

Agreement on Internal Trade

**Report of the Article 1704 Panel Concerning the Dispute Between
Alberta and Québec Regarding Québec's Measure
Governing the Sale in Québec of Coloured Margarine**

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ABBREVIATIONS

AIT or Agreement	Agreement on Internal Trade
Regulation or measure	Regulation Respecting Dairy Product Substitutes
CIT	Committee on Internal Trade
Regulation	Regulation Respecting Dairy Products Substitutes
COPA	Canadian Oilseed Producers Association
Trade Policy Committee	Federal Provincial Agricultural Trade Policy Committee
Inspection Committee	Federal Provincial Agri-Food Inspection Committee

1. INTRODUCTION

The following is a report of a dispute resolution panel (hereinafter the “Panel”) established pursuant to Chapter Seventeen (Dispute Resolution Procedures) of the *Agreement on Internal Trade* (hereinafter the “Agreement” or “AIT”)¹ to address a dispute brought forward by the Government of Alberta (hereinafter the “Complainant”) under Article 1704 (Request for a Panel) against the Government of Québec (hereinafter the “Respondent”) regarding access to the Québec market for margarine coloured the same pale yellow hue as butter.²

The Panel was duly established under the provisions of the AIT. Its terms of reference are to examine whether the actual or proposed measure is or would be inconsistent with the AIT.³

As provided in Article 1707.2 (Report of Panel) of the AIT, this Panel report contains:

- (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 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.

2. COMPLAINT PROCESS

In accordance with Article 906 (Consultations) of Chapter Nine (Agriculture and Food Goods), Alberta requested consultations with Québec concerning Québec’s *Regulation Respecting Dairy Product Substitutes*⁴ (hereinafter the “Regulation” or the “Measure”)

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

² Article 1704.

³ Article 1705.4.

⁴ Section 40(1)(c) of the *Regulation Respecting Dairy Products Substitutes* (“Regulation”), R.S.Q. 1981, c.P-30, r.15, as amended, was enacted pursuant to the *Food Products Act (Québec)*(the “Act”) (R.S.Q., c.P-29), which is the consolidated legislation that replaces the *Dairy Products and Dairy Products Substitute Act*, which was repealed on March 27, 2002.

on September 8, 2003.⁵ The Regulations prohibit the sale in Québec of margarine coloured the same pale yellow hue as butter. The ensuing consultations did not result in a resolution of the dispute.

By letter dated May 14, 2004, the Complainant formally requested the assistance of the Committee on Internal Trade (hereinafter the “CIT”) in resolving the dispute.⁶ On June 2, 2004, the Ministers met by conference call to consider the matter. No resolution was reached. CIT Ministers agreed that the AIT provided Alberta with an opportunity to request a hearing before an independent panel and a panel was so requested.⁷

The Panel was duly appointed and following the exchange of written submissions, it held a hearing (which was open to the public) in Montréal, Québec, on May 9, 2005.

In accordance with Article 1704.9, any Party with a substantial interest in a dispute is entitled to join panel proceedings as an Intervenor. Manitoba and Saskatchewan provided the required notice of their intent to join the panel proceedings and filed written submissions in support of the Complainant’s position in this matter. Both provinces also made oral presentations at the hearing.

3. THE COMPLAINT⁸

3.1 The Position of the Complainant

Alberta has identified the measure at issue as s. 40(1)(c) of Québec’s *Regulation Respecting Dairy Products Substitutes* which states:

40. In addition to satisfying the requirements of the Food and Drugs Act (R.S.C., 1970, C. F-27) and its regulations, the substitutes referred to in section 39 shall meet the following standards of composition:

(1) Margarine:

...(c) must have a colour measuring not more than one and six-tenths degrees or less than ten and five-tenths degrees of yellow or yellow and red combined on the Lovibond colorimeter scale.⁹

⁵ *Agreement on Internal Trade Dispute Concerning Québec’s Measure Prohibiting the Sale of Coloured Margarine* - Submission by the Complaining Party, the Government of Alberta, August 16, 2004 (hereinafter “Alberta’s First Submission”), Appendix 2.

⁶ Alberta’s First Submission, Appendix 4.

⁷ Alberta’s First Submission, Appendix 5.

⁸ The complaints of Alberta, Manitoba and Saskatchewan are set out in their respective submissions to the Panel which can be found on the *Agreement on Internal Trade* website at www.ait-aci.ca/margarine.

⁹ Quoted in Alberta’s First Submission, para. 12.

The statutory authority for the Regulation is found in Section 7.5 and Section 40 of the Québec *Food Products Act*. Section 7.5 authorizes regulations to set standards for the colour of “dairy products substitutes”:

7.5 Every dairy product substitute must meet the standards respecting composition, colour, quality, form and format determined by regulation, and the recipient packaging or wrapping containing the dairy product substitute must bear the name, origin, quantity and composition of the product.¹⁰

Section 40(e) of the Act also provides authority for the Regulation:

40. The Government may, by regulation:

...(e) establish classes, categories, appellations, qualifiers or designations of products and prohibit any unlawful use thereof, require the grading of products and set standards of composition, form quality, wholesomeness, colour, proportion of constituents, presentation and uniformity...¹¹

Alberta notes that this measure results in the situation where only margarine that is coloured virtually white, very much like lard, can be sold in Québec.¹² This, it contends, makes the margarine less appetizing and depresses demand for the product in Québec with consequential losses for Albertan margarine manufacturers and their upstream suppliers, oilseed growers and processors.

Alberta contends that the measure violates three AIT obligations:

- Article 401 (Reciprocal Non-Discrimination), because in requiring margarine to be coloured while not requiring butter to be similarly coloured, Québec's measure accords less favourable treatment to a directly competitive or substitutable good in comparison to the treatment accorded to butter;¹³
- Article 402 (Right of Entry and Exit), because in requiring margarine sold in Québec to be coloured a non-butter-like hue when it need not be so coloured for any other provincial market in Canada, the measure has the effect of restricting or preventing the movement of margarine across Québec's provincial boundaries;¹⁴ and

¹⁰ Quoted in Alberta's First Submission, para. 14.

¹¹ *Ibid.*

¹² Transcript, p. 23.

¹³ Alberta's First Submission, para. 27.

¹⁴ Alberta's First Submission, para. 29.

- Article 403 (No Obstacles), because the measure operates to create an obstacle to the internal trade of coloured margarine.¹⁵

Alberta recognizes that a measure that offends one or more of the obligations listed above can still be justified under Article 404 if it has a “legitimate objective” as its purpose, but contends that this measure cannot be so justified. In its view, the measure has no legitimate objective because it is intended to afford protection to domestic production of butter. In anticipation of Québec's argument that the measure is necessary to protect consumers, Alberta notes that while consumer protection is a “legitimate objective” under Article 200, that article also states that “‘legitimate objective’ does not include protection of the production of a Party...”.¹⁶ [Emphasis added.] It also emphasizes that no evidence has been presented to show that the regulation of the colour of margarine is necessary for the protection of human life or health or for consumer protection. Pale yellow coloured margarine is available in all provinces outside of Québec and consumed daily by Canadians. It is not prohibited by federal health and safety laws. Alberta submits that it is a safe and acceptable product and there is no basis for restricting its sale.¹⁷

Alberta emphasizes that Québec itself recognized that it had an obligation to remove the measure when it tabled a draft regulation that, had it been promulgated, would have removed the colouring requirement.¹⁸

Accordingly, Alberta asserts that the measure cannot be saved under Article 404 and that it must be found to violate the *Agreement on Internal Trade*.

Finally, Alberta adduced a number of letters and other documents in support of its claim that the measure has caused injury to Alberta oilseed growers, processors, and margarine producers.¹⁹ The Panel will revert to this evidence below.

3.2 Request for Findings

Alberta therefore requested the Panel to make the following findings:

- (a) The measure is included in the scope and coverage of the AIT pursuant to Article 902.3 (Scope and Coverage);
- (b) The measure is inconsistent with the objectives and operating principles of the Agreement contained in Article 100 (Objective) and Article 101.3

¹⁵ Alberta's First Submission, para. 30.

¹⁶ Alberta's First Submission, paras. 31-35.

¹⁷ Alberta's First Submission, para. 34.

¹⁸ Alberta's First Submission, paras. 39-42.

¹⁹ Alberta's First Submission, paras. 44-49.

(Mutually Agreed Principles). Article 101.4 (Mutually Agreed Principles) does not provide a justification for maintaining the measure;

- (c) The measure also contravenes Articles 401 (Reciprocal Non-Discrimination), 402 (Right of Entry and Exit), 403 (No Obstacles) and 405 (Reconciliation);
- (d) The measure is not justified to achieve a legitimate objective as defined by Article 404 (Legitimate Objectives) of the agreement; and
- (e) Alberta margarine manufacturers and the Alberta oilseed industry are injured by the measure.²⁰

Alberta further requested the Panel to recommend that:

- (a) Québec immediately repeal the measure;
- (b) Pending repeal of the measure, Québec cease to enforce the measure;
- (c) Should Québec intend to replace or amend the measure, Québec:
 - (i) Must comply with provisions of Article 905 (Non-Sanitary and Non-Phytosanitary Measures), and the consultation provisions of Article 906 (Consultations);
 - (ii) Must ensure that any amendment or replacement measure be consistent with the AIT; and
 - (iii) Should consider deferring to the federal standards and regulations relating to margarine;
- (d) Any action by Québec and implementation of the Panel's recommendations must allow for the export into and the immediate sale of Alberta coloured margarine in Québec.²¹

3.3 The Positions of the Intervenors

Manitoba and Saskatchewan concurred with Alberta's complaint. Both agreed that the measure contravenes Articles 401, 402 and 403 and that it cannot be justified under Article 404 for the reasons given by Alberta.²²

²⁰ Alberta's First Submission, para. 51.

