

**AGREEMENT ON INTERNAL TRADE
DISPUTE RESOLUTION PANEL**

**IN THE MATTER OF A CHALLENGE BY SASKATCHEWAN
WITH RESPECT TO QUÉBEC'S MEASURES
REGULATING EDIBLE OIL PRODUCTS, DAIRY BLENDS AND DAIRY ANALOGUES**

SUBMISSION ON BEHALF OF THE GOVERNMENT OF MANITOBA, INTERVENOR

AUGUST 28, 2013

**MANITOBA JUSTICE, CIVIL LEGAL SERVICES
730 – 405 BROADWAY AVENUE
WINNIPEG, MANITOBA
R3C 3L6**

Introduction

1. Measures governing Dairy Analogs and Dairy Blends (as those terms are defined in the Saskatchewan Submission referred to later in this submission, and which are collectively hereinafter called “Dairy Alternatives”) under Québec’s *Food Products Act*, R.S.Q., c. P-29 (hereinafter the “FPA”) and the associated *Regulations Respecting Food*, R.S.Q., c. P-29, r. 1 (hereinafter the “Regulations”) are the subject of dispute between Saskatchewan and Québec.
2. The measures in dispute are technical measures relating to internal trade in agricultural and food goods, which are covered by Chapter Nine (Agricultural and Food Goods) of the Agreement of Internal Trade (the “AIT”).
3. Saskatchewan initiated dispute resolution proceedings against Québec (Saskatchewan and Québec being the “Disputing Parties”) on June 17, 2013 when it requested that a Panel be established under Chapter 17 (Dispute Resolution Procedures) of the AIT to resolve the dispute.
4. Saskatchewan filed a written submission in the Panel Proceeding on August 8, 2013 (the “Saskatchewan Submission”), in which it asserts that certain of Québec’s measures found in the FPA and Regulations (collectively, the “Measures”) are barriers to internal trade in Dairy Alternatives in Canada and that the Measures contravene Québec’s AIT commitments.
5. Manitoba fully supports Saskatchewan’s assertions that the Measures are barriers to internal trade in Dairy Alternatives and that they contravene Québec’s AIT commitments.

Standing - Substantial Interest

6. On July 4, 2013, Manitoba gave notice in accordance with Article 1703(9.1) of the AIT that it would participate in the Panel Proceeding as an Intervenor (**Tab A**).
7. Manitoba has a substantial interest in the matter in dispute, within the meaning of Article 1703(10) because the Measures will adversely affect or do adversely affect a significant number of canola oil operators, producers, shippers, crushers, refiners and other processors carrying on business in the province of Manitoba. The Measures will have an economic impact or are having an economic impact on thousands of Manitobans, because canola oil is a principal ingredient in Dairy Alternatives.
8. Canola is one of the primary oilseeds produced in Manitoba. It is Manitoba's largest field crop according to 2011 census data surpassing spring wheat. Since 2006, the area planted to canola has increased 44.3% to 3.3 million acres in 2011 and is produced on 6,151 farms. Canola was grown on approximately 30.8% of the province's 10.7 million acres of cropland in 2011. It is the province's most valued agricultural commodity and most valuable crop. Farm cash receipts from canola in Manitoba were 1.02 billion in 2011. Farm cash receipts from canola, as a percent of total farm cash receipts for crops were 40% and as a percent of total farm cash receipts for 2011 were 20%.
9. Manitoba has three canola processing facilities that have a combined yearly processing capacity of approximately 2.39 million tonnes per year, producing oil for human consumption as well as meal for the livestock sector.
10. According to the Canola Socio-Economic Value Report of 2008, commissioned by the Canola Council of Canada, the economic impact of canola to Manitoba's provincial economy was \$2.3 billion in 2007. The canola industry generates

direct jobs for 10,000 farm operators and producers in Manitoba. About 114 people work with canola in grain handling and frontline agronomy support. Canola related jobs from crushers and refiners total 148.

11. The Measures limit the sale and purchase of vegetable oils and limit the potential development and growth of the Dairy Alternatives market. Manitoba, as a significant producer of canola in Canada, would stand to benefit from increases in the size of the market for Dairy Alternatives that would occur without the restrictions placed on the market by the Measures. Manitoba submits that producers of products like canola oil used in the creation of Dairy Alternatives are also being adversely affected by the Measures.

