

## Agreement on Internal Trade

Appeal from the Report of Article 1703 Panel Regarding the  
Dispute between Saskatchewan and Quebec Concerning Dairy Blends,  
Dairy Analogues and Dairy Alternatives Dated March 31, 2014

Submission of the Government of Alberta (Intervenor)

Dated August 18, 2014

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## **I. Introduction**

1. The Government of Alberta ("Alberta") is an Intervenor in the dispute under the Agreement on Internal Trade ("AIT") between the Government of Saskatchewan ("Saskatchewan") and the Government of Quebec ("Quebec") regarding certain Quebec measures pertaining to dairy alternatives. The Report of the Article 1703 Panel Regarding the Dispute between Saskatchewan and Quebec Concerning Dairy Blends, Dairy Analogues and Dairy Alternatives ("Report") was issued on March 31, 2014 by the panel ("Panel") established under Article 1703. Quebec has appealed the Report to this appellate panel ("Appellate Panel") pursuant to Article 1706.1. Alberta makes this Submission pursuant to Rule 44.2 of Annex 1705(1) of the AIT.
2. Quebec appeals many of the conclusions reached by the Panel in its Report, on the basis that the conclusions are "errors of law". This Submission specifically addresses:
  - (a) the standard of review applicable to this Appellate Panel in reviewing the Report;
  - (b) the merits of certain of Quebec's challenges to the Report.
3. Alberta submits that the Panel made no error of law, did not fail to observe any principle of natural justice and did not exceed or refuse to exercise jurisdiction. Alberta adopts the submissions of Saskatchewan and the other Intervenor and Alberta requests that this Appellate Panel confirm the Report of the Panel.

## **II. Standard of Review**

4. This is the first time that a dispute under the AIT has been appealed to an appellate panel. Thus, this is the first opportunity to consider the standard of review applicable to an appellate panel under the AIT. Article 1706.1(1) of the AIT establishes the scope of an appeal – the three grounds on which a panel's decision can be appealed are (a) error of law, (b) failure to observe a principle of natural justice, and (c) exceeding or refusing to exercise jurisdiction. The threshold question is what is the standard of review that this Appellate Panel should apply in reviewing the Report? Or, to express it another way, what level of deference should this Appellate Panel show to the analysis undertaken and conclusions reached by the Panel?
5. The AIT is an agreement among the federal, provincial and territorial governments and the decision-making powers of the Panel and the Appellate Panel are contractual, not statutorily delegated. The AIT, though, does not specify a standard of review. Alberta submits that, in the absence of a standard of review being specified in the AIT, it is a reasonable approach to consider the AIT as being analogous to legislation and to look to administrative law for the standard of review. This is supported by the provisions of the AIT. First, the grounds of appeal

expressed in Article 1706.1(1) are principles of administrative law. Further, it is a requirement under Annex 1704(2), Rule 9 that members of an appellate panel have expertise in administrative law. This is evidence that the Parties to the AIT intended that administrative law principles apply to the appeal process.

6. The case of ***Newton v Criminal Trial Lawyers Association***, 2010 ABCA 399 at paras 29-32 [***Newton***] examines the standard of review applicable to an appellate administrative tribunal. The Court concludes that it is required to consider many of the same factors as are discussed in the seminal case on administrative standard of review, ***Dunsmuir v New Brunswick***, 2008 SCC 9 [***Dunsmuir***]. ***Dunsmuir*** establishes that there are only two standards of review for substantive errors of law or facts: reasonableness and correctness. The analysis to select the appropriate standard of review is based on applying and balancing four factors: (1) the presence or absence of a privative clause or right of appeal; (2) the purpose of the tribunal as determined by the interpretation of the enabling legislation; (3) the nature of the question at issue, and; (4) the expertise of the tribunal.
  
7. ***Dunsmuir*** emphasizes that where a tribunal is required to have specific expertise and the nature of the issue in front of the tribunal is the interpretation of its own statute and within its expertise, the decision of the panel on a substantive matter should attract deferential review. In such a case, the standard of review is "reasonableness". The reasonableness standard of review is premised on the approach that questions before a tribunal may not have one, specific answer but may give rise to a number of possible, reasonable conclusions.
 