²¹ Alberta's First Submission, para. 52.

²² Manitoba's Submission, paras. 16-34, Saskatchewan's Submission, paras. 27-41.

Both provinces also added their own perspective on the matters subject to dispute and both identified a substantial interest in the proceeding by virtue of the fact that they are significant oilseeds producers and processors.

Finally, the Intervenors concurred with Alberta that the measure's effect has been to suppress demand for margarine in Québec with consequential suppression in demand for margarine and hence oilseeds produced in the western provinces.²³

4. THE POSITION OF THE RESPONDENT²⁴

Québec filed a lengthy Submission in which it took issue with Alberta's factual and legal characterizations of the dispute and rejected the allegations of breach. Québec argued that the measure did not have the effect attributed to it by Alberta and the Intervenors because the statistics demonstrated that margarine consumption in Québec for the 1997-2002 period was higher than for Ontario and comparable to that for British Columbia.²⁵ Since its consumption was higher or similar to two provinces in which margarine may be coloured, the losses claimed, but not proven, by Alberta and the Intervenors did not exist or, if they did, were not caused by Québec.²⁶

Québec also adduced extensive evidence as to the history of margarine regulation.²⁷ It noted that there has long been a concern for the need to protect consumers who believed that they were obtaining butter when in fact it was margarine passed off as butter. Legislation enacted by other provinces, including Alberta, had maintained the same type of coloured margarine regulation as was now being challenged. This, Québec submitted, had always been viewed as a matter of consumer protection. Indeed, events as recent as 1983 showed that unscrupulous traders had sought to pass off coloured margarine as butter. This led Ontario, for example, to similarly regulate margarine colouring in order to prevent the possibility of fraud or misrepresentation.²⁸

4.1 Objection to Jurisdiction

Before addressing the merits of Alberta's claim, Québec asserted that the Panel lacked the requisite jurisdiction to hear and decide the complaint.

²³ Manitoba's Submission, paras. 5-15, Saskatchewan's Submission, paras. 16-17.

²⁴ Québec's response is set out in its submissions to the Panel which can be found on the *Agreement on Internal Trade* website at www.ait-aci.ca/margarine.

²⁵ Québec's First Submission, para. 16.

²⁶ Québec's First Submission, paras. 16-17.

²⁷ Québec's First Submission, paras. 25-55 and the appendices referred to therein.

²⁸ Québec's First Submission, para. 52.

In this regard, Québec referred to AIT Article 902.3 which states that:

“Measures involving technical barriers with policy implications shall be included in the scope and coverage of this Chapter effective September 1, 1997. The Federal-Provincial Trade Policy Committee... shall, on or before September 1, 1997, give written notice to the Committee on Internal Trade of such measures.” [Emphasis supplied by Québec.]

Québec noted that the written notification to the Committee on which Alberta relies was dated October 1, 1997, *not* September 1, 1997, and argued that this failure to comply with mandatory terms of the AIT rendered the notice invalid. The Parties, it was submitted, could have remedied this failure to meet Article 902’s requirements by amending the AIT (as they had in five other instances) but they did not do so.²⁹

Québec recognized that in two other disputes involving Chapter Nine, the letter had been considered valid. It pointed out, however, that in the Nova Scotia/Prince Edward Island dispute over the latter’s *Dairy Industry Act Regulations*, the disputing parties agreed that the October 1, 1997 letter met the requirements of Article 902.3. That panel therefore acted on the basis of the Parties’ concurrence.³⁰ As for the *Farmers Dairy* dispute, New Brunswick did question the letter’s validity, arguing that “the authors of the letter made the decision to apply its content retroactively on their own”.³¹ Québec acknowledged that the panel found the letter had been sent correctly but argued that it should have addressed the notification’s purported retroactivity.³²

In Québec’s view, the failure to notify the Committee by the date specified in Article 902.3 has preclusive effect; that is, since the notification is invalid, no technical barriers with policy implications have been notified properly to the Committee and Article 902 cannot apply. Therefore, the Panel cannot determine this dispute.³³

4.2 The Merits

If the Panel ruled against its objection and proceeded to the merits, Québec argued that the Regulation did not constitute a barrier because it permitted the use of colouring within the specified range of the Lovibond scale.³⁴ Margarine manufacturers were permitted to colour margarine but they were not permitted to colour it like butter. Manufacturers that complied with the Regulation were free to market their products in Québec and such products could be purchased by consumers. In this respect, Québec noted that the *Agreement on Internal Trade* does not provide for completely unfettered

²⁹ Québec’s First Submission, paras. 58-104.

³⁰ Québec’s First Submission, para. 68.

³¹ Quoted in Québec’s First Submission, para. 70.

³² Québec’s First Submission, para. 70.

³³ Québec’s First Submission, paras. 81-104.

³⁴ Québec’s First Submission, para. 105.

free trade in Canada. Article 100 states that the objective of the Parties was “to reduce and eliminate, *to the extent possible*, barriers to the free movement of ... goods...” [Emphasis added.] This recognized that there would be exceptions to the commitment to promote trade liberalization and the need to take into account such matters as consumer protection.³⁵

Québec argued further that the AIT permitted each Party to set its own standards and even where harmonization of standards was contemplated, harmonization efforts were not always mandatory and they should be instituted only where appropriate and to the extent practicable.³⁶

If the Regulation respecting margarine colouring was included in the scope and coverage of Chapter Nine, which Québec contested, it was, Quebec argued, permitted under Chapter Eight, “Consumer-Related Measures and Standards”. That chapter, a “horizontal” chapter (that is, one which applied to certain other AIT chapters unless a specific chapter otherwise provided), applied to Chapter Nine, a so-called “vertical” chapter. According to Annex 1813, a horizontal chapter applies to matters falling within the scope of a vertical chapter. Since Québec's measure was a consumer-related measure, it fell within the scope and coverage of Chapter Eight, and in turn governed Chapter Nine, “Agricultural and Food Goods”.³⁷

Article 810 defines “consumer-related measures and standards” broadly as:

... measures and standards that are intended to protect the personal safety of consumers or the economic interests of consumers and are related to the offer, acquisition or use of a good... intended primarily for personal, family or household purposes;

The “economic interests of consumers” is further defined to include “accurate and timely information about goods” and the “prevention of unfair trade practices”.

Québec maintained that its Regulation protected consumers by preventing the fraudulent passing off of margarine as butter. Although other elements of the Regulation also protected the consumer, the colouring requirement was the only one that informed and protected the consumer when there were no others.³⁸ This was the main objective of Québec's Regulation.³⁹

The AIT recognized Québec's right to maintain such a consumer-related measure in pursuit of a legitimate objective and that right was unaffected by the decision of other

³⁵ Québec's First Submission, paras. 114-119.

³⁶ Québec's First Submission, Section 2.3.

³⁷ Québec's First Submission, paras. 128-129.

³⁸ Québec's First Submission, para. 136.

³⁹ Québec's First Submission, para. 137.

provinces not to do so. Article 804 permits a Party, in pursuing a legitimate objective, to adopt or maintain measures establishing the level of consumer protection that it considers appropriate and another Party's decision not to adopt or maintain such a measure "shall not affect" a Party's right to adopt or maintain such a measure.⁴⁰ In summary, the AIT expressly tolerates divergent approaches to consumer protection and permits a Party to maintain more stringent consumer protection measures than the other Parties.⁴¹

With respect to Alberta's claim that the Regulation is inconsistent with Article 401, Québec argued that it accords to margarine from other provinces treatment no less favourable than the best treatment Québec accords to margarine produced in Québec. Québec margarine manufacturers are subject to the same rules as manufacturers in other provinces and territories and do not benefit from any special treatment. The treatment accorded to goods from Alberta and the other Parties enables them to be sold in Québec on the same basis as the goods manufactured in Québec and therefore there is no discrimination under Article 401. Since the law does not discriminate against margarine from other Parties, it was not possible to confirm whether the conditions contemplated in the second stage of the Article 401 test had been met.⁴²

Québec also argued that insofar as "treatment" was concerned, strictly speaking, it was not applying a measure to butter; its colour was decided by producers but was governed primarily by federal regulations requiring that the colour be uniform and characteristic for butter in order to be graded *Canada 1*. Article 401 focuses on a comparison of treatment. Québec legislated the colour of margarine but not the colour of butter. Therefore, it was not possible to compare non-existent measures.⁴³

With respect to the alleged breach of Article 402, Québec asserted that the Regulation does not restrict or prevent the movement of margarine across provincial boundaries. The Regulation prohibits the sale of margarine that is the same colour as butter within the province, but does not prohibit the product's movement across provincial boundaries. In this respect, Article 55 of the *Food Products Act* expressly states that it did not prohibit the transportation of products in transit in Québec.⁴⁴

In Québec's view, Article 402 seems to originate from Article V of the GATT 1994, which deals with freedom of transit, and has an objective which is completely different from the objectives of Article 401 (those being the most-favoured-nation treatment and national

⁴⁰ Québec's First Submission, para. 140.