Measures are Technical Measures to Which Chapter Nine and Chapter Four Apply

12. Manitoba agrees with Saskatchewan that:
 - (a) the Measures are technical measures as that is defined in Article 907 of the AIT;
 - (b) Dairy Alternatives are agricultural and food goods as those terms are defined in Article 907 of the AIT;
 - (c) the Measures relate to internal trade in Dairy Alternatives; and
 - (d) that Chapter Nine therefore applies to the Measures by virtue of Article 902(1) of the AIT, and Chapter Four applies to the Measures by virtue of Article 900 of the AIT.

Measures Non-compliant with AIT

13. Manitoba agrees with Saskatchewan that the Measures contravene Articles 401, 402, and 403, and 905(4), (5) and (6) of the AIT.
14. Article 401 requires non-discriminatory treatment by Québec of “like, directly competitive or substitutable goods” from Manitoba or any other AIT Party. The Measures treat Dairy Alternatives (which fall into the category called “dairy product substitutes” in the Measures) in ways that discriminate against Dairy Alternatives and favour dairy products, notwithstanding that Dairy Alternatives are “directly competitive” with dairy products, or that Dairy Alternatives can be substituted for dairy products.
15. Article 402 prohibits a Party to the AIT from adopting or maintaining measures that restrict the movement of goods across provincial boundaries. By prohibiting the sale of Dairy Alternatives within Québec, Québec has created and is maintaining a barrier to the movement of those goods into and across the province of Québec. Furthermore, by prohibiting the manufacture of Dairy Alternatives in the province of Québec, the Measures restrict the possible export of Dairy Alternatives by Québec manufacturers.
16. Article 403 requires a Party to the AIT to ensure that it does not adopt or maintain measures that create obstacles to internal trade. Québec, through the Measures, has created and is maintaining impediments to internal trade in Dairy Alternatives and other agricultural and food goods that use or involve Dairy Alternatives. The Measures greatly diminish the demand for Dairy Alternatives in Canada because Québec represents such a large share of this market. In turn, the Measures prevent innovation in the Dairy Alternatives market because of the reduced demand. Accordingly, the Dairy Alternatives market is being limited and distorted for consumers across Canada, not just in Québec.

17. Article 905(4) prohibits a Party from adopting or applying a technical measure in a manner that would constitute a disguised restriction on internal trade. Article 905(5) and (6) require a Party to “specify its technical measures in terms of results, performance or competence” and to ensure that its technical measures have “a scientific, factual or other reasonable basis...”. As provided for in paragraph 12 of this submission, Manitoba is of the view that the Measures clearly fall within the definition of “technical measures” in Article 907.

18. Manitoba agrees with Saskatchewan that the Measures have been adopted and are being maintained in large part to protect Québec’s dairy industry. It would appear that Québec’s dairy industry agrees. On page 4 of the July/August, 2012 Newsletter of *Le Producteur De Lait Québécois* (located at Tab X in the Saskatchewan Submission), we find the following statement: “Today, there is no legal basis to contest the demand by Saskatchewan and British Columbia”. The demand referred to here is the assertion of Saskatchewan and British Columbia, in its request for consultations that led to Saskatchewan initiating this Panel Proceeding, that Quebec’s regulations “restrict analogs marketed in its territory and ...prohibit dairy blends containing a dairy substitute”.

19. Manitoba submits therefore that there are no credible or permissible reasons under the AIT for Québec to have singled out Dairy Alternatives for the treatment being afforded to them by the Measures. For this reason, Manitoba submits that Québec has failed to comply with the obligation to ensure that the Measures have a scientific, factual or other reasonable basis [Article 905(6)], and has in fact adopted and applied the Measures in a manner that constitute disguised restrictions on internal trade, contrary to Article 905(4).

Effect of the Measures

20. Manitoba agrees with Saskatchewan that the Measures will impair or do impair internal trade by:
- (a) prohibiting the sale and manufacture of Dairy Alternatives into Québec, one of the largest provincial markets in Canada;
 - (b) prohibiting the introduction of new and innovative products because of the prohibition on the production and sale of Dairy Alternatives in Québec;
 - (c) providing for significant fines for manufacturers and retailers selling or producing Dairy Alternatives in Québec;
 - (d) placing unique restrictions on the labeling and retailing of Dairy Alternatives in Québec stores and restaurants that are not placed on any other food product categories; and
 - (e) adversely impacting all other participants in the Dairy Alternatives market including growers of oilseed and other oil-producing crops as well as oilseed crushers, oil refiners and oil producers.

