

AGREEMENT ON INTERNAL TRADE  
DISPUTE RESOLUTION PANEL

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

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SUBMISSION ON BEHALF OF THE GOVERNMENT OF SASKATCHEWAN

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AUGUST 8, 2013

SASKATCHEWAN MINISTRY OF JUSTICE AND THE ATTORNEY GENERAL  
820 - 1874 SCARTH ST.  
REGINA, SASKATCHEWAN  
S4P 4B3

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# SUBMISSION ON BEHALF OF THE GOVERNMENT OF SASKATCHEWAN

## **1. Introduction**

[1] This complaint pertains to restrictions on trade across a wide spectrum of products known as Dairy Blends and Dairy Analogues (taken together, these Submissions will refer to Dairy Blends and Dairy Analogues as Dairy Alternatives).

[2] On July 1, 1995, the Agreement on Internal Trade (hereinafter the AIT), signed by representatives of each Canadian province and a representative of the federal government, came into force. The AIT had the following objective:

### Article 100: Objective

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

[3] Through the AIT, the provinces and federal government made (and continue to make) commitments relating to freer trade. These commitments include promises to not discriminate between products of differing jurisdictions (Article 401), to permit the free movement of goods (Article 402), and to not create barriers to internal trade (Article 403). The governments further committed to only abrogate the commitments in the AIT if they met a strict test for so-called “legitimate objectives” (Article 404).

[4] Saskatchewan maintains that certain measures of the Government of Québec, found in *The Food Products Act*, R.S.Q., c. P-29 [Tab H] and the associated *Regulations Respecting Food*, R.S.Q., c. P-29, R. 1 [Tab I], are barriers to the trade of Dairy Alternatives in Canada. Saskatchewan believes that the Measures contravene Québec’s AIT commitments and are contrary to the interests of inter-provincial trade.

[5] The Measures affect a number of established categories of food products, including (but not limited to) spreads and sauces, desserts, beverages, sandwich slices and loafs (i.e. imitation

cheese products). Many of these products are sold freely in Canada outside of Québec, but not within Québec. Furthermore, by acting as a blanket prohibition on the production and sale of unauthorized Dairy Alternatives in Quebec, the Measures prohibit the introduction of new and innovative products that might be caught by the restriction.

- [6] The Measures prohibit the sale and manufacture of Dairy Blends and Dairy Analogues and are therefore, both in law and in fact, injurious to free trade of Dairy Blend and Dairy Analogue products. Manufacturers and retailers who are discovered to be selling or producing Dairy Blends or Dairy Analogues contrary to the Measures are subject to significant fines.<sup>1</sup>
- [7] The Measures also place restrictions on the labeling and retailing of Dairy Alternatives in stores and restaurants, requirements not placed on any other food product categories. This also represents a barrier to trade.
- [8] As noted above, the Dairy Alternatives category is comprised of two distinct sub-categories, defined generally as:
  - (1) Dairy Analogues – these products, made from oilseeds and other vegetable oils, are vegetable-based alternatives to dairy products. Broadly speaking, this category includes soy- or other vegetable-based cheeses, frozen desserts made exclusively from vegetable oils, and margarine.
  - (2) Dairy Blends – these products are made from a mixture of dairy and non-dairy ingredients which together resemble a dairy product. The non-dairy ingredients would normally be sourced from vegetable oils and oilseeds. Examples of this sub-category would include vegetable oil-based cheeses with casein, canola oil/butter blended spreads, and frozen desserts made with a mix of dairy and non-dairy oils.
- [9] Dairy Alternatives are widely available in every other province in Canada and consumers across the Provinces choose daily to purchase Dairy Alternatives or dairy products for a variety of reasons. These reasons include the purported health benefits of substituting vegetable oils (unsaturated fat) for dairy oils (which are predominately saturated fats), the lower cost of many Dairy Alternatives, the longer shelf-life of Dairy Alternatives, and

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<sup>1</sup> Fines range from \$250 to \$9,000 per violation of the *FPA*, depending on the specific infraction in question. See *FPA*, ss. 42 and 44.

personal taste and preference. Furthermore, Dairy Alternatives often serve as an alternative to dairy products for consumers with a variety of dietary restrictions, both moral and medical.

- [10] Québec remains the last province to address its restrictions on Dairy Alternatives. With a population of over 8 million persons at the last census [See Tab P] amounting to 23% of Canada's total population, Quebec represents an enormous market for Dairy Alternatives in Canada. That market is suppressed by the Measures, which serves primarily to protect the interests of Quebec's dairy producers and manufacturers. This protection comes at the expense of actors across the oilseed supply chain—farmers, shippers, crushers, processors, and many others—in addition to retailers and manufacturers of Dairy Alternatives across Canada, and particularly in Western Canada including Saskatchewan. It also comes at the expense of Québec's consumers, who are presented with a greatly narrowed spectrum of consumer choice and the attendant loss of utility that accompanies such a restriction.
- [11] Similar measures in Ontario were successfully challenged before an AIT Dispute Resolution Panel as being inconsistent with articles 401, 402 and 403 of the AIT and not permissible under article 404. AIT Panels in the past have emphasized the desirability of consistency in panel findings. Saskatchewan submits that the burden is on Quebec to demonstrate why this Panel should arrive at inconsistent conclusions.

## **2. Jurisdiction of the Panel**

- [12] Saskatchewan is not aware of any preliminary objections to the jurisdiction of the Panel or any concerns that the Disputing Parties have not complied with the Dispute Resolution Chapter and associated Rules such that the Panel's ability to decide the issues. Subject to its right to apply to make written reply submissions (as per Annex 1705(1), Rule 29) Saskatchewan's submissions with regard to the jurisdiction of the Panel are therefore brief.

### **A. Timeline for the Panel's Constitution**

- [13] In accordance with Article 1702.1 of the AIT, Saskatchewan, along with British Columbia and Manitoba, requested consultations with Québec relating to the Measures on January 23, 2012 [see Tab A]

- [14] On April 4, 2012, consultations were held in-person between representatives of Saskatchewan, British Columbia, Alberta, Manitoba, and Québec.
- [15] On June 17, 2013, Saskatchewan formally requested the establishment of a Panel in accordance with Article 1703(1) of the AIT. As per that Article, the request for a Panel was made over 120 days after the request for consultations.

## B. AIT Jurisdiction over Dairy Analogues and the Measures

- [16] As per Article 906, a Panel is empowered to hear a Complaint relating to the obligations of the Parties in Chapter Nine:

### Article 906

Chapter Seventeen shall apply to consultations and the resolution of disputes arising out of this chapter.

- [17] The full inclusion of food and agricultural measures into the AIT was affected by the Eleventh Protocol of Amendment on November 8, 2010 and the introduction of the new Chapter Nine to the AIT. In the AIT Panel Reports in the *Ontario – Dairy Analogues I*<sup>2</sup> [attached as Tab L] and *Québec – Margarine*<sup>3</sup> [attached as Tab M] disputes, decided under the pre-amendment Chapter Nine, jurisdiction over agricultural goods was limited to matters expressly recognized by the Federal-Provincial Trade Police Committee. Presently, an AIT Panel hearing a Chapter Nine dispute has wide and plenary jurisdiction over food- and agriculture-related complaints.
- [18] Lest it be disputed at the outset, Saskatchewan submits that both Dairy Alternatives and the Measures regulating them are properly the subject of Chapter Nine, given the broad application of Article 902 and the definitions provided by Article 907:

### Article 902

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<sup>2</sup> 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, November 10, 2004 (Chair: Elizabeth Cuddihy) [Ontario – Dairy Analogues I].

<sup>3</sup> 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, June 23, 2005 (Chair: Bill Norrie, Q.C.) [Québec – Coloured Margarine].

1. This Chapter applies to technical measures adopted or maintained by a Party relating to internal trade in agricultural and food goods

[...]

#### Article 907

In this Chapter:

agricultural good means:

(a) an animal, a plant or an animal or plant product; or

(b) a product, including any food or drink, wholly or partly derived from an animal or plant, but does not include fish or fish products or alcoholic beverages;

[...]

food good means an article manufactured, sold or represented for use as food or drink to humans, chewing gum, and any ingredient that may be mixed with food for any purpose whatever, but does not include fish or fish products or alcoholic beverages;

[...]

technical measure means a measure that is a technical regulation, a standard, a sanitary or phytosanitary measure or a conformity assessment procedure but does not include purchasing specifications prepared for production or consumption requirements of a Party that are addressed in Chapter Five (Procurement), according to the coverage of that Chapter.

technical regulation means a document or instrument of a legislative nature which defines product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory by law. It may include or deal exclusively with terminology, symbols, packaging, marking or labeling requirements as they apply to a product, process or production method.