⁴¹ Québec's First Submission, paras. 150-153.

⁴² Québec's First Submission, para. 157.

⁴³ Québec's First Submission, paras. 158-160.

⁴⁴ Québec's First Submission, para. 170.

treatment standards originating in Articles I and III of the GATT, respectively).⁴⁵ Québec asserted that Article 402 addresses the transit of goods, not their sale, and has no application in the context of the present case.

With respect to the alleged breach of Article 403, a Party has a right to adopt a measure that does not restrict the movement of goods. Margarine from other Parties complying with the Regulation may be sold in Québec and is in fact sold there. Therefore, Québec submitted, there was no infraction of Article 403. Every government has standards that are specific to its jurisdiction without them being considered obstacles to trade. (Québec's First Submission set out various examples of such standards.)⁴⁶

In the event that the Panel found the measure to be inconsistent with any of Articles 401, 402 and 403, Québec argued that it was still permissible because it addressed a "legitimate objective" and met each of the conditions of Article 803.

Article 803 provides that a consumer-related measure which is inconsistent with one of the Chapter Four trade rules is still permissible if its purpose is to achieve a legitimate objective and if it meets certain other conditions.

Québec asserted that Article 803, not Article 404, as contended by Alberta, applied. This was evident from the provisions of Article 803 and from the decision of the Parties, in Article 800.1, to provide that Article 404 does not apply to Chapter Eight. Moreover, Article 803 must be interpreted taking into account the chapter-specific definitions of Article 810 and the Party's right, under Article 804, to adopt or maintain a consumer-related measure that may be distinct from those of other Parties, to establish the level of consumer protection that it considers appropriate, and to determine the costs to be borne by merchants in achieving that end.⁴⁷

The chapter-specific definition of "legitimate objective" in Chapter Eight "means the protection of... the economic interests of consumers and includes the enforcement of consumer-related measures and standards". This is broader than the Article 200 definition applicable to Article 404 and unlike Article 200 the definition of "legitimate objective" does not exclude "protection of the production of the Party." Québec asserted:

Consequently, in order to respect the principle of interpretation that requires that meaning be given to all terms of a law or agreement, in their interpretation of the expression "legitimate objective" in Article 803(a), the Parties and the panel must not consider the fact that a consumer-related measure may have an impact on the production of a Party. Such an impact has no bearing and, if it exists, must not be taken into account.⁴⁸

⁴⁵ Québec's First Submission, para. 172.

⁴⁶ Québec's First Submission, paras. 175-178.

⁴⁷ Québec's First Submission, paras. 179-180.

⁴⁸ Québec's First Submission, para. 183.

Québec reiterated its earlier arguments that the Regulation's purpose is the protection of the interests of consumers by providing for accurate and timely information about goods and prevention of unfair trade practices. It therefore fell within Chapter Eight's definition of "legitimate objective".⁴⁹

Québec submitted further that the measure did not operate to impair unduly the access of goods of the Party that met the legitimate objective and, for those goods that did not meet that objective, granting access to margarine coloured like butter would harm its pursuit of the objective.⁵⁰ Since margarine having the same colour as butter would have that effect, it was unnecessary to prove the third part of the test (whether the measure adopted to achieve the legitimate objective has the effect of hindering "unduly" product access). In sum, Québec asserted that it had no choice; it must ban access to margarine having the same colour as butter in order to achieve the legitimate objective it has chosen to attain.⁵¹

With respect to the requirement that the measure cannot be more trade restrictive than necessary in order to achieve the level of consumer protection adopted or maintained, Québec argued that if the Panel found that the measure does restrict trade in margarine, it does not restrict it absolutely but rather only to the extent necessary to ensure that the level of consumer protection is maintained in accordance with Article 804. The measure's proportionality was demonstrated by the fact that the margarine produced in other provinces, in particular, Alberta, is sold in Québec.⁵²

Finally, in Québec's view, the measure did not create a disguised restriction on trade. The measure was transparent and known to producers, grocers and consumers as well as to every government in Canada. Having regard to a decision of the WTO Appellate Body⁵³ interpreting the provision of the GATT from which Article 803(d) appears to be derived, to run afoul of this provision the measure would have to be arbitrary or unjustifiable discrimination. Québec asserted that its measure was perfectly justifiable and in no way arbitrary. It was entirely transparent and concealed nothing.⁵⁴

In the event that the Panel found that Article 404 rather than Article 803 applied, Québec asserted that the measure could be justified under Article 404 for essentially the same reasons as it had previously outlined (recognizing that the definition of legitimate objective applicable to Article 404 is narrower than that contained in Article

⁴⁹ Québec's First Submission, paras. 184-187.

⁵⁰ Québec's First Submission, para. 189.2.

⁵¹ Québec's First Submission, para. 189.3.

⁵² Québec's First Submission, para. 191.2.

⁵³ United States – Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R, 29 April 1996, p. 26.

⁵⁴ Québec's First Submission, paras. 194-201.

810). Québec emphasized that consumer protection is a legitimate objective under the AIT's general definition and that there was ample evidence that margarine having the same colour as butter could be mistaken for butter.⁵⁵

Québec therefore requested the Panel to:

- (a) rule that it does not have jurisdiction because the Regulation regarding the colouring of margarine does not fall within the scope and coverage of Chapter Nine because the notice stipulated in Article 902.3 was given late and without mandate;
- (b) rule that the Regulation does not constitute an obstacle to internal trade and that it does not fail to comply with the Preamble, the Mutually Agreed Principles, the objectives and Articles 401, 402, 403 or 405 of the *Agreement on Internal Trade*;
- (c) rule that the Regulation is a consumer-related measure permissible under Chapter Eight of the *Agreement on Internal Trade*;
- (d) rule that the Regulation is a measure permissible under Article 404 of the *Agreement on Internal Trade*;
- (e) and consequently, dismiss Alberta's complaint;
- (f) dismiss, on the same grounds, the interventions of Manitoba and Saskatchewan.⁵⁶

Alberta filed a rebuttal submission dated April 14, 2005 and Québec filed a reply thereto on April 28, 2005. The Panel will address the relevant points made by the Parties in their rebuttals in its discussion of their submissions below.

5. PANEL FINDINGS

5.1 Introduction to Findings

The Panel will begin by discussing its jurisdiction. Québec has pointed out that Article 100, the "Objective" clause of the *Agreement on Internal Trade*, recognizes a qualified commitment to trade liberalization. Article 100 states that it is the Parties' objective:

... 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

⁵⁵ Québec's First Submission, paras. 204-220 *et seq.*

⁵⁶ Québec's First Submission, Part IV, Conclusion.

trade and mobility within Canada would contribute to the attainment of this goal.
[Emphasis added.]

The AIT does not provide for perfectly free movement of persons, goods, services and investments within Canada or for the establishment of a perfectly open, efficient and stable domestic market. That being said, through its various rights and obligations, the AIT represents an important step towards reducing and eliminating barriers to trade and its terms must be given effect.

In discharging its duty, the Panel has no jurisdiction to determine the *vires* of Québec's measure under the Constitution. Alberta and the Intervenors have not contested Québec's right to maintain the measure as an exercise of the powers allocated to it under the Constitution. Nor could they. Article 300 of the AIT (Reaffirmation of Constitutional Powers and Responsibilities) states:

Nothing in this Agreement alters the legislative or other authority of Parliament or of the provincial legislatures or of the Government of Canada or of the provincial governments or the rights of any of them with respect to the exercise of their legislative or other authorities under the Constitution of Canada.

Indeed, the Supreme Court of Canada recently upheld the constitutionality of Québec's measure in *UL Canada, Inc. v. Attorney General of Québec, (Federation des Productures de Lait du Québec)*.⁵⁷

What the Panel must do, by agreement of the Parties, is established in its terms of reference, namely:

... to examine whether the actual ... measure ... is or would be inconsistent with this Agreement.⁵⁸

This is further confirmed by Article 1707, which requires a panel report to contain findings of fact, “a determination, with reasons, as to whether the measure in question is or would be inconsistent with this Agreement”, and “a determination, with reasons, as to whether the measure has impaired or would impair internal trade and has caused or would cause injury”.⁵⁹

In entering into the AIT, each Party has undertaken obligations and obtained corresponding rights. Each has exercised its constitutional powers to agree to certain obligations in exchange for the benefits that flow from liberalized trade within Canada. Each has recognized that the AIT “represents a reciprocally and mutually agreed balance of rights and obligations” and has agreed that enhancing trade within Canada

⁵⁷ *UL Canada, Inc. v. Attorney General of Quebec et al.*, 2005 SCC 10.

⁵⁸ *Agreement on Internal Trade*, Article 1705.4.

⁵⁹ *Agreement on Internal Trade*, Article 1707.2 and Annex 1716.1, Rule 43.

will contribute to the goal of establishing an “open, efficient and stable domestic market”.⁶⁰

Québec has submitted that the Panel should be guided by the rules of interpretation customarily used to interpret the international trade agreements from which many provisions of the AIT are derived.⁶¹ Other AIT panels have referred to such rules and to the decisions of WTO panels and the Appellate Body. The Panel will do likewise.

5.2 Does the measure at issue fall within the scope and coverage of Chapter Nine?

This is an important threshold question. While it accepts that the Panel has been duly established pursuant to Chapter Seventeen,⁶² Québec says that the Panel lacks the requisite jurisdiction to decide the dispute because the measure at issue was not notified to the Committee on Internal Trade in a timely fashion as required by Article 902.3.⁶³

Article 901, the “Scope and Coverage” provision of Chapter Nine, states that the chapter applies to “measures adopted or maintained by a Party relating to internal trade in agricultural and food goods”. The measure at issue is plainly one relating to internal trade in food goods.