"A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law."<sup>1</sup>
  
8. ***Dunsmuir*** provides four exceptions to when this strong presumption of the "reasonableness" standard would not apply and a "correctness" standard would be appropriate: (1) constitutional issues; (2) the narrow category of "true" jurisdictional issues; (3) questions of law of central importance or general interest to the legal system, and; (4) questions regarding the jurisdictional lines between two or more competing specialized tribunals.
  
9. The strong presumption that the standard of review of reasonableness applies to questions of law arising from the tribunal's home statute or within its expertise is followed in ***Smith v Alliance***

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<sup>1</sup> ***Dunsmuir*** at para 47.

*Pipeline Ltd.*, 2011 SCC 7 at paras 29-37 [*Smith*]; *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at paras 30-32; and *Canadian Artists' Representation v National Gallery of Canada*, 2014 SCC 42 at para 13. *Newton* and *Smith* were cases which examined the standard of review to be employed by an appeal tribunal, and not by a court, and applied the reasoning in *Dunsmuir*. Accordingly, the *Dunsmuir* analysis is applicable to the standard of review to be used by this Appellate Panel.

### III. The Standard of Review in this Appeal is Reasonableness

10. A number of factors in this case support a conclusion that the Appellate Panel should apply a deferential, or reasonableness, standard when reviewing the Panel's Report. First, the privative clause in Article 1707.4, which provides that the report of the first panel is final (unless appealed to the appellate panel) and is not subject to judicial review, is evidence of the AIT Parties' intent that a panel be given deference and that interference by reviewing courts be minimized. A privative clause gives rise to a strong indication of review pursuant to the reasonableness standard.<sup>2</sup>
11. Second, Article 1706(3) specifies that a panel established under Article 1703 is to produce a report which will contain, *inter alia*, findings of fact and a determination as to whether the measure is or would be inconsistent with the AIT. That is, the fundamental nature of the issue before a panel involves the panel's interpretation of its "home statute", the AIT. The purpose of the Panel in this case was to determine if certain laws of Quebec under examination comply with the AIT. The Panel's function was to interpret and apply the AIT. The Panel in this case is a specialized tribunal functioning within its expertise and interpreting its home statute.
12. Third, Annex 1704(2) of the AIT sets out the qualifications for the members of a panel and requires that roster members shall have expertise or experience in matters covered by the AIT. This is in contrast to the requirement for members of the appellate panel, who are not required to have trade experience but who are to have expertise in administrative law.
13. Finally, none of the four exceptions to the presumption of a reasonableness standard, identified above in paragraph 8, apply. The dispute before the Panel in this case does not involve constitutional issues, the narrow category of "true" jurisdictional issues, questions of law of central importance or general interest to the legal system or questions regarding the jurisdictional lines between two or more competing specialized tribunals.
14. Based on all of the foregoing and applying *Dunsmuir*, the appropriate standard of review in this matter is the reasonableness standard. The Appellate Panel should apply a deferential or

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<sup>2</sup> *Dunsmuir* at para 52.

reasonableness standard when reviewing the Panel's Report. In applying the reasonableness standard, the question the Appellate Panel must consider is whether the Panel's interpretation was unreasonable. As noted in paragraph 7 above, the Appellate Panel, in undertaking such consideration, must be "concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process". Only if no reasonable interpretation could lead to the result expressed in the Panel Report, should the Appellate Panel find an error of law.

15. If this Appellate Panel rejects the applicability of the reasonableness standard, and concludes, instead, that the appropriate standard of review is correctness as the Panel was engaging in contract interpretation (as opposed to statutory interpretation), Alberta respectfully submits that the correctness standard only applies to the interpretation process and the application of contract principles, and not to the interpretation itself.
16. As stated in **Dow Chemical Canada Inc. v Shell Chemicals Canada Ltd.**, 2010 ABCA 126 at para 12, once the exact terms and nature of the contract and the surrounding facts have been established, the correctness standard applies to the application of contract principles. These principles include interpretation within the context of the other provisions, examination of plain language, and determination of the parties' intentions.
17. Laskin JA wrote on the question of contract interpretation in **Bradscot (MCL) Ltd. v Hamilton-Wentworth Catholic District School Board** (1999), 42 OR (3d) 723 (CA) at 728-29 [**Bradscot**]:
 