- [19] Dairy Alternatives, including Dairy Analogues and Dairy Blends, will by definition be “partly derived from” an animal or plant (and therefore be agricultural goods) and will be “manufactured, sold or represented for use as food” (and therefore be food goods). Chapter Nine therefore applies to the Dairy Substitute category.
- [20] It is also clear that the Measures amount to “technical measures” such that Chapter Nine applies. The Measures set out mandatory product characteristics as well as mandatory

requirements for packaging, and the Measures are therefore properly considered technical regulations, a subset of technical measures.

### **3. Summary: the Violated Commitments**

- [21] The Agriculture Chapter of the AIT applies the general obligations of Chapter Four to Agricultural measures:

#### **Article 900**

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

#### **C. Article 401 – Reciprocal Non-Discrimination**

- [22] Article 401 of the AIT states (in part):

#### **Article 401**

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

- (a) its own like, directly competitive or substitutable goods; and
- (b) like, directly competitive or substitutable goods of any other Party or non-Party.

[...]

4. The Parties agree that according identical treatment may not necessarily result in compliance with paragraph 1, 2 or 3.

- [23] Saskatchewan maintains that the Dairy Substitute category of goods is “directly competitive or substitutable” to Québec’s dairy products and that the Measures, by prohibiting the introduction of a wide variety of Dairy Alternatives into the Québec market, discriminates in favour of domestic dairy producers and processors.

#### **D. Article 402 – Right of Entry and Exit**

- [24] Article 402 of the AIT states:



## Article 402

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

- [25] Saskatchewan believes that the Measures, by prohibiting the sale of Dairy Alternatives within Québec, acts as a barrier to the movement of those goods into and across Québec. Furthermore, by prohibiting the manufacture of Dairy Alternatives, the Measures restrict the possible export of Dairy Alternatives by Québec manufacturers.

## E. Article 403 – No Obstacles

- [26] Finally, Article 403 of the AIT states:

### Article 403

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.

- [27] This is further strengthened in the matter of technical measures by Article 905(4), which states:

### Article 905

[...]

4. No party shall adopt or apply a technical measure in a manner that would constitute a disguised restriction on internal trade.

- [28] The Québec Measures constitute an injurious and ongoing impediment to internal trade in Dairy Alternatives and other products. By prohibiting the sale and manufacture of many of these products, Québec greatly diminishes the Canada-wide demand for Dairy Alternatives by virtue of its large market size.
- [29] Furthermore, by suppressing this demand, Québec's Measures have the secondary effect of preventing innovation by greatly diminishing the expected return from innovations in the Dairy Alternatives market. This has the important effect of reducing consumer choice and distorting markets in the Dairy Alternative category for consumers across Canada, and not just in Québec.

- [30] Last, the Measures impact the entire chain of value-adding participants in the market, and not just the final producers and manufacturers of the Dairy Alternatives themselves. The Measures impact growers of oilseed and other oil-producing crops, as well as oilseed crushers and oil producers.

## 4. The Measures in Question

### F. The History of the Measures

- [31] The enactment of sections 4.1 and the enumerated sections 7.1 – 7.9 of the *FPA* (reproduced below) was effected by *An Act to amend the Agricultural Products, Marine Products and Food Act and other legislative provisions and to repeal the Dairy Products and Dairy Products Substitutes Act*, Bill 123, 26<sup>th</sup> Legislature, 1<sup>st</sup> Session (2000) [see Tab F]. The substance of the text of the Measures is, however, much older.
- [32] When the federal prohibition on margarine was struck down by the Supreme Court in 1948 (*In the Matter of a reference as to the validity of section 5(a) of the Dairy Industry Act*, R.S.C. 1927, chapter 45, [1949] S.C.R. 1), Québec immediately responded with its own legislation, instructively titled: *Loi protégeant l'industrie laitière dans la province*. Québec's prohibition on Dairy Alternatives—specifically, margarine—is over 60 years old. Restrictions on the sale and colouration of margarine have waxed and waned in Québec since 1949, eventually concluding with the 2005 AIT Panel report in *Québec – Margarine* and the subsequent repeal of the colouration requirements.
- [33] Manufacture and sale restrictions as well as labeling requirements were introduced in the *Dairy Substitutes Act*, S.Q. 1961, c. 50 [Tab B]. These restrictions are the precursor to Article 4.1 of the modern *FPA*. As the debates in the Legislative Assembly show, the protection of the dairy industry was at the forefront of the purposes of the Act. Before the 1961 Act, margarine was being sold in Québec as a “spread” to circumvent the prohibition on margarine sales. After 1961, margarine was allowed but heavily restricted.
- [34] In 1969 the Québec's National Assembly enacted the *Dairy Products and Dairy Products Substitutes Act*, S.Q. 1969, c. 45 (hereinafter the *DPDPSA*) [see Tab C]. That Act, like the Measures found in the current *FPA*, prohibited the blending of dairy products with Dairy

Substitutes and retained the strict controls on the colour of margarine and the use of dairy imagery that had been introduced with the *Dairy Substitutes Act*. The 1969 DPDSA combined the former *Dairy Substitutes Act* with two other Acts, which had formerly governed dairy products and cream, respectively.

- [35] In 1987 the restrictions on Dairy Alternatives in Québec were deepened with *An Act to amend the Dairy Product and Dairy Products Substitutes Act*, S.Q. 1987, c. 61 [see Tab D]. This amendment Act added s. 23.1 to the Dairy Products Act, which prohibited the sale of manufacture of any new Dairy Substitutes not allowed by regulations. It is the direct precursor of s. 7.2 of the modern *FPA*.
- [36] The debates in Québec's National Assembly during the passage of the 1987 Amendment Act are instructive. The Bill was introduced by the Honourable Michel Pagé, the Minister of Agriculture, Fisheries and Food. In his introduction to the bill, he stated:

Par ailleurs, la loi actuelle ne confère pas au gouvernement le pouvoir de designer les succédanés qui peuvent être fabriqués ou mis en vente au Québec. En effet, M. le Président - cet aspect doit être pris en compte et il est très important pour ce qui est de la consommation des produits alimentaires - les succédanés sont une menace réelle pour notre industrie laitière.

Aux États-Unis, les substituts de fromage connaissent un succès phénoménal actuellement. Au cours des années 1983 et 1984, la production de fromage qui n'en est pas en fait, de fromage qui a l'apparence et peut-être le goût, mais qui ne contient pas de produit laitier a été en pleine croissance. Cette croissance a été de 22 % dans le secteur du service alimentaire, c'est-à-dire la restauration et l'hôtellerie.

Aux États-Unis, le taux de croissance de l'utilisation de succédanés est de 43 % pour la production d'aliments. Lorsqu'on va aux États-Unis - c'est un choix tout à fait légal qu'ils ont fait et c'est de qualité, je ne remets pas en cause la qualité ou la valeur qualitative de ces produits, loin de là - plus souvent qu'autrement, quand on mange une pizza congelée, le fromage qu'il y a dessus est fait de succédanés, il n'y a pas de lait. L'augmentation des succédanés vendus au détail est de 50 %. On est donc en droit de s'interroger sur les prédictions. On estime que le commerce du succédané de fromage atteindra les 780 000 000 de livres, cette année, et même jusqu'à 4 000 000 000 de livres, à la fin du siècle, si la tendance se poursuit. Qu'advient-il de notre industrie laitière dans un contexte de libre-échange possible, qui est actuellement discuté avec nos bons amis du Sud? Il nous faut donc agir dès maintenant face à cette menace grandissante des succédanés. Commençons d'abord par renforcer notre législation qui, à certains égards, est fort boiteuse. [...]

[courtesy translation provided at page 41]

- [37] The forgoing shows the legislative intent of 23.1 of the DPDSA, which became s. 7.2 of the FPA, is *expressly* the restriction on the sale of Dairy Alternatives to protect Québec's dairy production.
- [38] The *FPA*, by contrast, was enacted in 1974. Until the year 2000, the *FPA* regulated the majority of food producers and sellers, etc. in the province of Québec, but did not regulate dairy products and Dairy Alternatives (and, incidentally, bees and beekeepers). In 2000, the *FPA* was amended by Bill No. 123, which subsumed the restrictive prohibitions of the *DPDPSA* into the *FPA*.
- [39] The movement of the Dairy Substitute prohibitions from the *DPDPSA* to the *FPA*, while it achieved a measure of administrative simplicity, did not lessen the scope, effect, or nature of the prohibition originally found in the *DPDPSA*.
- [40] A comparison of the *DPDPSA* with the provisions of the *FPA* added or amended by the 2000 Act is set out at Tab Q. As can be seen from those tables, other than small changes in drafting and structure, the prohibition on the sale of Dairy Substitutes continued from the *DPDPSA* into the *FPA* unabated.
- [41] Indeed, the testimony of witnesses and statements by the Minister responsible for the *FPA* at the time of the 2000 amendments buttresses this conclusion. When discussing the Bill article-by-article in Committee, for example, the Honourable Minister of Agriculture, Fisheries, and Food Mr. Remy Trudel stated:

M. Trudel: Il n'y a pas rien que les gens de Saint-Hyacinthe qui cherchent, il y a aussi les Américains qui ont trouvé quelque chose qui s'appelle les oléobeurres. Alors, ils ont trouvé quelque chose, mais ils ont trouvé quelque chose qui nous ferait perdre notre avantage au plan d'un produit de qualité qu'on développe par excellence au Québec. Alors, c'est pour ça qu'on a pris ces mesures. Tu ne peux pas jouer avec un produit attrayant et attractif de n'importe quelle façon et profiter, par un succédané ou une approche perverse...