A sub-species of such measures are “technical barriers with policy implications”. These are addressed in Article 902.3, which provides as follows:

3. Measures involving technical barriers with policy implications shall be included in the scope and coverage of this Chapter effective September 1, 1997. The Federal-Provincial Trade Policy Committee (the “Trade Policy Committee”) *shall, on or before September 1, 1997, give written notice to the Committee on Internal Trade of such measures.* [Emphasis added.]

It is common ground that the notice to which the second sentence of paragraph 3 refers, was given, not on or before September 1, 1997, but rather one month later on October 1, 1997.

Québec asserts the notification’s lateness has preclusive effect, in that its lack of timeliness prevents the Panel from exercising jurisdiction over the dispute. In its view, the use of the mandatory word “shall” required the Committee to be given written notice of such measures by September 1, 1997 and any notice given thereafter is of no legal effect and consequently a dispute settlement panel cannot determine the AIT-

⁶⁰ *Agreement on Internal Trade*, Article 101.2 and Article 100.

⁶¹ Québec’s First Submission, paras. 8-11.

⁶² Transcript, pp. 116, 123.

⁶³ Transcript, pp. 116–117.

consistency of any technical barrier with policy implications that was notified out of time.⁶⁴

5.2.1 The Letter's Treatment by Other Panels

Québec recognized that by the time of the hearing, the October 1, 1997 letter had been accepted as valid in three previous AIT panel proceedings convened to examine alleged non-compliance with Chapter Nine.⁶⁵

Québec responded that it was not a party to those proceedings and was under no obligation to raise its objection in any of those proceedings, nor in the consultations leading up to the present Panel's establishment. It asserted that it has raised its objection in a timely fashion by making it in the first written pleading filed in this proceeding.⁶⁶

Québec urged the Panel to consider its objection as if the other panels have not passed on the matter and asserted that previous panel reports are not binding on this Panel under the AIT scheme. It argued further that where a jurisdictional objection that may be completely dispositive of the complaint is raised, the objecting party is entitled to have its objection considered fully.⁶⁷

5.2.2 The Panel's Approach to the Objection

The Panel agrees that Québec is entitled to raise such objections as it sees fit and that each should be considered on its merits without deferring to the decisions of prior panels which are not binding in the sense of *stare decisis* (leaving aside how inherently persuasive they may be).

The absence of *stare decisis* in AIT dispute settlement does not mean however that panels should not examine how the same issues have been treated by other panels. There is considerable value in jurisprudential consistency because it contributes to greater common understanding of the AIT. Moreover, as Alberta noted, a finding by this Panel that the October 1, 1997 letter is of no legal effect could raise questions about the

⁶⁴ Transcript, p. 117–118. When Québec filed its first Submission, two panels had considered the letter. The findings of those panels can be found in *Report of the Article 1704 Panel Concerning the Dispute Between Nova Scotia and Prince Edward Island Regarding Amendments to The Dairy Industry Act Regulations* and *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*. A third report, *Report of the Article 1704 Panel Concerning the Dispute Between Alberta / British Columbia and Ontario Regarding Ontario's Measures Governing Dairy Analogs and Dairy Blends*, decided in November 2004, agreed with the finding of the first panel and accepted the letter's validity.

⁶⁵ Transcript, p. 120.

⁶⁶ Transcript, p. 123.

⁶⁷ Transcript, pp. 120–122.

validity of the three reports where panels acted on the basis that the letter, although late, was still operative.⁶⁸ For these reasons, where three other panels have accepted the letter as a valid notification, Alberta and the Intervenors argue that it should be treated likewise by this Panel.⁶⁹

Bearing in mind the desirability of consistency yet recognizing that prior panel reports are not binding, the Panel will consider whether Québec's objection is well-founded.

5.2.3 The Record Evidence

The record evidence shows that provincial margarine colouring standards have been considered to be a barrier to interprovincial trade both prior to and after the AIT's entry into force:

- By transmittal letter dated May 24, 1993, the Federal-Provincial Agriculture Trade Policy Committee (hereinafter the "Trade Policy Committee") received a memorandum on "policy barriers", including restrictions on the use of colouring in margarine.⁷⁰
- By correspondence dated June 28, 1993, the Federal Provincial Agri-Food Inspection Committee (hereinafter the "Inspection Committee") identified provincial margarine colouring standards as one of eight barriers to interprovincial trade that were being referred to the Trade Policy Committee for resolution.⁷¹
- In a Record of Decision on "Interprovincial Trade Barriers" by the Federal-Provincial and Territorial Ministers of Agriculture meeting, dated July 4-6, 1994, Ministers agreed to "confirm their agreement to bring technical barriers with policy implications under the scope and coverage of the Agriculture and Food Products Chapter of the Internal Trade Agreement within the time frames established." To that end, officials were directed "to complete the economic analysis to study the impact of harmonizing margarine colouring regulations, to proceed with industry consultations and to complete a work plan to harmonize margarine colouring regulations by September 1, 1997." This ministerial decision was taken some twelve

⁶⁸ Alberta's Rebuttal Submission, para. 14., Transcript, p. 82.

⁶⁹ Transcript, pp. 14-15, 80-81.

⁷⁰ Alberta's Rebuttal Submission, Appendix 2.

⁷¹ Memorandum from the Executive Secretary of the Federal Provincial Agri-Food Inspection Committee, June 28, 1993, Alberta's First Submission, Appendix 6. Other technical barriers that were notified and have since been the subject of AIT panel proceedings were "fluid milk production and distribution" and "imitation dairy products".

days before the AIT's signing on July 18, 1994. (The AIT entered into force on July 1, 1995.)⁷²

- In a memorandum prepared for a Federal-Provincial Assistant Deputy Ministers Meeting on November 10, 1995, (after the AIT's entry into force) "technical barriers with policy implications" were discussed and it was noted that "[t]hese barriers will fall under the full scope and coverage of the ITA on September 1, 1997, *i.e.* the dispute settlement provisions of the Agreement come into effect." The memorandum went on to note that among the specific barriers being addressed by the Trade Policy Committee were "colouring requirements for margarine" and noted further that Québec was the only province with such requirements and its "regulations are under review..."⁷³
- In a letter to Mr. Lawrence Strong, President of Unilever Canada Inc. (a margarine manufacturer), dated June 20, 1996, the Office of the Premier of Québec noted that "[a]s you point out, *the Agreement on Internal Trade provides for the elimination of barriers to interprovincial trade in margarine by September 1, 1997.*"⁷⁴ It noted further that Québec was a signatory of that AIT, that it was "in favour of maintaining the Canadian economic space that allows companies such as yours to sell anywhere in Canada", and assured him "that *the removal of barriers to interprovincial trade in margarine remains on our agenda.*"⁷⁵ [Emphasis added.]
- On January 8, 1997, Québec published in the Québec Gazette a notice of a draft regulation, entitled the "Regulation to amend the Regulation respecting dairy products substitutes". The second paragraph of the notice provided:

"The purpose of the draft regulation is, in accordance with the *Agreement on Internal Trade*, to harmonize the Québec regulatory provisions respecting the colouring of margarine with the federal and provincial regulations. *For that purpose, the draft regulation proposes to remove from the Regulation respecting dairy products substitutes (R.R.Q., 1981, c, P-30, r. 15) the standard for the colour of the product.*

The economic impact of the draft regulation will be positive for Québec margarine manufacturers involved in interprovincial trade, who in the future will no longer have to support stocks of margarine of different colours.

⁷² Alberta's Rebuttal Submission, Appendix 3.

⁷³ Alberta's Rebuttal Submission, Appendix 4.

⁷⁴ Alberta's First Submission, Appendix 8.

⁷⁵ *Id.*

In addition, a study made in 1994 on the impact of a decrease in butter consumption caused by the abandonment of the regulatory provisions in both Québec and Ontario indicates, in particular, that consumers are less and less concerned by the colour of margarine. Price and health constitute the two major parameters in deciding whether to purchase butter or margarine. The study also noted that it is difficult to identify and measure the impact of colour.⁷⁶ [Emphasis added.]

- The text of the draft regulation stated in relevant part that: “The Regulation respecting dairy products substitutes ... *is further amended by deleting subparagraph c of paragraph 1 of section 40*.”⁷⁷ [Emphasis added.]
- Finally, by letter dated October 1, 1997, the co-chairs of the Trade Policy Committee sent the letter to which Québec objects to the Committee on Internal Trade.⁷⁸

In the Panel’s view, the two most important documents in the above list are the letter from the Office of the Premier and the draft Regulation, as both emanated from the Respondent. Both documents acknowledged that coloured margarine is covered by the AIT and both accepted that Québec had an obligation to act in accordance with the AIT by bringing its measure into compliance therewith. Finally, the amendment to the Regulation proposed to eliminate precisely the subparagraph that is at issue in this proceeding. In the Panel’s view, the documents recognized the existence of a legal obligation to address the issue under the AIT even before the September 1, 1997 letter was to be sent to the Committee on Internal Trade. The jurisdictional objection now being advanced is at odds with Québec’s prior conduct and acknowledgement. This is in itself sufficient to dispose of Québec’s objection. However, the Panel wishes to make certain additional observations about the use of deadlines in agreements such as the AIT and their relevance to dispute settlement.

