

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

Supplemental Submission of the Government of Alberta (Intervenor)

Dated October 7, 2014

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## I. Introduction

1. The Government of Alberta ("Alberta"), as Intervenor in the appeal of the Report of the Article 1703 Panel Regarding the Dispute between Saskatchewan and Quebec Concerning Dairy Blends, Dairy Analogues and Dairy Alternatives issued on March 31, 2014 ("Report"), is making this Supplementary Submission pursuant to the order of this Appeal Panel dated September 17, 2014. This Supplementary Submission:
  - (a) Provides a response to certain arguments made by Quebec in its Supplementary Submission dated September 24, 2014 ("Quebec Supplementary Submission");
  - (b) Addresses the following issues raised by the Chair of this Panel in the pre-hearing conference call with the Parties held on September 12, 2014:
    - A. Does the reasonableness standard of review apply to Quebec's allegation that the Panel failed to provide reasons; and
    - B. Does the reasonableness standard of review apply to Quebec's allegation that the Panel did not have jurisdiction to make the recommendation (in par 8(b) of the Report) that until Quebec brings its measures into compliance, it must refrain from enforcing the non-compliant measures.

## II. Applicable Standard of Review

2. In its Supplementary Submission, Quebec, essentially, argues that the *Dunsmuir* standard of reasonableness applies solely to review by the courts of an administrative body and does not apply to an appeal whereby an administrative body reviews the decision of another administrative body. Quebec's interpretation of the law on standard of review is erroneous.
3. Quebec argues that *Dunsmuir* (and the extensive line of cases following *Dunsmuir*) applies only to review by a court of an administrative tribunal because, in that case, it was a court reviewing the administrative body. Yet, Quebec does not point to any case which states that the standard of review for an administrative appeal body differs. Jones & de Villars in their text, *Principles of Administrative Law*, state:

"One of the most difficult issues is to determine the standard of review which courts (or an administrative appellate body) will use when hearing a particular appeal....the appropriate standard of review by the appellate body needs to be determined by using the same standards-of-review analysis which is used in the context of applications for judicial review" (emphasis added).<sup>1</sup>

Thus, Jones & de Villars direct us to administrative law and judicial standards of review in the case of appeals being heard by an administrative appellate body.

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<sup>1</sup> David Phillip Jones & Anne S. de Villars, *Principles of Administrative Law*, 6<sup>th</sup> ed (Toronto: Carswell, 2014) at pages 642-643.

4. Indeed, *Dunsmuir*, and the cases preceding and following *Dunsmuir*, examine the standard of review applicable in administrative law when the decision of an administrative body is being reviewed. The reasoning and principles behind the standard of review of the decision of an administrative body apply both when the review is being done by a court and when the review is being carried out by an administrative body that is established as an appeal tribunal.
5. As stated at paragraph 6 of the Alberta Submission filed in this appeal, dated August 18, 2014 ("Alberta Submission"), in *Newton v. Criminal Trial Lawyers Association*, 2010 ABCA 399 [*Newton*], where the standard of review applicable to an appellate administrative tribunal was examined, the Court concluded that it was required to consider many of the same factors as are discussed in *Dunsmuir*.

*Newton* provides:

"[42] The determination of the standard of review to be applied by an appellate administrative tribunal (here the Board) to the decision of an administrative tribunal of first instance (here the presiding officer) requires a consideration of many of the same factors that are discussed in *Housen and Dunsmuir/Pushpanathan*, adapted to the particular context: *College of Physicians and Surgeons of Ontario v. Payne* (2002), 2002 CanLII 39150 (ON SCDC), 219 D.L.R. (4th) 350, 163 O.A.C. 25 (Div. Ct.) at para. 20.

[43] The following factors should generally be examined:

- (a) the respective roles of the tribunal of first instance and the appellate tribunal, as determined by interpreting the enabling legislation;
- (b) the nature of the question in issue;
- (c) the interpretation of the statute as a whole;
- (d) the expertise and advantageous position of the tribunal of first instance, compared to that of the appellate tribunal;
- (e) the need to limit the number, length and cost of appeals;
- (f) preserving the economy and integrity of the proceedings in the tribunal of first instance; and
- (g) other factors that are relevant in the particular context."

See paragraphs 5 and 10-13 of the Alberta Submission which discuss the applicability of many of the foregoing factors to this appeal.