M. Dion: De contrefaçon.

M. Trudel: ...de contrefaçon, ou encore faire en sorte que tu assimiles ton produit à la réputation que l'autre s'est bâtie même s'il n'en a pas les qualités et les propriétés.

[courtesy translation provided at page 41]

[42] More excerpts from the debates can be found at Tab G. It is clear from the comments of the Honourable Minister and members of the committee that the intent of the 2000 Act was to move the prohibitions from the *DPDPSA* to the *FPA* intact.

[43] This leads to two conclusions:

The dominant intent of the Measures, as enacted in 1969 and continuing to the present day has been the protection of the dairy industry from competition from Dairy Alternatives.

The fact that the *FPA* governs most (if not all) food products sold in Québec does not diminish the targeted, specific, and extensive prohibitions on the sale and management of Dairy Alternatives that the *FPA* now contains.

#### G. The current *Food Products Act* and *Regulations*

[44] The full *FPA* is reproduced at Tab H. The following sections, together with the regulatory sections which follow, comprise the Measures that Saskatchewan alleges are incompatible with the AIT.

1. In this Act, unless the context indicates a different meaning, the following expressions mean:

[...]

(a.3) “dairy product” : milk, or any derivative of milk, and any food product made with milk as the sole ingredient or the main ingredient;

(a.4) “dairy product substitute” : any food product which may be substituted for a dairy product and which, in its external characteristics or its mode of use, resembles a dairy product;

[...]

4.1. In addition, no person shall

(1) use the words « milk », « cream », « butter », « cheese » or a derivative of any of those words to designate a dairy product substitute ;

(2) use any words, trademarks, names or images that evoke the dairy industry to designate a dairy product substitute.

[...]

**7.1.** No person shall mix a dairy product or constituent of a dairy product with a dairy product substitute, except to the extent provided by regulation.

**7.2.** No person shall prepare, offer for sale, sell, deliver, process or keep, display or transport for the purpose of sale any dairy product substitute that is not designated by regulation.

[...]

**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.

**7.6.** In any establishment where food is served for remuneration, no person shall offer or serve a dairy product substitute without informing the consumer by means of an indication on the menu or, if there is no menu, a sign or label.

[...]

**40.** The Government may, by Regulation: [...]

(a.3) determine, for the purposes of subparagraph a.3 of the first paragraph of section 1, the cases in which milk or any derivative of milk ceases to be a dairy product after being treated, modified, processed or reconstituted, and the criteria whereby milk is to be considered the main ingredient in the making of a dairy product;

(a.4) authorize standardization of the proportion of fat and other solids of any dairy product it indicates, subject to the conditions and according to the processes it determines, including skimming;

(b) prohibit or regulate the use of substances capable of impairing the quality or wholesomeness of a product;

(b.1) prohibit, to the extent it indicates, the adding of dairy product substitutes or other ingredients to any dairy product or constituent of a dairy product;

(b.2) designate the dairy product substitutes that may be prepared, offered for sale, sold, delivered, processed, held, displayed or transported for sale;

[45] Saskatchewan believes the following *Regulations*, enacted pursuant to the *FPA*, are contrary to the AIT (an excerpt of the regulations is attached as Tab I):

**11.1.1.** [...]

“milk” means the lacteal secretion obtained from the mammary gland of a domestic animal such as a cow, goat or sheep and intended for human consumption;

**11.1.2.** For the purposes of subparagraph a.3 of the first paragraph of section 1 of the Act, milk is considered to be the main ingredient in the preparation of a food product if

- (1) the main ingredient is milk;
- (2) the main ingredient is a constituent of milk, such as milk fat or lactose; or
- (3) the main ingredient is a derivative of milk, such as cheese or butter.

[...]

**11.9.1.** For the purposes of this Division, sections 7.1 to 7.6 and subparagraph k.4 of the first paragraph of section 9 of the Act, the following substitutes are not considered to be dairy product substitutes:

- (1) powdered mixes used by consumers in puddings, dessert toppings and pie fillings;
- (2) salad dressings;
- (3) dairy product substitutes prepared especially for infants and babies; and
- (4) milk pudding substitutes.

**11.9.2.** No dairy product substitute may be prepared and marketed except

- (1) margarine that is a butter substitute;
- (2) liquid or powder coffee whitener that is a coffee cream substitute;
- (3) liquid or foam dessert topping that is a whipped cream or whipping cream substitute;
- (4) frozen dessert mixes that are ice cream mix substitutes; and
- (5) frozen desserts that are ice cream substitutes.

[...]

**11.9.4.** In addition to the requirements of the Food and Drugs Act (R.S.C. 1985, c. F-27) and its regulations, the dairy product substitutes listed in section 11.9.2 must meet the following requirements:

- (1) margarine
  - (a) must contain refined vegetable, animal or fish or marine mammal oils, or a mixture of those oils, with a 22-carbon monounsaturated

fatty acid content that represents not more than 5% of the total fatty acids in the oils and that weigh

(i) the same as or 40% less than the total weight of all components; or

(ii) the same as or 80% greater than that weight;

(b) may also have a non-fat milk solids content of not more than 2.8% of its total weight if it contains refined oils within the range set out in subparagraph i of subparagraph a, or 1.4% of its weight if it contains refined oils within the range set out in subparagraph ii of subparagraph a;

(2) coffee whiteners must have a refined vegetable oil content of not less than 10% and may have a non-fat milk solids content of not more than 5%;

(3) dessert toppings must have a refined vegetable oil content of not less than 16% and may have a non-fat milk solids content of not more than 5%;

(4) frozen dessert mixes must have a refined vegetable oil content of not less than 5% and may have a non-fat milk solids content of not more than 15%; and

(5) frozen desserts must have a refined vegetable oil content of not less than 5%, must contain 25 g of refined oils per litre, and may contain not more than 15% non-fat milk solids.

The composition standards set out in the first paragraph that establish a content standard for an ingredient or component of a dairy product substitute refer to the percentage by weight of the ingredient or component per 100 parts of the dairy product substitute.

[...]

**11.12.2.** Dairy product substitutes must be displayed at a sufficient distance from dairy products to avoid misunderstanding or confusion in the minds of consumers.

## H. Precedent of Ontario – Edible Oils

[46] Reference should be made to the AIT Panel Report in the *Ontario – Dairy Analogs I* and to the Panel Report in *Ontario – Dairy Analogs II*<sup>4</sup> [see Tab N]. While AIT Panel Reports are not

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<sup>4</sup> Report of Article 1702(2) Summary Panel Regarding the Pre-Existing Dispute Concerning Ontario's Measures Governing Dairy Analogs and Dairy Blends, September 24, 2010 (Chair: Bryan Schwartz) [Ontario – Dairy Analogues II]



binding upon subsequent Panels, they are persuasive. As noted by the panel in *Québec – Coloured Margarine* (pp. 16-17) the effect of past decisions is important:

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 validity of the three reports where panels acting on the basis that the letter, although late, was still operative. [...] [citations omitted]

- [47] The measures in question in *Ontario – Dairy Analogues I* are nearly identical to the Measures that Saskatchewan and the interveners challenge in this dispute. A comparative index of Ontario's former measures and the Québec Measures is set out at Tab R.
- [48] Despite the lack of *stare decisis* in arbitral decisions, the importance of avoiding inconsistent decisions under the AIT should be emphasized. Québec should rightly be made to very clearly and strongly distinguish its measures from those in Ontario before a Panel comes to a different conclusion than the one reached in *Ontario – Dairy Analogues I* and *Ontario – Dairy Analogues II*. Such an inconsistency would cause confusion in Ontario which amended its measures in response to the 2012 AIT Summary Panel.
- [49] It should be noted that Ontario's *Edible Oil Products Act*, R.S.O. 1990, c. E-1 (repealed), (hereinafter *EOPA*) was targeted specifically at Dairy Alternatives. Quebec's *FPA* is a statute of much broader importance and the Act is not discriminatory on its face. However, as noted above, Québec's specific prohibition on Dairy Blends and Dairy Analogues has a long history, and the provisions that provide for strict control over Dairy Alternatives is unique, even within the Act. Québec cannot sanitize the Measures by placing them in an Act alongside measures which are not discriminatory.