5.2.4 Other AIT Panel Proceedings

The experience under another chapter of the *Agreement on Internal Trade* is similar to what occurred in this case. In the *Cost of Credit* case, the Panel was requested to review Canada’s compliance with certain obligations relating to the reconciliation of consumer-related measures and standards. Annex 807.1, paras. 7-10, stated that the “Parties *shall* adopt harmonized legislation respecting the disclosure of cost of credit...” and stipulated that: “The Parties *shall complete negotiations* on the harmonization of cost of credit disclosure *no later than January 1, 1996, and shall adopt* such harmonized

⁷⁶ Québec Gazette, January 8, 1997, Volume 129, No. 1, Part 2, pp. 132-133, Alberta’s First Submission, Appendix 9.

⁷⁷ *Id.*

⁷⁸ Alberta’s First Submission, Appendix 7. Alberta also filed annual reports prepared by the Internal Trade Secretariat and the office of Consumer Affairs, Industry Canada, in which coloured margarine was described as a technical barrier with policy implications brought into the scope and coverage of Chapter Nine. Alberta’s Reply Submission, Appendices 5 and 9.

legislation *no later than January 1, 1997*. [Emphasis added.] Neither deadline was met, but the negotiations continued and some of the participants adopted legislation that purported to implement their commitments.

A dispute over Canada's compliance with its obligations subsequently arose between Alberta and the federal government. The fact that the negotiations were not completed by the stipulated deadline and that harmonized legislation was not adopted by all Parties by January 1, 1997, notwithstanding Annex 807.1(10)'s use of the same mandatory term "shall" as used in Article 902, was not seen by any of the disputing parties or Intervenors as having preclusive effect in terms of the panel's jurisdiction to determine whether Canada had duly complied with Annex 807.1.

Québec appeared as an intervenor in that case, noting that it had a substantial interest in the case. Like the complainant and other Intervenors who complained of Canada's implementation of the cost of credit harmonized template, Québec will benefit from that panel's having exercised jurisdiction over the complaint, issuing a report, and from Canada's bringing itself into compliance with the AIT.⁷⁹

The Panel is also mindful of the fact that the three other cases concerning Chapter Nine have accepted the October 1, 1997 letter as valid. The Panel considers that the approach taken by those panels and parties is consistent with a general view that the purpose of deadlines in the AIT was to galvanize action by the Parties, not to deprive dispute settlement panels of jurisdiction in the event that a deadline was missed.

5.2.5 Conclusions on the Jurisdictional Objection

This is not a case where officials acted without authorization and designated technical barriers having policy implications in the absence of prior senior official and ministerial involvement. The Panel is satisfied that all Parties, including Québec, as shown by its own actions, at all material times recognized that coloured margarine was a technical barrier with policy implications covered by the AIT. The best evidence of that recognition is Québec's own explanation, quoted above, as to why it was introducing a regulation to eliminate the measure. The fact that the regulation was not promulgated is of no import; the dispositive fact is that Québec itself saw the linkage between the AIT's technical barriers with policy implications process and the removal of its own measure.

In the Panel's view, the AIT negotiators' decision to stipulate deadlines was intended to provide the Parties with sufficient time to complete the work contemplated by the AIT, while at the same time imposing some discipline on the Parties to induce them to attain progress. In some instances, such as in the cost of credit negotiations, the deadlines

⁷⁹ *Report of the Article 1704 Panel Concerning the Dispute Between Alberta and Canada Regarding the Federal Bank Act – Cost of Borrowing (Banks) Regulations.*

were missed by years, not thirty days as in this case, yet the failure to meet the deadline was not seen to have preclusive effect.⁸⁰

Viewed in light of previous ministerial and senior official work and Québec's own acknowledgements, the co-chairmen's notification of coloured margarine and other measures one month after the date stipulated in Article 902.3 is of no material significance and cannot be given the preclusive effect asserted by Québec.

Notwithstanding counsel for Québec's very able written and oral submissions, the Panel concludes that Québec's measure is a technical barrier with policy implications duly notified to the Committee on Internal Trade, albeit one month after the date stipulated in the AIT, and that it falls within the scope and coverage of Chapter Nine.

Québec's measure therefore must be considered in light of the general rules contained in Chapter Four.

5.3 Chapter Nine (Agriculture and Food Goods)

At the outset, the Panel notes that in addition to seeking a determination of breach of Articles 401, 402, 403 and 405, Alberta asks for a determination of inconsistency with Articles 100 and 101. In the Panel's view, these articles do not stand as independent obligations but rather are contextual and intended to assist a panel in interpreting the substantive obligations that follow them. They are intended to provide assistance to a panel that may be confronted with conflicting interpretations so that it can have regard to the motivating principles of the Agreement in resolving such conflicts. Accordingly, the Panel will address the substantive obligations alleged to be breached in this case. In addition, although Alberta asserted that Article 405 was also violated, it did not press the point, preferring instead to focus in particular on Article 401 (and on Articles 402 and 403 to a lesser extent). Given the structure of Chapter Nine, the Panel considers that the most relevant substantive provisions are Articles 401-403 and it will therefore focus on the arguments advanced in relation thereto.

Turning to the merits, the Panel wishes to address an argument advanced by Saskatchewan at the outset because if accepted, it would substantially limit the scope of the Panel's inquiry.

Saskatchewan contended that since Québec's measure has been designated as a technical barrier with policy implications, it was essentially a forgone conclusion that the measure violates Articles 401 and 403. In its written submission, Saskatchewan noted that "inconsistent measures under chapter 9 are determined prescriptively [i.e., by the

⁸⁰ Annex 807.1 stated that the "Parties *shall* complete negotiations ... *no later than* January 1, 1996," and "*shall adopt* such harmonized legislation *no later than* January 1, 1997." The negotiations were completed on June 1, 1998, seventeen months after the stipulated deadline and at the time of the panel hearing on May 9, 2005 only two Parties had actually sought to implement harmonized legislation that was supposed to have been enacted by January 1, 1997.

Federal-Provincial Agri-Food Inspection Committee], not descriptively”.⁸¹ Saskatchewan asserted further:

... a technical barrier to trade is by definition an obstacle to internal trade within the meaning of article 403. An interpretation short of such conclusion would make meaningless the exercise of the relevant committees under chapter 9 of identifying technical barriers. Québec has therefore been in breach of the obligation to remove this technical barrier to trade since September 1, 1997.⁸²

Accordingly, in Saskatchewan’s view, the identification of the measure as a technical barrier to trade “is at least a *prima facie* indication of discriminatory treatment”.⁸³ At the hearing, counsel elaborated on this argument asserting:

...Chapter Nine is a descriptive mechanism rather than a prescriptive mechanism...the fact that we have identified measures by identification rather than definition means that it is automatically an obstacle to trade.⁸⁴

There is some force in this argument. A technical *barrier* must by definition be somewhat restrictive or obstructionist. The dictionary definition of barrier confirms that it is generally synonymous with obstacle and indeed the French version of the AIT uses the word “obstacle” in Article 902.3 where the English version uses the word “barrier”. The Nouveau Petit Robert defines obstacle as follows:

1 Assemblage de pièces de bois, de métal qui ferme un passage, sert de clôture. 2 Porte qui fermait l’entrée d’une ville, d’un château. 3 Obstacle naturel qui s’oppose au passage, a l’accès. 4 Ce qui sépare, fait obstacle 5 Limite à ne pas franchir.⁸⁵

The Oxford Concise English Dictionary essentially treats barrier as synonymous with obstacle:

1 a fence or other obstacle that bars advance for access. 2 an obstacle or circumstance that keeps people or things apart, or prevents communication...⁸⁶

However, Saskatchewan's argument can be pressed too far. The drafters brought technical barriers with policy implications into Chapter Nine’s scope and coverage but did not resolve that they *ipso facto* offended Articles 401 and 403 (which, had the negotiators done so, would have conclusively proven Saskatchewan’s argument that

⁸¹ Saskatchewan’s Submission, para. 22.

⁸² Saskatchewan’s Submission, para. 30.

⁸³ Saskatchewan’s Submission, para. 34.

⁸⁴ Transcript, pp. 85-86.

⁸⁵ Nouveau Petit Robert: dictionnaire alphabétique et analogique de la langue française, nouvelle édition du petit Robert 2004 de Paul Robert et al, Paris : dictionnaires Le Robert 2004.

⁸⁶ Concise Oxford English Dictionary, Edited by Soanes, Catherine and Stevenson, Angus, Eleventh Edition, Oxford, Oxford University Press, 2004.

once designated, a technical barrier having policy indications must by definition amount to a breach of Article 401 and 403). Instead, the drafters simply incorporated the general rules of Chapter Four into Chapter Nine and put the onus on the complaining Party to demonstrate that a measure listed by virtue of Article 902.3 does in fact contravene Articles 401 and 403.

The Panel agrees with Saskatchewan that the fact of designation as a technical barrier shows that the Parties considered that there is some degree of obstruction or trade restriction, but such a designation does not, in our view, relieve the complaining party of the obligation of demonstrating a contravention of Chapter Four.

5.3.1 The Structure of Chapter Nine and its Relationship to Chapter Eight

Chapter Nine's title, Agriculture and Food Goods, conveys that it is intended to apply to a particular sector of trade. It is the first of six such sectoral chapters in the AIT.