I do not think that there is one "right" interpretation of the words [...]. Both the interpretations given by Shaw J. in the *Smith Bros.* case and the interpretation given by Somers J. in the present case are reasonable [...]. Moreover, the appellant does not suggest that Somers J. applied incorrect principles of contract interpretation. Faced with two interpretations, either of which is reasonable, and no error in the application of the relevant legal principles, in my view this court should defer to the finding of the trial judge [emphasis added].
18. The deferential approach in contract interpretation articulated by Laskin JA in **Bradscot** is followed in **MacDougall v MacDougall** (2005), 205 OAC 216 (CA) at para 29; **Bell Mobility Inc. v MTS Allstream Inc.**, 2009 MBCA 28 at para 31; **Bell Canada v The Plan Group**, 2009 ONCA 548 at para 161; and **3869130 Canada Inc. v I.C.B. Distribution Inc.**, 2008 ONCA 396 at para 39.
19. Therefore, even if the Appellate Panel applies the correctness standard, the question is whether the Panel correctly applied the principles of contract interpretation. In other words, the correctness standard should be applied to the process of interpretation and not whether the

Appellate Panel agrees with the Panel's interpretation. If the Panel, applying the principles of interpretation correctly, came to a reasonable interpretation, the Appellate Panel should defer to the findings of the Panel: **Bradscot**.

20. Further, even in the administrative law context, a question of law does not always attract the standard of review of correctness. In **Art Hauser Centre Board Inc. v Canadian Union of Public Employees Local No. 882**, 2008 SKCA 121 at paras 3 and 37, the standard of review in the judicial review of interpretation of contract provision is reasonableness. In **Council of Canadians with Disabilities v VIA rail Canada Inc.**, 2007 SCC 15 at paras 96-98, statutory interpretation by highly specialized tribunals functioning within their expertise is an exception to the correctness standard. The rationale for this exception is that the tribunal is better equipped than the appellate court to interpret and apply its home statute within the legislative scheme.
21. Accordingly, Alberta submits that the reasonableness standard of review applies to this Appellate Panel.

#### IV. Application of the Reasonableness Standard by the Appellate Panel

22. Quebec disagrees with the Panel's interpretation of various provisions of the AIT and characterizes these as errors in law.<sup>3</sup> In its written submission ("Quebec Submission") to this Appellate Panel, Quebec sets out, in detail, its interpretation of certain relevant AIT provisions and asks this Appellate Panel to adopt Quebec's interpretation instead of the Panel's interpretation. As required by **Dunsmuir**, the task for the Appellate Panel is to apply the reasonableness standard of review. If the Report evidences justification, transparency and intelligibility, the Appellate Panel should defer to the Panel's interpretations and conclusions unless such interpretations and conclusions fall outside the range of possible and defensible outcomes.
23. Alberta submits that all of the Panel's interpretations and conclusions fall within the range of reasonable outcomes and do not constitute errors of law. The Panel articulated the issues, considered appropriate factors, applied appropriate rules of contractual or statutory interpretation, and reached a conclusion that was not unreasonable. Throughout its thirty-seven page Report, the Panel:
  - clearly identified the applicable provisions of the AIT, which were the provisions identified by the Parties in their written and oral submissions to the Panel;
  - summarized the arguments being advanced by the Parties, evidencing consideration of those arguments and consideration of alternate interpretations of the relevant provisions;

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<sup>3</sup> See, for example, paras 12 and 17 of Quebec Submission.

- identified relevant decisions of other AIT panels;
- evidenced a logical progression through the relevant provisions of the AIT and provided its interpretation of those AIT provisions;
- applied recognized principles of interpretation, including consideration of the ordinary meaning of a word or phrase, consideration of provisions in their context and consideration of the intent of the AIT.

Applying the reasonableness standard and in recognition of the foregoing, the Panel's conclusions fall within the range of reasonable outcomes.