## 5. The Effect of the Measures

- [50] The Measures have the following impact on the ability of Dairy Alternatives to enter and compete within the Québec market:

Article 4.1 prevents any Dairy Alternative from displaying the words “butter,” “cream,” “milk,” or “cheese” on the package, and prohibits the Dairy Alternative from exhibiting any dairy scene or imagery on the package.

Article 7.1 prevents any Dairy Blends from being sold in Québec that are not authorized by statute or regulation. Only a narrow category of specific blends is permitted by the Regulations. The effect is to prevent the sale and manufacture of any Dairy Alternatives that lies along the continuum from pure vegetable-based to pure dairy-based except for those mixes specifically authorized by the Regulations.

Article 7.2 prevents the introduction of any Dairy Alternative product that has not been explicitly authorized by the Regulations. Regulation 11.9.2 lists the five permitted “dairy product substitutes”.<sup>5</sup> Regulation 11.9.4 regulates expressly the compositional standards of those five goods, preventing any new Dairy Alternatives from being introduced to the Québec market and additionally preventing any new or better compositions of the five permitted Dairy Alternatives from being sold.

- [51] While the category of affected goods is not closed, two goods are most affected by the measures [see Tab X]. First, “butter blends” which consist of butter mixed with vegetable oils (usually canola), are prohibited. These “butter blends” are lower in saturated fat than pure butter, and are spreadable at room temperature. Second, “cheese analogues,” or vegetable oil-based cheese blends, are prohibited. *Le Producteur de Lait Québécois* notes, however, that “despite” the regulations these products are “tolerated” at retail [Tab X, p. 3]. They remain prohibited on the face of the regulations and the penetration of these goods into the Québec restaurant market is certainly affected by the Measures.

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<sup>5</sup> A limited exception can also be found in *Regulation* 11.9.1 – powdered pudding mixes, salad dressings, and baby formula are not considered to be dairy substitutes. The effect of this regulation is to exempt the products from section 7.1 and 7.2 of the *FPA* (and therefore allow those products to be mixed with dairy products), but not to exempt the products from s. 4.1 of the *FPA* and the labeling restriction.

- [52] The Dispute Resolution Panel noted in *Ontario – Dairy Analogues II* that the potential market for dairy blends was as high as a quarter of a billion dollars, with substantial room for growth with innovation and education (at p. 25).
- [53] With specific regard to cheese analogs, the market share is harder to calculate; in Canada it could be as much as 1.2% of the total market for cheese (or 3.9% of the market for mozzarella cheese) as at 2007. In the United States, it may be as high as 6 to 10 %. Cheese analogues offer a remarkable 50-70% cost reduction over pure cheese products which makes these analogues very attractive to manufacturers and producers of intermediate goods.<sup>6</sup>
- [54] Butter blends have begun to penetrate in eastern markets, and now make up 2.2% of spread sales in the Maritimes. Butter blends already constitute 0.6% of spread sales in Ontario since the very recent AIT Panel decision in *Ontario – Dairy Analogues II* and the repeal of the measures that prohibited such products [Tab X, p. 3]. Canadian butter blends include brands such as Gay Lea's "Spreadables" line and Alberta's "Foothills' Creamery" butter blend; a number of American butter blends also exist (e.g. Land O' Lakes). These products remain prohibited in Québec.
- [55] Any variety of "filled milk" product is also prohibited. "Filled milk" products are Alternatives to milk or milk-based products (e.g. condensed milk, chocolate milk) in which the dairy oils have been removed and replaced with vegetable-based oils.
- [56] Many of the Dairy Alternatives prohibited by the Measures are used in the *production* of other consumer goods; these prepared food products may be destined for the Québec market, markets in other provinces, or the United States. By prohibiting the sale of many Dairy Alternatives within Québec, the Measures have secondary effects on the food processing industry. Furthermore, a plain reading of Article 7.2 of the *FPA* lends itself to the interpretation that any mixing of a "dairy substitute" with a "dairy product" is prohibited, even if the resultant product is not itself a "dairy substitute" (i.e. butter and margarine mixed together to make a croissant).

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<sup>6</sup> AGÉCO, *Rapport Final: Perspectives pour l'industrie de la transformation laitière québécoise*, April 2007, pp. 43-45.

I. Article 401: The test for “no less favourable treatment”

[57] Previous AIT Panels have formulated a two-part test for determining whether a measure fails to comply with 401(1) of the AIT. It was originally formulated by the AIT Panel Report in *Canada – Manganese-Based Fuel Additives*<sup>7</sup> (at pp. 6-7) and adopted by subsequent panels.<sup>8</sup> The test is as follows:

1. Does the measure discriminate against the goods of one party to the benefit of the goods of another Party?
2. Are the goods discriminated against “like, directly competitive or substitutable” with the goods of another Party?

J. “Directly competitive” goods

[58] Saskatchewan’s believes that the Dairy Alternatives are “directly competitive or substitutable” to dairy products. The definition of “dairy substitutes” in the Measures makes this conclusion self-evident. Reference to the AIT Panel Report in *Ontario – Dairy Analogues I*, at p. 18 should be made:

Thus, Article 401 provides a broad non-discrimination obligation akin to the national treatment obligation contained in a variety of international trade agreements such as the World Trade Organization agreements and the North American Free Trade Agreement. To the extent that the EOPA forbids or restricts the sale of Dairy Analogs and Dairy Blends it fails to provide to the producers of these products from other provinces the best treatment it accords to producers of dairy products in Ontario.

[59] The Summary Panel reviewing Ontario’s compliance with the decision in *Ontario – Dairy Analogues I*, agreed with this conclusion (*Ontario – Dairy Analogues II*, p. 19).

[60] The fact that similar measures treated Dairy Alternatives as substitutional for dairy products was noted in *Québec – Coloured Margarine* to be evidence that margarine was a substitute for butter (at p. 25). This reasoning is sound. Saskatchewan submits that the Dairy Alternative category, broadly speaking, is “substitutional” or “competitive” with dairy products, as those terms are used in the AIT.

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<sup>7</sup> Report of the Article 1704 Panel Concerning the Dispute Between Alberta and Canada Regarding the Manganese-Based Fuel Additives Act, July 12, 1998 (Chair: Clay Gilson).

<sup>8</sup> E.g. *New Brunswick – Fluid Milk* at p. 13; *Ontario – Edible Oils II* at p. 18; *P.E.I. – Fluid Milk* at p. 8.

K. Discrimination: the prohibition on blending and manufacture of “unauthorized” Dairy Alternatives

- [61] Historically, dairy producers in Québec have been protected from competing non-dairy substitutes. Statistics Canada data shows, quite plainly, the size of the dairy industry in Québec. As one of the largest provinces it is unsurprising that Québec’s dairy industry would be one of the largest—the *per capita* data, however, demonstrates that the relative size of the dairy industry within Québec is far higher than the national average, despite Québec’s large population [see Tab P].<sup>9</sup>
- [62] By contrast, oilseed producers and crushers are predominantly western agricultural concerns. The Prairie Provinces grow the majority of Canada’s oilseed crops [see Tab P] and are home to 12 of Canada’s 18 oilseed crushing facilities [see Tab W]. The following excerpts from the Statistics Canada Data are notable, and evince the relative importance of canola oils and butter oils to the economies of the Disputing Parties:

Excerpts of 2012 Statistics Canada Data [values above the national average are highlighted]			
	Canola Sales (dollars / person)	Butterfat (kg / person)	Milk Sales (dollars / person)
Saskatchewan	<b>\$3,755.57</b>	8.34 kg	\$214.57
Manitoba	<b>\$792.92</b>	<b>10.30 kg</b>	<b>\$265.17</b>
Alberta	<b>\$794.28</b>	6.82 kg	\$175.52
B.C.	\$8.05	5.73 kg	\$5.73
Québec	\$2.23	<b>14.93 kg</b>	<b>\$365.75</b>

<sup>9</sup> Québec’s *per capita* milk production and butterfat production are, in fact, higher than every other province in Canada except for Prince Edward Island. Presumably, P.E.I.’s very small population explains its remarkable *per capita* milk production.

Canada (mean)	\$235.88	9.09 kg	\$228.335
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[63] While the Measures do not *expressly* discriminate between Québec producers and producers from elsewhere in Canada, this does not end the inquiry. As the AIT Panel Report in *New Brunswick – Fluid Milk*<sup>10</sup> noted (at p. 13):

The Panel notes that two previous panels held that two factors must be considered in determining whether a measure is inconsistent with Article 401(1):

1. Does the measure discriminate against the goods of one Party to the benefit of the goods of another Party?
2. Are the goods discriminated against “like, directly competitive or substitutable” with the goods of another Party?

This Panel adopts the same criteria in the present case.

With respect to the second criterion, there is no doubt that Complainant’s products are “like, directly competitive or substitutable”. Respondent did not contest this point.