Two important provisions establish how Chapter Nine relates to the rest of the *Agreement on Internal Trade* and to Chapter Eight, the chapter on which Québec has emphasized in arguing that it, rather than Chapter Nine, governs the measure.

Québec has asserted that since Chapter Eight is a horizontal chapter, according to Annex 1813 (Rules of Interpretation), it applies “both to matters within its scope and, where applicable, to matters that fall within the scope of a vertical chapter.”⁸⁷ The key phrase to note, in the Panel's view, is “where applicable”; there is no doubt that a horizontal chapter does apply to a vertical chapter where applicable and that Chapter Nine is a vertical chapter. *Prima facie* Chapter Eight does apply to Chapter Nine. However, Rule 4 of Annex 1813 states that: “In the event of an inconsistency between a vertical chapter and a horizontal chapter, the vertical chapter prevails to the extent of the inconsistency, except as otherwise provided.”⁸⁸

As shall be seen, the Panel considers that there is an inconsistency between Chapter Nine and Chapter Eight and that Chapter Nine accordingly prevails.

Article 900 (Application of General Rules), states:

For greater certainty, Chapter Four (General Rules) applies to this Chapter, except as otherwise provided in this Chapter.

This requires the Panel to determine which of the relevant Chapter Four rules apply to a measure falling within Chapter Nine's scope and coverage. In addition, Article 901 (Relationship to Other Chapters), states:

⁸⁷ Annex 1813, Rule 3.

⁸⁸ Annex 1813, Rule 4.

In the event of an inconsistency between a provision of this Chapter and any other provision of this Agreement, this Chapter prevails to the extent of the inconsistency.

Thus, if there is an inconsistency between any of the Chapter Nine provisions (including those of Chapter Four that operate by way of their inclusion under Article 900) and the provisions of another chapter, the Chapter Nine provisions govern.

The interaction of Articles 900 and 901 leads to the following conclusions as to the AIT's structure:

- the General Rules of Chapter Four are incorporated into Chapter Nine, “except as otherwise provided” by the latter;
- in particular, the relevant substantive obligations of Chapter Four (Articles 401, Reciprocal Non Discrimination, 402, Right of Entry and Exit, and 403, No Obstacles), apply as if they were expressed separately as Chapter Nine obligations;
- Chapter Four's exceptions clause, Article 404, Legitimate Objectives, also applies. Articles 401, 402 and 403 themselves expressly state that they are subject to Article 404, so when they are incorporated into Chapter Nine so too by reference is Article 404, unless Chapter Nine “otherwise provides” a chapter-specific “Legitimate Objectives” clause. Article 404 is one of the Chapter Four provisions that applies to it. Nothing in Chapter Nine expressly refers to Chapter Eight such that it would displace the texts of Articles 401, 402 and 403 and their respective references to Article 404;
- since Article 404 applies to Chapter Nine, Article 901 requires that that article (not Article 803, as Québec contends) applies to measures that fall within the chapter's scope and coverage. Article 803 is inconsistent with Article 404 and by operation of Article 901 must give way to Article 404. The narrower definition of “legitimate objective” set forth in Article 200 and employed in Article 404 is thus to be applied rather than the more expansive Article 810 definition.
- As a matter of context, this interpretation is supported not only by the text of the specific Chapter Four obligations that are incorporated into Chapter Nine, but also by the fact that the drafters were careful to state that Article 404 did *not* apply to Chapter Eight⁸⁹, but did not similarly state that Article 404 did not apply to Chapter Nine. In this respect, an interpreter of the two chapters cannot fail to be struck by the differences in the structure of the opening provisions of Chapters Eight and Nine. Article 800 *expressly incorporates* Articles 400, 402, 403, 405, and 406 while *expressly excluding* Article 404; in contrast, Article 900 simply states that: “For greater certainty, Chapter Four (General Rules) applies to this chapter,

⁸⁹

See Article 800.1.

except as otherwise provided in this Chapter.” The implication to be drawn is that *all* of Chapter Four – including Article 404 - (except as otherwise provided in Chapter Nine) is incorporated; otherwise, the drafters would have used language similar to that of Article 800. Since Chapter Nine does not “otherwise provide” that Article 404 is to be displaced by Article 803, it has the same effect in Chapter Nine as the other Chapter Four obligations.

The Panel will now turn to Alberta’s claims in respect of Articles 401, 402, and 403.

5.4 Article 401

Article 401 states in relevant part:

Subject to Article 404, each Party shall accord to goods of the other Party treatment no less favourable than the best treatment it accords to:

- (a) its own like, directly competitive or substitutable goods...

This particular formulation of the so-called national treatment rule warrants attention. It is evident that the drafters intended to provide for an expansive “comparator” when it came to determining whether or not goods of another Party were accorded no less favourable treatment. In contrast to the formulation of GATT Article III, which deals with the treatment accorded to imported products in comparison to “like domestic products”⁹⁰, Article 401 clarifies that the class of comparators includes not only like goods but “directly competitive or substitutable goods”.⁹¹

The comparison of the treatment accorded to “goods of any other Party” is thus not only restricted to the treatment accorded by the Party to its own “like goods”, but also the treatment that it accords to the two other classes of goods. This is confirmed by the fact that the opening sentence of Article 401 requires each Party to accord “treatment no less favourable than the *best* treatment it accords to” the three classes of goods.

The parties disagreed as to what was the appropriate good from which to compare treatment. Québec argued that the comparator is margarine produced in the province. Alberta asserted that it is butter produced in the province.

⁹⁰ See, for example, GATT Article III:2 and 4, both of which use “like domestic products” as the basis for comparison.

⁹¹ Alberta's First Submission, para. 27. In this respect, it appears that the drafters of the AIT were influenced by *NAFTA's* National Treatment obligation insofar as it applies to a state or province. Article 301.2 of *NAFTA* states: “The provisions of paragraph 1 regarding national treatment shall mean, with respect to a state or province, treatment no less favorable than the most favorable treatment accorded by such state or province to the like, directly competitive or substitutable goods, as the case may be, of the Party of which informs a part.” [Emphasis added.]

In the Panel's view, the appropriate comparator is butter. It is butter that Québec has sought to prevent being substituted by margarine having the same colour as butter and throughout the Regulation margarine is treated as a substitute for butter.⁹² The measure must be evaluated in relation to how it treats any directly competitive or substitutable good such as margarine produced by another Party.

In the Panel's view, by mandating by law that margarine cannot be coloured as the producer sees fit, yet permitting butter producers to leave butter uncoloured or to colour it as they see fit, Québec has accorded less favourable treatment to a directly competitive or substitutable good, contrary to Article 401.⁹³

The Panel therefore finds that Québec's measure contravenes Article 401.

Although its First Submission devotes the bulk of its argument to Article 401, Alberta also identifies two other Chapter Four obligations that it says are also contravened by the measure.

5.5 Article 402

Article 402 (Right of Entry and Exit) states:

Subject to Article 404, no Party shall adopt or maintain any measure that restricts or prevents the movement of... goods... across provincial boundaries.

In Alberta's view, the measure effectively does not allow the export into and sale of coloured margarine in Québec. Accordingly it prevents the movement of coloured margarine across provincial boundaries into Québec.⁹⁴

In the Panel's view, the measure is more appropriately dealt with under Article 401 and potentially Article 403. Bearing in mind that different provisions of an agreement should be given different meanings, it is superfluous to treat Article 402 as having the same meaning as Article 403. In this respect, the Panel agrees with Québec that Article 402 appears to be derived from GATT Article V which is aimed at freedom of transit and it should be given a different meaning and effect than Article 401 (akin to GATT Articles I and III) and Article 403 (akin to GATT Article XI).

Québec does not purport to restrict or prevent the movement of goods across its boundaries such that shipments of coloured margarine from Western or Central Canada

⁹² Alberta's First Submission, para. 27.

⁹³ The Panel agrees with Alberta that: "By imposing a colouring standard on margarine that the substitute good—butter—does not have to meet, Québec fails to offer reciprocal non-discriminatory treatment to margarine and contravenes Article 401.1 (Reciprocal Non-Discrimination) of the AIT." Alberta's First Submission, para. 27.

⁹⁴ Alberta's First Submission, para. 29.

are constrained from being shipped to the Maritime provinces. Indeed, section 55 of the *Food Products Act* expressly provides the opposite. While it can be said that the measure restricts or prevents the movement of coloured margarine across the Québec provincial boundary where such margarine is destined for consumption within Québec, this is a denial of national treatment or potentially an obstacle to trade, not a measure which is caught by Article 402.

The Panel finds no breach of Article 402.

5.6 Article 403

Article 403 (No Obstacles) states:

Subject to Article 404, each Party shall ensure that any measure it adopts or maintains does not operate to create an obstacle to internal trade.

“Obstacle” is not defined in Article 200 or in Article 407, the Definitions article for Chapter Four. The Oxford Concise Dictionary defines obstacle as:

n. A person or thing that obstructs progress. [Middle English via Old French from Latin *obstaculum*, from *obstare* ‘impede’...

The Panel has already referred to the Nouveau Petit Robert definition of obstacle.

Alberta contends that the measure’s effect is to block the sale in Québec of coloured margarine manufactured in Alberta and this amounts to an obstacle to internal trade.⁹⁵

In the Panel’s view, applying the ordinary dictionary definition of the term, an obstacle to trade is created when a measure impedes trade. It need not restrict or prohibit it entirely; an obstacle is created simply when trade is impeded. Alberta submitted in argument and substantiated the point with a letter from an Alberta-based manufacturer of margarine that has produced uncoloured margarine for sale in Québec, that additional costs of production are incurred that affect the profitability of the sale of margarine destined for the Québec market.