### III. Duty to Give Reasons

6. Quebec alleges that the original Panel failed to provide reasons in respect of a number of the issues addressed in the Report.<sup>2</sup> In administrative law, the duty to provide reasons is an issue of procedural fairness and natural justice. The question whether the Panel met the obligation of procedural fairness is subject to a correctness standard of review. Either the fairness standard has been met or it has not.
  
7. However, in order to determine if the fairness standard has been met in the case where an administrative body has provided written reasons, the reviewing body must assess the adequacy of the reasons. The adequacy and the form of the reasons are reviewable on a reasonableness standard. The test is whether, when read in light of the evidence before the administrative body and the nature of its task, the reasons adequately explain the basis of its decision. The Supreme Court of Canada decision of *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*,<sup>3</sup> 2011 SCC 62 [Nurses] has settled this point. The adequacy of reasons is not an independent or stand-alone basis to set aside or quash a decision of a lower tribunal; instead, the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes: *Nurses* at para 14.
  
8. A decision maker is not required to make an explicit finding on each constituent element leading to the final conclusion, or address all the arguments in its reasons. Rather, the reasons should allow the reviewing tribunal to understand why the lower tribunal made its decision and permit the reviewing tribunal to determine whether the result is within the range of acceptable outcomes: *Nurses* at para 16. Furthermore, the notion of deference to administrative tribunal decision-making requires the reviewing tribunal to pay "respectful attention to the decision-maker's reasons": *Nurses* at paras 12 and 17. The Court held, at para 21, that it is unhelpful to suggest in every circumstance that "alleged deficiencies or flaws in the reasons fall under the category of a breach of the duty of procedural fairness and that they are subject to a correctness review". The Court further stated at para 22:

"It is true that the breach of a duty of procedural fairness is an error in law. Where there are no reasons in circumstances where they are required, there is nothing to review. But where, as here, there are reasons, there is no such breach. Any challenge to the reasoning/result of the decision should therefore be made within the reasonableness analysis."

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<sup>2</sup> See Alberta Submission paragraphs 24-26 and references therein to the original Quebec Submission.

<sup>3</sup> See Tab 14 of the Alberta Book of Authorities, Alberta Submission.

9. The AIT requires the Panel to give reasons in Article 1706(3). As discussed in paras 22 and 26 of the Alberta Submission, the Panel provided extensive reasons in its Report, which were sufficient for Quebec to understand the conclusions and recommendations of the Panel. The Panel has met the standard of reasonableness in respect of its reasons and there is no breach of the duty of procedural fairness.

#### IV. Jurisdiction to Make Recommendation

10. Quebec alleges that the Panel does not have the jurisdiction to make the recommendation that, until Quebec brings its laws into compliance with the AIT, Quebec shall refrain from enforcing the laws.<sup>4</sup> The law is settled that the standard of review on a true jurisdictional question is correctness. However, the Supreme Court of Canada cautioned that true jurisdictional questions are exceptional and extremely rare, and the interpretation by a tribunal of “its own statute or statutes closely connected to its function, with which it will have particular familiarity” should be presumed to be a question of statutory interpretation subject to deference: ***Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association***,<sup>5</sup> [2011] 3 SCR 654, 2011 SCC 61 at paras 33-34.
11. AIT Article 1706(3)(d) requires that the Panel to make recommendations to assist in resolving the dispute if requested by a Disputing Party. The form of such a recommendation is, by its nature, in the discretion of the panel. *Dunsmuir* (at paras 51 and 53) establishes that discretionary decisions are reviewable on a reasonableness standard and “deference will usually apply automatically”.
12. Finally, Article 1707(2) states:

“Wherever possible, a dispute shall be resolved by removing, amending or not implementing the measure that is or would be inconsistent with this Agreement” (emphasis added).

Thus, it was clearly within the Panel's jurisdiction to make its recommendation that Quebec should not enforce the impugned measures until Quebec complied with its obligations to repeal the measures.

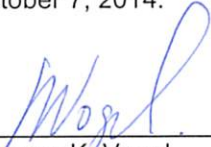
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<sup>4</sup> Report, para 8(b).

<sup>5</sup> See Tab 4 of the Alberta Book of Authorities, Alberta Submission.

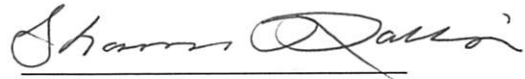
All of which is respectfully submitted.

October 7, 2014.



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