry of Training, Colleges & Universities

David Pal, Policy Advisor, Ministry of Training, Colleges & Universities

Erin McLaughlin, Policy Advisor, Ministry of Economic Development & Innovation

Jenarra DeSouza, Policy Advisor, Ministry of Economic Development & Innovation

Michael Solursh, Legal Counsel, Ministry of Economic Development & Innovation

Internal Trade Secretariat

Anna Maria Magnifico, Executive Director

Patrick Caron, Internal Trade Officer