Shortly before the hearing, with Québec’s consent, Alberta filed a letter from Canbra Foods, an Alberta-based margarine producer, which discussed the additional costs incurred in separately producing margarine for the Québec market:

“In order to comply with Quebec margarine regulation, Canbra was required to do the following:

Maintain separate runs of the facility equipment to process the margarine. This resulted in increased labour cost to clean the system of any residue of yellow coloured product and to formulate new uncoloured margarine. The cleaning process also results in the

⁹⁵ Alberta’s First Submission, para. 30.

waste of product that resides within the tanks, pipes and equipment to produce the product that must be flush between runs of different products.

Maintain separate inventories of coloured and uncoloured margarine, which required specific inventory tracking, storage and administrative processes to account for the unique uncoloured margarine. Having separate inventories requires additional working capital and therefore increases the overall cost of the product. It also increases the risk of increase product write-offs and distribution errors.

The compliance costs associated with the above were approximately \$35,000 annually, based on costs incurred (down-time in equipment in between runs, changes required to inventory storage and management, extra time required by personnel in managing inventory, working capital, product loss, etc.). Given our sales volumes this was an increase in cost ranging from \$1.05 to \$1.75 per case, or 4% to 7%, over the years we marketed product into Québec. These are cost [sic] that directly reduced product margins and company profit.⁹⁶

Canbra's letter supports the proposition that if a producer has to engage in a separate production of different coloured margarine when its normal production is of butter-like hued margarine, it will incur additional costs in separating the two lines of production. Québec filed certain confidential information relating to the respective market shares held by margarine and butter in Québec.⁹⁷ Both parties referred to consumption statistics.⁹⁸ Québec's point was that margarine has achieved a substantial share of the Québec spreads market and that in some years, consumption of margarine has been greater in Québec than in neighbouring Ontario.⁹⁹

In the Panel's view, the evidence of market share does not rebut the allegation that an obstacle has been created by the measure. On well-established GATT and WTO jurisprudence that is helpful in interpreting the AIT provisions derived from those agreements, the purpose of rules such as Articles 401 and 403 is to preserve competitive opportunities.¹⁰⁰ So long as a measure can be seen to have impeded or restricted competitive opportunities, it will offend such rules and it is not necessary for the complainant to adduce the detailed economic analysis in support of its complaint.

The Panel finds that the measure operates to create an obstacle to internal trade contrary to Article 403.

⁹⁶ Letter from Canbra Foods to Mr. Shawn Robbins, dated May 5, 2005.

⁹⁷ Confidential market share data filed by Québec on April 26, 2005.

⁹⁸ Alberta's First Submission, Appendix 11, Québec's First Submission, Appendix 10.

⁹⁹ Québec's First Submission, paras. 15-16, 19.

¹⁰⁰ *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, Report of the Appellate Body (November 10, 1996) paras. 16-17.

5.7 Article 404

The fact that a measure may contravene Article 401 or Article 403 is not the end of the matter. Both obligations are expressly subject to Article 404 which permits an otherwise inconsistent measure to be maintained under the AIT where it can be demonstrated that the measure meets each of four related tests.

Where it is established that a measure is inconsistent with Article 401, 402 or 403, that measure is still permissible under this Agreement where it can be demonstrated that:

- (a) the purpose of the measure is to achieve a legitimate objective;
- (b) the measure does not operate to impair unduly the access of ...goods... of a Party that meet that legitimate objective;
- (c) the measure is not more trade restrictive than necessary to achieve that legitimate objective; and
- (d) the measure does not create a disguised restriction on trade.

Once again, in accordance with well-established WTO practice, where a Party seeks to justify an otherwise inconsistent measure under an exceptions clause, the burden of proving that the measure meets the clause's requirements rests upon that Party.¹⁰¹ Alberta contended and Québec did not disagree that the burden is Québec's to discharge.¹⁰² In addition, for a measure to be permitted under Article 404, *each* of the four tests must be met. (This is made clear by the inclusion of the word "and" after subparagraph (c).)

The AIT's drafters intended that each Party would retain a substantial measure of discretion to pursue legitimate objectives as it alone sought to define them and that each Party could choose to set standards differently from the others in accordance with its own conceptions of public policy and necessity. Diversity of approach in setting standards is an accepted feature of international trade regulation and domestic trade regulation under the AIT. However, the AIT does not give each Party *carte blanche*.

The AIT's drafters plainly intended to vest dispute settlement panels with the jurisdiction to determine whether a measure that has as its purpose the pursuit of a legitimate objective also meets the additional requirements set forth in paragraphs (b) to (d). A Panel must be satisfied that the measure's purpose is to achieve a legitimate objective. While satisfying such a test is necessary, it is not sufficient to defend the measure. Moreover, the Article 200 definition of "legitimate objective" expressly states that the

¹⁰¹ Korea – Various Measures on Beef, WT/DS161/AB/R, WT/DS169/AB/R, Report of the Appellate Body (January 10, 2001) para. 157.

¹⁰² Alberta's First Submission, para. 33.

term “does not include protection of the production of the Party or, in the case of the Federal Government, favouring the production of a Province”.

Québec described its measure as being intended to achieve the legitimate objective of consumer protection. It pointed to extensive evidence where consumers in the past have been misled by the fraudulent misrepresentation of margarine as butter. Québec noted that other provinces, including Alberta, have had margarine colouring regulations in their own statute books in the past. As Quebec noted in its presentation:

...Quebec is the only place where we are maintaining this regulation but this regulation is not unique. There was legislation, very similar, which was adopted by the other parties in this Accord, including Alberta, the complaining party, in addition to other measures which allow to distinguish the butter substitute to butter.¹⁰³

The Panel agrees with Québec that consumer protection is of fundamental importance and is recognized as such by the AIT. Ensuring that consumers are not misled by unscrupulous traders is a concern for each Party to the AIT.

Alberta contended that the purpose of the measure is to protect Québec dairy production.¹⁰⁴ There is some evidence that the measure’s predecessors were intended to have some protective effect for the dairy industry. For example, in Québec’s regulations concerning margarine colouring (or its outright prohibition from sale), there is some older evidence that the National Assembly was concerned with ensuring the continuance of a stable dairy industry.¹⁰⁵ Order in Council No. 235, dated March 2, 1955, noted:

Whereas farming is one of the essential bases of the national and economic prosperity of the Province;

Whereas the stability of the dairy industry is intimately linked to the welfare, to the prosperity of the farmers and to the entire population...

Whereas, the addition of colouring to certain food products is of a nature to mislead consumers by making of these products an imitation of butter;

...

That be designated and considered as a substitute for butter in the sense and for the purpose of the Act to protect the dairy industry in the Province of Quebec ... any product,

¹⁰³ Transcript, p. 106.

¹⁰⁴ In its first submission, Alberta asserted that the “purpose of the Measure is protection of dairy products produced in Québec from competition”. First Submission, para. 35. Saskatchewan also disputed that there was any legitimate objective to the measure, Submission, para. 40, as did Manitoba’s Submission, paras. 32-33.

¹⁰⁵ See the recitals to the March 17, 1949 Order in Council No. 291 prohibiting the manufacture, sale or, placing on sale, of margarine. Québec’s Appendix 25.

under whatsoever name it may be designated, which, by colouring or by an artificial preparation, imitates the colour and appearance of butter;...¹⁰⁶

In some cases, particularly where the other requirements of Article 404 appear to be met, it will be necessary for a panel to scrutinize a measure to determine whether its main or even its predominant purpose is to achieve a legitimate objective. Article 200, which defines “legitimate objective” to include consumer protection, goes on to state that “[e]xcept as otherwise provided, ‘legitimate objective’ does not include protection of the production of a Party...” This qualification’s application to all seven of the listed legitimate objectives indicates that a panel should scrutinize a measure which is claimed to achieve a legitimate objective to ensure that it is not intended to protect the production of the Party.

Measures often (indeed in many cases) have more than one purpose. Precisely how a panel must distinguish between multiple purposes of a measure and weigh such purposes in order to conclude whether the measure is intended to achieve a legitimate objective, is a matter which can be left to another day.

The Panel finds it unnecessary to engage in such an exercise on the facts of this case because it is satisfied that Québec's measure plainly does not meet two of the four tests set out in Article 404. In the Panel's view, the measure does “operate to impair unduly the access of... goods... of a Party that meet that legitimate objective” and the measure at issue is “more trade restrictive than necessary to achieve that legitimate objective”. Québec argued vigorously that it is necessary to maintain the measure to ensure that consumers were not misled by margarine which appeared to be butter. It contended that in the absence of labelling, a consumer can rely only on the difference in colour that results from the measure's application.