With respect to the first criterion, the previous panels concluded that there must be a geographical component to the discrimination for a measure to be inconsistent with Article 401(1). Further, those panels concluded that this geographical component can be direct, where goods from one Party are favoured over identical goods from another Party, or indirect, where goods produced predominately in the territory of one Party are favoured over directly competitive or substitutable goods produced predominately in the territory of another Party. The Panel accepts this reasoning. [citations omitted; emphasis added]

[64] The effect of the Measures is dramatic, and plainly discriminates between dairy products and Dairy Alternative products within the province. This was the conclusion reached by the AIT Panels in *Ontario – Dairy Analogues I* (p. 18) and *Ontario – Dairy Analogues II* (p. 19). The Panel in *Ontario – Dairy Analogues II* was clear:

With respect to the first criterion, by prohibiting filled milk and certain types of spreads from being sold in the province, Ontario fails to accord these goods produced in other provinces the best treatment it provides to dairy products in Ontario.

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<sup>10</sup> *Report of the Article 1716 Panel Concerning the Dispute Between Farmers Co-operative Dairy Limited of Nova Scotia and New Brunswick Regarding New Brunswick’s Fluid Milk Distribution Licensing Measures*, September 13, 2002 (Chair: John F. Helliwell).

- [65] Section 7.2 of the *FPA* prohibits the manufacture of *any* Dairy Analogues that are not authorized by the Regulations. Only five Dairy Analogues are therein authorized. This prevents any novel or innovative Dairy Analogues from being introduced to the province without being permitted by the Government. No such restriction is placed on dairy products or, indeed, any other product category. This provision protects the dairy industry from the incursion of substitutional goods and provides Dairy Alternatives with treatment markedly “less favourable” than Québec dairy products.
- [66] Similarly, section 7.1 prevents the blending of any Dairy Substitutes with dairy products unless they fit within the narrowly permitted exceptions of the Regulations. The effect of this provision is similar, but two-fold. First, it prevents Dairy Blends from containing more than a certain percentage of dairy ingredients. Increasing the percentage of dairy ingredients in a particular Dairy Alternative is often done to improve the flavor of the resulting Dairy Alternative product. By strictly limiting the amount of permitted milk ingredients in Dairy Alternatives, the Measures suppress the ability of Dairy Alternatives to compete with the flavour or richness of pure dairy products. Second, the anti-blending provision prevents producers from adding vegetable oil products to dairy products to reduce the saturated fat content or change the usage of the resulting Dairy Alternative product. For example, the Gay Lea “Spreadable” butter spread consists of butter mixed with canola oil, such that the resulting product is spreadable at refrigerator temperature. As per the Measures, this “Spreadables” product is prohibited in Québec.

#### L. Discrimination: The Packaging Restrictions

- [67] Article 4.1 of the *FPA* provides for a specific and unusual restriction on the ability of Dairy Alternative packages to have certain dairy-related words on them. No other product in the *FPA* is subject to such specific prohibition.
- [68] The effect of this provision is to create an environment “less favourable” to dairy substitutes within Québec. Dairy Substitute manufacturers are unable to describe their products as “creamy” or “buttery,”<sup>11</sup> or even as “soy cheese.” These words have, by Québec’s legislature,

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<sup>11</sup> See i.e. *Unilever* (2013), *infra* at paragraph 34, affirming sanctions on Unilever for their manufacture Becel Gold margarine, described on the package as having a “buttery taste.”

been specifically assigned to the dairy industry. Notably, the dairy industry is not prevented from using words associated with vegetable-oil-based products.

- [69] The result is that only butter may be described as “buttery,” only cream can be described as “creamy,” and only real cheese can be described as “cheese” or even “cheesy” The result is to leave Dairy Alternatives at a disadvantage at the point of purchase. This is analogous to the AIT Panel Report in *Québec – Margarine*, which stated (at p. 25):

In the Panel’s view, by mandating a 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.

- [70] This is not to say that Dairy Alternatives (or any product) should be permitted to mislead or misdirect consumers as to the content or nature of the product. Article 4 of the *FPA* provides that packaging shall not be confusing in a variety of ways (e.g. should not confuse the consumer as to nature, quality, or source of the product). Saskatchewan is concerned with Article 4.1, which has superadded restrictions on Dairy Substitutes’ ability to contain dairy-related words. It is not clear why Article 4 of the *FPA* and the labeling requirements of the federal *Food and Drugs Act* are insufficient to protect consumers from confusion at the point of sale.

#### M. Article 402: Right of Entry and Exit

- [71] As noted by the Panel in *Ontario – Dairy Analogues II* (p. 19), AIT Panels have interpreted Article 402 differently.
- [72] The “narrow” view, adopted by the Panel in *Québec – Coloured Margarine* (p. 25), restricted the application of Article 402 to *transit* across the province in question.
- [73] The “broad” view, adopted by the Panel in *Ontario – Dairy Analogues I*, *Ontario – Dairy Analogues II*, and two other AIT Panels,<sup>12</sup> is that Article 402 applies more generally to the

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<sup>12</sup> *New Brunswick – Fluid Milk*, *supra* note 10; *Report of the Article 1704 Panel Concerning the Dispute Between Nova Scotia and Prince Edward Island Regarding Amendments to the Dairy Industry Act Regulations*, January 18, 2000 (Chair: Clay Gibson) [*P.E.I. – Fluid Milk*].



“entry” of goods into the provincial market, as well as transit of goods and export restrictions. As per the Panel in *Ontario – Dairy Analogues II* (p. 19):

In the Summary Panel’s view, Article 402 could apply to any and all of the following situations:

- restrictions on entry of a good or service into a province;
- restrictions on a product leaving a province (e.g., prohibition against the export of a raw material from a province);
- restrictions on transit of a good across a province.

The Summary Panel agrees with the majority of other Panels that the meaning of Article 402 includes a restriction on entry of a good into a province.

[74] The “narrow” approach would appear to be subsumed into the “broad” approach (bullets two and three, above). A measure that contravenes the “narrow” interpretation would therefore contravene the AIT under the “broad” interpretation as well.

[75] Saskatchewan would encourage the Panel to adopt the “broad” approach to 402, for two reasons:

(1) The “narrow” approach would not protect the AIT Parties from a situation where a Party *indiscriminately* prohibits certain goods or categories of goods from the province. For example, if Québec were to ban the sales of *all* margarine and butter within the province, Article 401 would not apply. Article 402 would apply whether or not the prohibition on sale and manufacture is discriminatory.

(2) While Panels have ruled both ways on the interpretation of Article 402, the majority of panels have ruled in favour of the “broad” approach. Panels are, of course, not bound by the interpretations of previous Panels, but the importance of consistent interpretation of the AIT should be emphasized.

[76] The Measures operate to prohibit the entry into the Québec market of a number of established Dairy Alternatives and any new Dairy Alternatives. The Measures therefore violate Article 402 of the AIT.

[77] The Measures, by restricting the *manufacture* of Dairy Alternatives without regard to the fact that the goods may be sold outside of Quebec, and restricting the sale of these goods to

Québec manufacturers who might use Dairy Alternatives as *inputs* in consumer goods, also act as a barrier to *export*, which is properly characterized as a breach of both the narrow and broad interpretations of Article 402.

#### N. Article 403: No Obstacles

- [78] Article 403 is a commitment of broad importance. Saskatchewan submits that the Measures contravene Article 403 by acting as a barrier to trade in the Dairy Alternative category.
- [79] By preventing Dairy Alternatives from competing properly in the Québec market—the second largest Canadian market by population—the Measures present a clear obstacle to the trade in these goods. This has spillover effects for other Canadian markets; by excluding the entry of these goods into Québec market, the Measures reduce the expected return on investment a manufacturer would receive from the research and development of a new Dairy Alternative. This serves to suppress investment in Dairy Alternatives nation-wide.
- [80] Moreover, by preventing the manufacture of these products within Québec, the Measures present an obstacle to trade by prohibiting Québec manufacturers from exporting Dairy Alternatives to other markets within Canada. This presents as a second, no less important, obstacle to internal trade.
- [81] This prohibition on sale and manufacture has effects across the supply chain. It suppresses demand for vegetable oils across Canada. This affects oilseed producers (primarily canola producers), oilseed crushers and processors, and manufacturers and shippers of oilseed products. The western provinces (Alberta, Saskatchewan, Manitoba, and British Columbia) account for a full 99% of Canada's total canola production. Saskatchewan alone accounts for over two-fifths of Canadian canola production and is home to four of Canada's 18 canola crushing plants (twelve of which are in western Canada). The Saskatchewan economy, and the western provinces' export of oilseeds more generally, is being injured by the Measures.
- [82] Lastly, the Measures present an obstacle to internal trade if the manufacturers of Dairy Alternatives are forced to lobby the Québec government to change regulations to accommodate any new or slightly different product formulations. The Regulations permit only five sub-categories of Dairy Alternatives; these five sub-categories are the same five that have been authorized in Québec since the 1960's. There does not appear to be a formal

mechanism or system by which new Dairy Alternatives are added and authorized by the Government—new Dairy Alternatives are included at the discretion of the Minister, with no formal oversight. Notably, even if the government were to change or consider change to the Regulations on request, the requirement that Dairy Alternative manufacturers *seek* this authorization before manufacturing their products is itself discriminatory, and presents a barrier to internal trade.