## V. Specific Errors of Law

### (a) Failure to Give Reasons

24. Quebec argues that an error of law or jurisdictional error occurred in relation to the reasons, or lack thereof, in the Report.<sup>4</sup> Quebec suggests that unless the Panel separately addresses each and every argument submitted by Quebec, there is an error of law pertaining to the giving of reasons.
25. However, an adjudicator is not required to recite every argument made by a party; rather, it must provide sufficient reasons so that the conclusion reached by the adjudicator is transparent. Further, the "adequacy" of reasons by an adjudicator is not a stand-alone basis for quashing a decision; an adjudicator should not undertake two separate analyses – one for the reasons and another for the result. Rather it is a "more organic exercise" where the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of acceptable outcomes: see *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61; and *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 14.
26. It is clear from the Panel Report that no such error of law occurred. The Panel provided extensive reasons to support its recommendations. Further, the Panel analyzed and interpreted all the sections of the AIT raised by the Parties in relation to the examination of the Quebec measures and compliance with the AIT. It was not necessary for the Panel to comment on every argument raised by Quebec; rather, it is necessary that the reasons given allow the Parties to the dispute to understand the conclusions and recommendations of the Panel. The reasons given in the Panel Report accomplish this and no error of law occurred. However, should this Appellate Panel find that insufficient reasons were given by the Panel, under Article 1706.1(4)(a), the

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<sup>4</sup> See, for example, paras 52-53, 66-67, 73, and 76-78 of Quebec Submission.



Appellate Panel should refer the matter back to the Panel to provide its reasons, rather than find an error of law.

**(b) Article 905 of the AIT**

27. Quebec asserts certain errors in law in the Panel's findings on AIT Article 905.<sup>5</sup> Quebec alleges that the Panel failed to provide reasons, as required by Article 1706(3)(b), for its finding that s. 4.1(1) of the *Food Products Act* ("FPA") is contrary to Quebec's commitments under Article 905. The second error that Quebec alleges is that the Panel incorrectly applied the burden of proof with regards to compliance with Article 905. Alberta submits that, applying the reasonableness standard of review, the Panel's interpretation of Article 905 is within the realm of reasonable interpretations and, moreover, is correct.
28. In respect of the allegation of a failure to provide reasons, it is necessary to review Quebec's original argument to the Panel. Quebec argued, in its written submission to that Panel dated September 23, 2013, that as section 4.1(1) of the FPA was based on an international standard it, therefore, complied with the AIT.<sup>6</sup> Quebec argued, in the alternative, that if this measure was found to be inconsistent with the obligations under the AIT, it was justified as a legitimate objective under Article 404 of the AIT. As part of that argument, Quebec provided an interpretation of Article 905.<sup>7</sup> The Panel summarized Quebec's position as follows:

"Generally speaking, the arguments put forth by the Respondent in its written and oral submissions seem to suggest that where a given measure could be found to be "consistent with an international standard", this fact alone would be sufficient to establish that all obligations imposed on a responding party pursuant to paragraphs (3), (4), (5) and (6) of Article 905 have been discharged."<sup>8</sup>

The Panel specifically rejected the argument that compliance with an international standard was sufficient to make a measure compliant with Article 905, and provided reasons in the last two paragraphs on page 24 of the Report. Quebec's allegation that the Panel failed to provide reasons for its interpretation of Article 905 is unfounded.

29. In respect of the second alleged error of law, the Panel, after finding that section 4.1(1) of the FPA is inconsistent with Article 403, put the onus on Quebec to demonstrate that the requirements of Articles 404 and 905 were met and the Panel determined that Quebec failed to

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<sup>5</sup> Quebec Submission, section 4.2 (paras 66-72).

<sup>6</sup> Submission of Quebec to the Panel dated September 23, 2013 at para 38.

<sup>7</sup> Submission of Quebec to the Panel dated September 23, 2013 at paras 77-87.

<sup>8</sup> Panel Report at 24.

meet that onus.<sup>9</sup> In its Submission to this Appellate Panel, Quebec argues that Saskatchewan, the Complaining Party, has the burden to prove that the measure is inconsistent with Article 905.<sup>10</sup> In support, Quebec points to Annex 1813 (Rules of Interpretation) Rule 10, which places the onus on a Party asserting that a measure is inconsistent with the AIT to prove that inconsistency.