Alberta and the Intervenors, Manitoba and Saskatchewan, contended firstly, that labelling of margarine in accordance with Québec's regulations will disclose that the contents of a container of a spread is indeed margarine. In the Panel's view, this will be so when the consumer either purchases the spread in a store or examines an individual service packet in a restaurant or other place where the product is offered. Québec's regulation provides that the butter substitute must bear the word “margarine” in legible and prominent letters, and in the retail trade, margarine must be delivered in an opaque package.¹⁰⁷ Moreover, Article 38 provides that when displayed for sale in grocery stores, dairy substitutes must be placed far enough away from any dairy product to prevent any mistake or confusion on the part of the buyer.¹⁰⁸ Where the product is

¹⁰⁶ Québec's Appendix 26. See also the text of the resolution regarding dairy product substitutes, which was adopted by the farmers present at the last General Congress of the UCC held in Trois-Rivières following Bill 74, May 31, 1961, Québec's Appendix 30, and the statements of the then-Minister of Agriculture and Food in 1987 as to the economic effect of new margarine colouring regulations (in favour of butter consumption) in Appendix 37.

¹⁰⁷ Arts. 42, 44, 49, 49.2, 49.3 and 49.4 of the *Regulation Respecting Dairy Product Substitutes*.

¹⁰⁸ Article 38 of the *Regulation Respecting Dairy Product Substitutes*.

presented to the consumer in a container that is labelled in accordance with Québec's Regulation, the consumer will be able to make an informed decision as to whether to purchase or consume butter or margarine.

As for a restaurant or other place where margarine may be served and the customer is not able to examine the product's packaging, Alberta and the Intervenors point out that the Regulation requires such establishments to clearly inform customers when margarine is being used by the establishment. Article 37 of the Regulation provides that when the substitute is served in an establishment where food is served for a consideration, an indication on the menu or on a sign or label must indicate that it is a substitute. Alberta stressed that it does not contest the AIT-consistency of this aspect of Québec's Regulation.¹⁰⁹

Québec put before the Panel a variety of newspaper reports which indicated that margarine had been passed off as butter in the past. There is no doubt that this can occur, but ultimately this is a question of law enforcement in respect of which Québec's law can adequately protect the consumer interest without the need for the colouring requirement.

The fact that Québec presently has a regulation concerning the colouring of margarine would not necessarily dissuade an unscrupulous person wishing to pass off margarine coloured like butter (and consumable in any other province or territory in Canada) as butter in Québec.¹¹⁰ That possibility already exists since margarine coloured to resemble butter is already being sold throughout the rest of Canada.

In view of the fact that the measure cannot be justified under Article 404 (b) and (c), it is unnecessary to consider subparagraphs (a) and (d).

Accordingly, the Panel concludes that Québec has failed to demonstrate that the measure meets the requirements of Article 404 and it cannot be justified.

Since the Panel has held that this particular technical barrier with policy implications falls within the scope and coverage of Chapter Nine and since Articles 900 and 901 operate such that Article 404 prevails to the extent of any inconsistency with Article 803, it is unnecessary to address Québec's arguments in respect of the latter.

6. DETERMINATION OF IMPAIRMENT OF TRADE AND INJURY

Article 1707.2(c) requires that the Panel's report contain a determination, with reasons, as to whether the measures under review have or would impair internal trade and have

¹⁰⁹ Transcript, p. 29.

¹¹⁰ Article 37 of the *Regulation Respecting Dairy Product Substitutes*.

or would cause injury. As previous panels have found, it is unnecessary to engage in a detailed economic analysis of the measure's impact. Rather, it is open to a panel to make a common sense determination as to whether the impugned measure has impaired or would impair internal trade or has caused or would cause injury. The panel in *Farmers Dairy/New Brunswick*, for example, noted that: "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."¹¹¹ This approach has been used in other case such as *Cost of Credit* and most recently, *Dairy Analogs and Dairy Blends*.¹¹²

In the Panel's view, there is more than sufficient evidence on the record to support a determination of impairment and injury.

Alberta asserted that with its significant population, Québec represents a significant lost market for Alberta margarine manufacturers and noted in this respect that the *Farmers Dairy* panel established that a denial of an opportunity to participate in a market is injury in itself.¹¹³

It went on to attempt to quantify the loss of the opportunity by noting that statistics prepared by the Dairy Farmers of Canada and posted on the website of the Canadian Dairy Information Centre demonstrate that margarine consumption compared to butter consumption in Québec is significantly below the national average. Alberta acknowledged that there may be other factors at work but in its view it was striking to note that the one province that prohibits the sale of coloured margarine has a significantly lower margarine-to-butter consumption ratio.¹¹⁴

Alberta noted that according to industry statistics, nationally, margarine has a 66 percent market share, based on volume, of the combined margarine and butter market whereas in Québec margarine's share of the market is only 57 percent. The Vegetable Oil Industry of Canada ("VOIC") attributed the significant difference in share largely to the measure which requires margarine to be "an unappetizing white, lard-like colour as opposed to the pleasant yellow-hue associated with margarine virtually everywhere else in the world."¹¹⁵

Alberta also referred to the affidavit of B. J. Isman, President of the Canola Council of Canada, which asserted that margarine's market share in Québec as a percentage of the combined margarine/butter market was stated to be 10 percentage points below the national market share on a dollar basis, on an annual basis. This difference of 10

¹¹¹ *Farmers Dairy/New Brunswick*, p. 27.

¹¹² *Cost of Credit*, p. 47 and *Dairy Analogs and Dairy Blends*, p. 37.

¹¹³ Alberta's First Submission, para. 43

¹¹⁴ Alberta's First Submission, para. 45.

¹¹⁵ Alberta's First Submission, para. 46, referring to Appendix 10.

percentage points was estimated to amount to a loss to the Canadian margarine industry (manufacturers, oilseed growers, and oilseed processors) of \$19 million annually.¹¹⁶

It also pointed out that if Alberta margarine producers sought to produce white coloured margarine as required by Québec's measure, they would incur additional compliance costs associative with maintaining separate production runs, separate inventories and separate distribution systems. It noted that Unilever has assessed its compliance costs with Québec's measure at \$1.2 million annually.¹¹⁷ Reference has already been made to the additional costs incurred by Canbra Foods in maintaining separate production runs for Québec-destined margarine.

Finally, Alberta, Manitoba and Saskatchewan all sought to estimate the measure's impact on the upstream suppliers of oilseeds to the margarine producers. Manitoba observed that it produces significant amounts of canola seed, sunflower seeds and soybeans and that there are three vegetable oils processing plants in the province. It noted that the Canadian Oilseed Processors Association ("COPA") estimates that the total annual cost of Québec's measure to the margarine and related industries is approximately \$17 million in lost sales.¹¹⁸ Saskatchewan likewise noted that it is a major producer of oilseeds, specifically canola oil (it produces approximately 44% of total Canadian production), and that it has approximately 15% of Canada's crushing capacity. It believes that were margarine producers able to increase their sales in Québec, Saskatchewan would be able to increase its production by some \$576,000 annually.¹¹⁹

The Panel finds that the measure has impaired and caused injury to margarine producers and their upstream suppliers.

7. SUMMARY OF PANEL FINDINGS

The Panel wishes to record its appreciation for the written and oral submissions of all Parties. It was most impressed with the professionalism, the quality of the advocacy and the civility of all counsel and representatives who participated in the proceeding.

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. That being noted, the Panel makes the following findings that:

¹¹⁶ Alberta's First Submission, para. 47

¹¹⁷ Alberta's First Submission, para. 48.

¹¹⁸ Manitoba's submission, paras. 5-15.

¹¹⁹ Saskatchewan's Submission, paras. 6-17.

Québec's measure contravenes Article 401.

There is no breach of Article 402.

Québec's measure operates to create an obstacle to internal trade contrary to Article 403.

Québec has failed to demonstrate that the measure meets the requirements of Article 404. It cannot be justified.

Québec's measure has impaired and caused injury to margarine producers and their upstream suppliers.

8. PANEL RECOMMENDATIONS

For the reasons set out herein the Panel makes the following recommendations:

- (a) Québec repeal the measure forthwith, and in any event no later than September 1, 2005.
- (b) Any action by Québec and implementation of the Panel's recommendations must allow for the sale of margarine coloured the same pale yellow hue as butter in Québec no later than September 1, 2005.

9. ALLOCATION OF COSTS

Rule 53 of Annex 1706(1) (Panel Rules of Procedure) of the AIT gives a Panel the discretion to allocate a portion of the operational costs of a Panel to the Intervenors in a dispute resolution process. The Panel considers a fair allocation of operational costs to be:

50% to Québec;

40% to Alberta;

5% to Manitoba; and

5% to Saskatchewan.

APPENDIX A

Participants in the Panel Hearing

Panel

Bill Norrie Q.C. (Chair)
J. C. Thomas Q.C.
Lynne Burnham Q.C.

For Alberta

Shawna Vogel
Lawyer
Fraser Milner Casgrain LLP

Shawn Robbins
Internal Trade Representative
International and Intergovernmental
Relations

Darcy Willis
Senior Policy Analyst
Agriculture, Food and Rural Development

Richard Skelton
Trade Policy Officer
International and Intergovernmental
Relations

For Saskatchewan

Robert Donald
Internal Trade Representative
Saskatchewan Government Relations

Alan Jacobson
Trade Counsel
Saskatchewan Justice

For Québec

Jean-François Jobin
Lawyer
Justice

Raymond Tremblay
Lawyer
Justice

Pierre Roy
Trade Policy Advisor
Agriculture, Fisheries and Food

Luc Walsh
Senior Advisor
Secretariat for Canadian intergovernmental
relations

Denis Desrosiers
Assistant Director
Agriculture, Fisheries and Food

Jean Dalati
Food Inspection Advisor (regulatory)
Agriculture, Fisheries and Food

For Manitoba

Alan Barber
Internal Trade Representative
Industry, Economic Development and Mines