## 6. A Lack of Legitimate Objectives: Article 404 and 905

- [83] Notwithstanding that the Measures are a restriction on internal trade, the AIT allows for a limited protection of non-conforming measures that amount to “legitimate objectives.”

### Article 404

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 persons, goods, services or investments of a Party that meet that legitimate objective;
- (c) the measure is not more restrictive than necessary to achieve that legitimate objective; and
- (d) the measure does not create a disguised restriction on internal trade.

- [84] As per 404(c), the requirements of Article 404 are conjunctive (“and”)—a measure must meet *each* of the four criteria in Article 404 before it is permissible under the AIT (see *Québec – Coloured Margarine*, p. 28).

- [85] The AIT defines “legitimate objectives” in Chapter Two:

### Article 200

[...]

legitimate objective means any of the following objectives pursued within the territory of a Party:

- (a) public security and safety;
- (b) public order;
- (c) protection of human, animal or plant life or health;
- (d) protection of the environment;
- (e) consumer protection;
- (f) protection of the health, safety and well-being of workers; or
- (g) affirmative action programs for disadvantaged groups;

considering, among other things, where appropriate, fundamental climatic or other geographical factors, technological or infrastructural factors, or scientific justification.

Except as otherwise provided, "legitimate objective" does not include protection of the production of a Party, or, in the case of the Federal Government, favouring the production of a Province.

For greater certainty, "legitimate objective" may be amended by a provision in Part IV.

- [86] Furthermore, with regard to technical measures, Chapter 9 mandates an even more rigorous standard for the vetting of permissible measures than Chapter 4 alone. Article 905 states:

#### Article 905

1. For greater certainty, in adopting and maintaining any technical measures a Party may establish the level of protection it considers appropriate in the circumstances to achieve a legitimate objective.
2. For greater certainty, each party shall, in ensuring that any technical measure that it adopts or maintains is not more trade-restrictive than necessary to achieve a legitimate objective, take into account the risks that non-fulfillment of that legitimate objective would create and ensure proportionality between the trade restrictiveness of the technical measures and those risks.
3. Each Party shall ensure that any technical measure adopted or maintained for a legitimate objective does not arbitrarily or unjustifiably discriminate between or among Parties, including between that Party and other Parties, where identical or similar conditions prevail.

4. No Party shall adopt or apply a technical measure in a manner that would constitute a disguised restriction on internal trade.

5. Each Party shall ensure that its technical measures have a scientific, factual or other reasonable basis and that where appropriate, such technical measures are based on an assessment of risk.

- [87] The forgoing section has the effect of limiting the scope of the “legitimate objectives” justification for a technical measure even further than the already circumspect scope of the “legitimate objectives” defense provided by Chapter Four. It demands that a technical measure have a “scientific, factual or other reasonable” basis, as well as demanding a more exacting assessment of “risk” (in both 905(2) and (5)) before the measure will be found to be “permissible.”
- [88] It has been repeatedly affirmed by AIT Panels that the Party *defending* the Measures bears the burden of convincing the Panel that Article 404 saves the measures in question (see *Québec – Coloured Margarine*, p. 25; *Ontario – Dairy Analogues II*, p. 23).
- [89] It is not known whether Québec intends to defend the Measures by relying on Article 404. Should Québec do so, it will bear the onus of proof in defending the measure. As this is still necessarily unknown, Saskatchewan’s submissions at this stage are brief and limited primarily to Article 404(a) (the identification of a “legitimate objective”), subject to its right to request reply submissions (as per Annex 1705(1), Rule 29).
- [90] It is also clear that a measure may have more than one goal; a Panel must scrutinize a measure to discover whether it is truly intended to “achieve a legitimate objective.” (*Quebec – Coloured Margarine*, p. 30). Notably, AIT Panels have previously examined Hansard and *les travaux parlementaires* when undertaking this analysis (*Québec – Coloured Margarine*, pp. 29 – 30).
- [91] The nature of the dispute (being a matter of food products) and the AIT’s history with similar disputes would suggest that “protection of human [...] health” (Article 200, clause (c)) and “consumer protection” (Article 200, clause (e)) are the most applicable “legitimate objectives” to this measure.

## O. Protection of Health

- [92] Any attempt to justify the Measures by reference to the protection of the health and safety of consumers would not be realistic.
- [93] First, Québec would have to establish that Dairy Alternatives are capable (or more capable than pure dairy products) of being contaminated, adulterated, tampered with, or otherwise constituted in a way that would injure Québec consumers. Any concerns in this vein would be adequately addressed by the *FPA*, ss. 3 – 3.5. These sections mandate that all food sold in Québec must be prepared safely and traceably and would, of course, apply to Dairy Alternatives.
- [94] Saskatchewan does not, in this dispute, take issue with the right of Québec to maintain standards of cleanliness and clarity in the manufacture of dairy products and Dairy Alternatives. Among other provisions of the Act and Regulations, for example, Division 11 in particular mandates standards for production and transport, etc. which should, if adequately enforced and policed, guarantee the safety of consumers to purchase Dairy Alternatives, as well as pure dairy products. There is no sensible reason to restrict the sale and manufacture of Dairy Alternatives, which would be produced with due regard to the health and safety requirements of the Act.
- [95] Further, a considerable body of federal laws exists to protect food safety and purity. *The Food and Drugs Act*, R.S.C. 1985, c. F-27 [Tab J] states (*inter alia*) that:

4. (1) No person shall sell an article of food that

- (a) has in or on it any poisonous or harmful substance;
- (b) is unfit for human consumption;
- (c) consists in whole or in part of any filthy, putrid, disgusting, rotten, decomposed or diseased animal or vegetable substance;
- (d) is adulterated; or
- (e) was manufactured, prepared, preserved, packaged or stored under unsanitary conditions.

[...]

5. (1) No person shall label, package, treat, process, sell or advertise any food in a manner that is false, misleading or deceptive or is likely to create an erroneous impression regarding its character, value, quantity, composition, merit or safety.

(2) An article of food that is not labelled or packaged as required by, or is labelled or packaged contrary to, the regulations shall be deemed to be labelled or packaged contrary to subsection (1).

6. (1) Where a standard for a food has been prescribed, no person shall

(a) import into Canada,

(b) send, convey or receive for conveyance from one province to another, or

(c) have in possession for the purpose of sending or conveying from one province to another any article that is intended for sale and that is likely to be mistaken for that food unless the article complies with the prescribed standard.

[...]

[96] Considering the extensive federal and provincial laws on the matter, it is not clear what concerns remain would possibly justify the very pointed trade-distorting effect of the Measures.

[97] Finally, the Measures would appear, if anything, to act *contrary* to the health of Québec consumers. Health Canada, in a recent Assessment [see Tab V] concluded that the substitution of unsaturated fats for saturated fats, as would be the case for most Dairy Alternatives or products that contain Dairy Alternatives, has health *benefits*:

Health Canada has concluded that the results of the updated literature review are consistent with the results of the 2002 IOM report on the replacement of saturated fat with unsaturated fat and blood cholesterol lowering, in other words, scientific evidence exists in support of the therapeutic claim linking the replacement of saturated fat with unsaturated fat to a reduction of blood cholesterol. The claim is relevant and generally applicable to the Canadian population given that a high proportion of the population (approximately 44%) is hyperlipidemic. Based on the scientific evidence available, feedback from the petitioner and consideration of decisions made in other jurisdictions, it is Health Canada's opinion that the therapeutic claim statements set out below are substantiated in relation to vegetable oils and foods containing vegetable oils when specific conditions for the food carrying the claim are met. [emphasis added, citations omitted]

[98] As per the Assessment, certain goods that have had their saturated fats replaced with unsaturated fats may now carry text alerting consumers to the health benefits of choosing unsaturated fats:

The following statements may be made in the labelling and advertising of food products meeting the qualifying criteria.

[...]

For example:

If the food is a vegetable oil:

“Replacing saturated fats with polyunsaturated and monounsaturated fats from vegetable oils helps lower cholesterol. 2 teaspoons (10 mL) of this blend of corn and canola oil contains 84% less saturated fat than 2 teaspoons (10 g) of butter”

If the food is made with a vegetable oil or a blend of vegetable oils:

“Replacing saturated fats with polyunsaturated and monounsaturated fats from vegetable oils helps lower cholesterol. This blueberry muffin (55 g) is made with canola oil, contains 25% less saturated fat than our regular blueberry muffin (60 g) and is a source of omega-3 polyunsaturated fat”

The following additional statement could be used in letters up to the same size and prominence as those of the primary statement:

“High cholesterol is a risk factor for heart disease”

[citations omitted]

- [99] It would strain credulity to suggest that the same products being sold outside of Québec as having health *benefits* could be prohibited in Québec, purportedly to meet a health-targeted “legitimate objective.”