30. However, it is Annex 1813 Rule 11 that is applicable and not Rule 10. Rule 11 provides that a Party asserting that an exemption or an exception applies to its measure has the burden of establishing that the exemption or exception applies. It has been established by many AIT panels that the Party relying on Article 404 to justify or save its measure (that has been found to be inconsistent with the AIT) has the onus to demonstrate that it fully meets the requirements of Article 404.<sup>11</sup> Annex 1813 Rule 11 applies to Article 404. Quebec did not and does not dispute that characterization of the onus for Article 404.
31. Alberta submits that the same approach applies to Article 905. Quebec, in its written submission to the Panel, characterized Article 905 as guiding the application of Article 404 Legitimate Objectives.<sup>12</sup> The Panel specifically agreed with Quebec that "where agricultural and food goods within the scope of Chapter Nine of the AIT are in issue, in the determination of whether any technical measure is permissible under the provisions of Article 404, it must take into account the provisions of Article 905".<sup>13</sup> The Panel interpreted Articles 404 and 905 as being parallel to each other; specifically, the Panel viewed "the provisions of paragraphs 905(2), (3) and (4) as applying supplementary disciplines on the use of the legitimate objectives exception set out in Article 404".<sup>14</sup> This interpretation is consistent with the characterization of the relationship between Article 404 and Article 905 advanced by Quebec. It would be nonsensical if the burden to prove compliance with Article 404 is on the Party that is maintaining the measure (Rule 11) but the burden to prove compliance/non-compliance with Article 905 is on the Party challenging the measure (Rule 10). Both Article 404 and Article 905 (particularly Article 905(1)-(3)) are exemptions or exceptions under the AIT. Thus, it is appropriate that Rule 11 of Annex 1813 apply to both. This is the position of the Panel. Alberta submits that not only is the interpretation reasonable, it is correct.

## VI. Conclusion

32. This Appellate Panel should apply a deferential, or reasonableness, standard when reviewing the Panel's Report. The purpose of the Panel in this case was to determine if certain laws of Quebec

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<sup>9</sup> Panel Report at 25.

<sup>10</sup> Quebec Submission at paras 70-71.

<sup>11</sup> See BC's Submission to the Panel at para 29 and Saskatchewan's Submission to the Panel at para 88.

<sup>12</sup> Quebec Submission at para 78.

<sup>13</sup> Panel Report at 23.

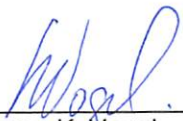
<sup>14</sup> Panel Report at 23.


under examination comply with the AIT. The Panel's function was to interpret and apply the AIT. Members of a panel are required to have expertise or experience in trade matters. The Panel in this case is a specialized tribunal functioning within its expertise and interpreting its home statute. Based on all of the foregoing, and according to *Dunsmuir*, this Appellate Panel should review the Panel's interpretation on a deferential standard of reasonableness.

33. As required by *Dunsmuir*, the task for the Appellate Panel is to apply the reasonableness standard of review. If the Report evidences justification, transparency and intelligibility, the Appellate Panel should defer to the Panel's interpretations and conclusions unless such interpretations and conclusions fall outside the range of possible and defensible outcomes. Alberta submits that all of the Panel's interpretations and conclusions fall within the range of reasonable outcomes and do not constitute errors of law.
34. Further, the Panel's conclusion that the burden of proof for compliance of a measure with Article 905 rests with the Party seeking to maintain the measure is correct. Both Article 404 and Article 905 (particularly Article 905(1)-(3)) are exemptions or exceptions under the AIT. Thus, it is appropriate that Rule 11 of Annex 1813 apply to both. The Panel correctly found that Quebec had the onus to demonstrate to the Panel that section 4.1(1) of the FPA is consistent with Article 905 and that Quebec failed to do so.
35. Accordingly, Alberta requests that this Appellate Panel affirms the Report of the Panel in its entirety.

All of which is respectfully submitted.

August 18, 2014.

  
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