Lack of Legitimate Objectives

21. Manitoba also agrees with Saskatchewan that Québec has not demonstrated that the Measures are required to achieve a "legitimate objective" (as that is defined in Article 404 and limited by Article 905 of the AIT) and that Québec has the onus to do so if it wishes to rely on these provisions to maintain the Measures notwithstanding their inconsistency with the AIT.

22. Saskatchewan notes in the Saskatchewan Submission that similar measures in Ontario have been successfully challenged twice before AIT Dispute Resolution Panels, and were found to be inconsistent with Articles 401, 402 and 403 of the AIT, and not permissible under Article 404. While Manitoba acknowledges that AIT Panel Reports are not binding upon subsequent panels, Manitoba finds the consistency with which past Panels have treated similar measures to be persuasive.

Injury

23. Under Article 1706(3)(c), a Panel is required to make a determination of injury in its report.
24. As set out in Saskatchewan's Submission at paragraph 114, the denial of the opportunity to participate on an equal footing in a market is injury in itself. The canola industry provides significant economic benefit to Manitoba and to Manitobans. By preventing the sale and manufacture of Dairy Alternatives that utilize canola oil, the Measures mean lost sales to manufacturers and upstream sales of canola that affect investment and capital expenditures, and employment by oilseed operators, producers, shippers, crushers, refiners and processors in Manitoba.

Relief Requested

25. Manitoba requests that the Panel make the following findings:
- (a) that the Measures are inconsistent with the AIT, Articles 401, 402, 403, 905(4), 905(5) and 905(6); and
 - (b) that the Measures do not serve a "legitimate objective", as defined in Article 200, or in the alternative, that the Measures serve a "legitimate

objective” but do not meet the requirements of Articles 404(b) – (d) and Article 905(2) and 905 (3) of the AIT.

26. Pursuant to those findings, Manitoba requests that the Panel make the following recommendations:
- (a) that Québec repeal or amend the Measures to bring them into compliance with the AIT by no later than the end of 2013;
 - (b) that until the Measures have been so repealed or amended, Québec neither enforce the Measures nor prosecute any persons for contravening them; and
 - (c) that Québec refrain from enacting any further measures relating to or affecting Dairy Alternatives, including the sale, manufacture or marketing of Dairy Alternatives, that are inconsistent with the AIT.

Payment of Panel Operational Costs

27. Under paragraph 55 of Annex 1705(1), the Panel “may apportion Operational Costs to the participating Parties at its discretion.” In exercising its discretion, the Panel “may consider other relevant considerations that may justify assessing a major part of the responsibility for Operational Costs to one of the Disputants”.
28. Manitoba agrees with Saskatchewan, in the Saskatchewan Submission at paragraphs 119 – 123, that there are sufficient reasons for the Panel to exercise its discretion to make Québec responsible for payment a major part of the Operational Costs. Québec has had sufficient time to resolve this complaint before initiation of the Panel Proceeding by Saskatchewan, because:

- (a) it undoubtedly knew for some years that measures similar to the Measures had been held by Panels to be inconsistent with the AIT, including the decision of a Summary Panel in 2010 regarding a Pre-Existing Dispute Concerning Ontario's Measures governing Dairy Analogs and Dairy Blends; and
- (b) Saskatchewan, Manitoba, and British Columbia had undertaken consultations with Québec that extended for more than one year, beginning in January 23, 2012, in an attempt to resolve this complaint in accordance with Article 1702.1.

29. Therefore, Manitoba requests that the Panel apportion Operational Costs in their entirety to Québec.

All of which is respectfully submitted on this 28th day of August, 2013.



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TAB A

**MANITOBA LETTER OF JULY 4, 2013
REQUEST TO PARTICIPATE AS INTERVENOR**

July 4, 2013

Mr. Patrick Caron
Officer
Internal Trade Secretariat
Suite 850, 444 St. Mary Avenue
Winnipeg, MB R3C 3T1

Dear Mr. Caron:

Further to Saskatchewan's letter of June 17, 2013 requesting a dispute resolution panel, and in accordance with Article 1703(9.1) of the Agreement on Internal Trade, I am providing notice by way of this letter that Manitoba will continue its participation as an intervenor in this dispute between Saskatchewan and Quebec regarding Quebec's measures governing dairy analogs and dairy blends. Manitoba is doing so in its capacity as a Party with a substantial interest.

Please address all future communications regarding this dispute to

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Yours Sincerely,



Tami Reynolds
Internal Trade Representative

c. Internal Trade Representatives
Hugh Eliasson, Alan Barber
Barry Todd, Mike Lesiuk, Sandy Derrett