## P. Consumer Protection: The Prohibition

- [100] In previous Panels relating to Dairy Alternatives and similar products, the protection of consumer interests has been cited by parties defending their measures. It has not been successful, for reasons that follow.
- [101] While Saskatchewan does not dispute that “consumer protection,” abstractly, can constitute a “legitimate objective” under the AIT, it contests that the same can be applied to the within dispute. Most importantly, as outlined above, Saskatchewan contests that the purpose of the measures is consumer protection. The measures appear on their face to protect the dairy industry from losing market share to Dairy Alternatives. The Debates in the Legislative



Assembly, discussed above, support this conclusion. Notably, when introducing the prohibition on new Dairy Analogues in 1987, the Honourable Minister of Agriculture stated that the government did not have concerns about the quality of Dairy Alternatives (“[...] c’est un choix tout à fait légal qu’ils ont fait et c’est de qualité, je ne remets pas en cause la qualité ou la valeur qualitative de ces produits, loin de là [...]” M. Pagé, *Journal des debates*, April 7, 1987, p. 6668).

- [102] Second, it is not clear what consumers are being protected *from*. Dairy Alternatives, while they are (by definition) competitive and substitutable *vis-à-vis* many dairy products, it is difficult to suggest that they are *mistaken* for dairy products, or that consumers are at a disadvantage for being offered a choice between dairy products and Dairy Alternatives.
- [103] Furthermore, there are permitted Dairy Alternatives in Québec’s *Regulations*. It is unclear why Regulations 11.9.1 and 11.9.2 would permit a narrow band of dairy products while excluding all others, and permits only specific ratios of dairy to non-dairy oils in such substitutes: if consumers truly needed to be protected from Dairy Alternatives, the narrow exceptions would not exist. As the Panel noted in *Ontario – Dairy Analogues II* (p. 22):

With respect to protection of human health, the record does not explain the need for a prohibition on dairy blends when dairy products themselves can be produced, distributed and sold lawfully. As pointed out by Alberta, Ontario does not distinctly regulate the mixing of dairy products with other goods in a variety of other contexts, and does not explain the need to do so when dairy products are mixed with edible oils.

It is also difficult to understand from the evidence presented how human safety issues arise if the amount of edible oil added forms a certain percentage of a product, but not otherwise. Spreads containing more than 50% oil are prohibited; there is no explanation why product safety is triggered by crossing this threshold. Small amounts of edible oils can be added to milk for flavouring or as an omega 3 supplement; the evidence in record does not indicate how adding a larger amount of oil would trigger a bona fide health concern.

- [104] Third, all food products are regulated by the federal government pursuant to the *Food and Drugs Act*. By law, in accordance to the *Food and Drug Regulations*, C.R.C., c. 870 [Tab K], all ingredients must be declared:

B.01.008. (1) The following information shall be shown grouped together on any part of the label:

(a) any information required by these Regulations, other than the information required to appear on the principal display panel or the nutrition facts table and the information required by sections B.01.007, B.01.301, B.01.305, B.01.311, B.01.503, B.01.513 and B.01.601; and

(b) where a prepackaged product consists of more than one ingredient, a list of all ingredients, including, subject to section B.01.009, components, if any.

[...]

(3) Ingredients shall be shown in descending order of their proportion of the prepackaged product or as a percentage of the prepackaged product and the order or percentage shall be the order or percentage of the ingredients before they are combined to form the prepackaged product.

[105] The federal *Food and Drug Regulations*, enacted pursuant to the *Food and Drugs Act*, create extensive standards for dairy products, as well as certain dairy substitutes. The Regulations state:

B.08.001. The foods referred to in this Division are dairy products.

[...]

B.08.002. Except as provided in these Regulations, a dairy product that contains a fat other than milk fat is adulterated.

The *Food and Drug Regulations* Division 8 sets out an extensive regulatory scheme for named “dairy products.” Put simply, it would be illegal to mix dairy oils with non-dairy oils in a manner not allowed by the Food and Drug Regulations and sell the resulting blend as a named dairy product.

[106] Given the extensive federal rules regarding labeling and the federal compositional standards for named “dairy products,” it is unlikely that Québec consumers will be confused or injured by the wider introduction of Dairy Alternatives into the Québec market.

[107] Finally, consumers are not indifferent between Dairy Alternatives and dairy products. Consumers purchasing Dairy Alternatives will have a number of factors in mind, including taste, price, nutrition, different end uses, brand preference and other marketing concerns, and availability. The proliferation of Dairy Alternatives across Canada shows clearly that consumers are *looking* for alternatives to dairy products, including Dairy Alternatives, and are not being *tricked* into those alternatives.

## Q. Consumer Protection: Labeling and *FPA* Article 4.1

[108] Particular attention should be paid to Articles 4 and 4.1 of the *FPA*, which state:

4. No person shall use on a product, its container, label or package, on any sign relating thereto or in any document concerning the advertising, keeping, handling or distribution of a product for sale, any inaccurate, false or misleading indication or indication that could confuse the purchaser as to the source, nature, category, class, quality, condition, quantity, composition, preservation or safe use of the product.

The absence of an indication, or an incomprehensible or illegible indication, on any of the elements described in the first paragraph is considered to be an inaccurate, false or misleading indication.

4.1. In addition, no person shall

(1) use the words « milk », « cream », « butter », « cheese » or a derivative of any of those words to designate a dairy product substitute ;

(2) use any words, trademarks, names or images that evoke the dairy industry to designate a dairy product substitute.

[109] The prohibition in Article 4.1 has been used, in the very recent past, to levy fines and result in the effective exclusion of certain goods from the Québec market. For example, Becel's "Buttery Taste" margarine spread (marketed as "Becel Gold" in Québec, though with the words "buttery taste" on the container) was introduced to Québec immediately after the AIT panel report in *Québec – Margarine* and the subsequent repeal of the coloured margarine regulations. It was immediately sanctioned by the Québec government. That sanction was recently upheld by the Québec Court of Appeal (see *Unilever Canada inc. c. Québec (Directeur des poursuites criminelles & pénales)*, 2013 QCCA 546, 2013 CarswellQue 2540) [Tab U].

[110] In the earlier case of *Unilever Canada Inc. c. Québec (Attorney General)* (2005), 234 D.L.R. (4th) 398, [2003] R.J.Q. 2729 (Q.C.C.A.) [Tab S] (affirmed 2005 SCC 10, [2005] 1 S.C.R. 143 [Tab T]). The Court of Appeal noted that the margarine colouring regulations were *intra vires* the legislature and explicitly noted that the protection of the dairy industry was one of the animating reasons for the regulation (see e.g. paras. 41, 44, 52-64). The Court of Appeal in *Unilever* (2013) built on this conclusion, and noted that while Article 4 of the *FPA* was intended to protect consumers, Article 4.1 had the explicit purpose of protecting the dairy industry:

[32] L'article 4.1 de la Loi vise à restreindre l'utilisation de certains termes qui sont expressément réservés à l'industrie laitière lorsqu'il est question de désigner un succédané de produit laitier. Les travaux parlementaires entourant l'adoption de cet article dans des lois antérieures indiquent la volonté du législateur de protéger les producteurs de l'industrie laitière en empêchant leurs concurrents, qui produisent et mettent en marché la margarine, d'utiliser le mot beurre pour désigner leurs produits. Lors de l'étude détaillée du projet de loi n°123 - Loi modifiant la Loi sur les produits agricoles, les produits marins et les aliments et d'autres dispositions législatives (titre modifié), les propos suivants ont été échangés à l'égard de l'article 4.1 de la Loi et ils établissent que l'objectif de cette Loi est le même que celui qui prévalait dans les lois antérieures:

M. Trudel: Alors, à la page 20, donc 4.1 reprend substantiellement les paragraphes a et b de l'article 28 de P-30? on emmène ça dans P-29? relatifs aux succédanés de produits laitiers, qui se lisent comme suit :

Il est interdit:

- a) d'employer, pour désigner un succédané, les mots « lait », « crème », « beurre », « fromage », ou un dérivé d'un de ces mots;
- b) d'utiliser, pour désigner un succédané, des mots, marques de commerce, appellations ou images évoquant l'industrie laitière.

M. Vallière : Est-ce que c'est une reconduction intégrale du texte?

Mme Bernier (Nicole): Le seul changement, c'est que, à la place de « succédané », on a dit « succédané de produit laitier » pour ne pas élargir la portée de l'article de P-30, l'article 28, parce que P-30 s'appliquait aux produits laitiers. Donc, il peut y avoir des succédanés d'autres produits. On ne veut pas élargir. C'est-à-dire, le libellé prévoit uniquement que c'est le seul changement.

M. Trudel: Puis vous comprenez que c'est un article extrêmement important.

M. Vallières: Oui. Quand je te dis : Passe-moi du beurre . . .

[ . . . ]

M. Trudel : Oui, c'est important. C'est parce que les mots et images ont pris de la valeur. Puis ils ont pris de la valeur, pourquoi? Parce que les producteurs laitiers en particulier ont développé un produit de qualité. Et là il y a bien du monde qui voudrait peut-être utiliser ça à son profit sans utiliser le produit lui-même. Alors, c'est pour ça que le statu quo, tel que souhaité par les produits laitiers, il est encastré dans la loi.

[33] Il n'appartient pas à la Cour de questionner ou de remettre en cause cette orientation législative qui vise la protection des intérêts des producteurs laitiers en prohibant l'utilisation du mot « beurre » pour désigner une margarine.

[citations omitted] [courtesy translation provided at page 42]

- [111] In addition to *les travaux parlementaires* and the persuasive statements of a unanimous Court of Appeal on this point, Saskatchewan would also point to the *de juris* inequality and specificity of Article 4.1 – it does not prevent butters, cheeses, or other dairy products from using any dairy substitute-related words on their packaging (e.g. “margarine” or “soy loaf”), nor are there any other specific prohibitions on words and phrases to be found anywhere else in the *FPA* or the *Regulations*.
- [112] Article 4.1 does not have a “legitimate objective.” The purpose of this Article is expressly and solely to protect the dairy industry, particularly the dairy industry within Québec. Any protection of Québec consumers will be adequately guaranteed by the broad and purposive language in Article 4 of the *FPA*. Article 200 of the AIT is clear: the protection of the production of a Party is not a “legitimate objective.”

## 7. Injury

- [113] As per Article 1706(3)(c) of the AIT, a Panel is required to make a determination of injury in its report.
- [114] Previous Panels have noted that there is no obligation on a Disputing Party to specifically measure or quantify the amount of damages at this stage. The “denial of the opportunity or competitive disadvantage” is sufficient, as per the Panel Report in *New Brunswick – Fluid Milk* (p. 23):

With respect to injury, Complainant alleges that the denial of a fluid milk distribution license in New Brunswick has caused significant injury to Complainant’s prospects for growth and has eroded its capability to respond to competition in the future. Complainant admits that it is difficult to quantify the extent of injury and submitted no documentation in that regard. The Panel notes that a complainant is not required under the Agreement to prove a demonstrable dollar amount to establish injury, not is a panel required to rule on the extent of injury. It is the view of the Panel that the denial of the opportunity to be considered for a fluid milk distribution license in a manner that is fair and consistent with the *Agreement* is injury in itself, as is the denial of the opportunity to participate on an equal footing in the New Brunswick market.

- [115] A similar approach was followed in *Ontario – Dairy Analogues II* (p. 25) and *Ontario – Dairy Analogues I* (p. 33).

[116] The Measures have undoubtedly caused injury to many participants in the industry. As the Panel Reports in *Ontario – Dairy Analogues II* (p. 33) and *Québec – Coloured Margarine* (p. 33), by preventing the sale and manufacture of Dairy Alternatives in Québec, the Measures mean lost sales to manufacturers and lost upstream sales of oilseeds and other ingredients. Furthermore, it presents an injury to consumers across Canada, since the Measures operate to suppress innovation in the Dairy Alternatives category.

## **8. Relief Requested**

[117] Saskatchewan submits that this Panel make the following findings:

- (1) That ss. 4.1, 7.1 and 7.2 of the *FPA*, alongside the compositional formulas for Dairy Alternatives provided in the Regulations, abrogates Québec's commitments under the AIT, Articles 401, 402, and 403, as well as the commitments in Chapter 9.
- (2) That the Measures do not serve a "legitimate objective";
- (3) In the alternative, if the measures do serve a "legitimate objective", they cannot be justified under Articles 404(b) - (d) and Article 905 of the AIT.

[118] Pursuant to those findings, Saskatchewan submits that the Panel makes the following recommendations:

- (1) That Québec repeal or amend the Measures to bring them into compliance with the AIT by no later than the end of 2013;
- (2) That until such repeal or amendment is affected Québec neither enforce the Measures nor prosecute any persons for contravening them; and
- (3) That Québec refrain from enacting any further measures that would limit the sale, manufacture, and marketing of Dairy Alternatives within the province.

## 9. Operational Costs

- [119] Saskatchewan submits that this Panel exercise its discretion under Annex 1705(1), Rule 55, and award an unequal division of Operational Costs in favour of Saskatchewan and the Interveners.
- [120] The AIT non-compliance of the Measures was brought to the attention of Québec over 15 months ago. Despite a year-long period from Consultations to the Notice of Panel, the Measures have not been amended or repealed to bring them into line with Québec's AIT commitments.
- [121] Furthermore, the AIT non-compliance of the Measures should have been evident after the 2004 Panel Report in *Ontario – Dairy Analogues I*. This conclusion was underscored by the 2010 Summary Panel in *Ontario – Dairy Analogues II*.
- [122] Saskatchewan submits that an uneven distribution of costs is therefore appropriate, given the substance of Rule 55:

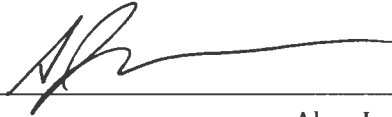
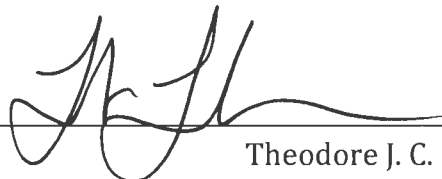

55. Unless otherwise specified, the panel may apportion Operational Costs to the participating Parties at its discretion. In exercising its discretion, the Presiding Body may consider:

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

- [123] Saskatchewan would submit that the long-standing knowledge (even within the dairy industry) that the Measures were non-compliant with the AIT is an "other relevant consideration" within the meaning of Rule 55(c) that ought to affect the Panel's apportionment of Operational Costs. This Panel represents the *third* time that similar measures regarding Dairy Alternatives have been challenged by Parties to the AIT, and the second time that Québec has been before an AIT Panel for measures relating to the protection of its dairy industry (see *Québec – Coloured Margarine*). Saskatchewan would submit that the Panel apportion Operational Costs no less favourable to Saskatchewan and

the Interveners than the apportionment in *Ontario – Dairy Analogues II* (p. 28) and assess at least 70% of the Operational Costs to Québec.

All of which is submitted this 8<sup>th</sup> day of August, 2013.

  
\_\_\_\_\_  
Alan Jacobson  
Senior Crown Counsel  
Ministry of Justice and Attorney General  
Government of Saskatchewan  
\_\_\_\_\_  
Theodore J. C. Litowski  
Crown Counsel  
Ministry of Justice and Attorney General  
Government of Saskatchewan  
\_\_\_\_\_  
Nadette Schermann  
Internal Trade Representative  
Executive Council – Intergovernmental Affairs  
Government of Saskatchewan



## Unofficial French – English Translation of Block Quotes

### A. Translation of excerpt at paragraph [36]:

Also, the current act does not give to the government the power to designate substitutes that can be manufactured or offered for sale in Quebec. Indeed, Mr. Chairman, this aspect must be taken into account and it is very important in regard to the consumption of food products; substitutes are a real threat to our dairy industry.

In the United States, cheese substitutes are currently experiencing a phenomenal success. In the years 1983 and 1984, the production of cheese, which is not really cheese, which has the appearance and perhaps the taste, but contains no dairy product, was in full expansion. This growth was 22% in the food service sector, that is to say, in restaurants and hotels.

In the United States, the rate of growth in the use of substitutes in food production is 43%. When going to the United States – and this is a perfectly legal choice they have made, I do not call into question the quality or qualitative value of these products, far from it – more often than not, when you eat a frozen pizza, the cheese topping is made of substitutes, there is no milk in it. The increase in substitutes sold is 50%. We are therefore entitled to consider what the future holds. It is estimated that trade in cheese substitutes will reach 780 million pounds this year, and even up to 4 billion pounds by the end of the century if the trend continues. What will happen to our dairy industry in a context of possible free trade, which is presently under discussion with our good friends to the South? We must act now in the face of this growing threat of substitutes. Let's begin by strengthening our laws, which in some ways are very lame. [...]

### B. Translation of excerpt at paragraph [41]:

**Mr. Trudel:** It is not just people in Saint-Hyacinthe that are doing research; there are also the Americans who have discovered something called the butter blends (*oléobeurres*). So they have discovered something, but something that would make us lose our advantage in respect to a quality product developed, *par excellence*, in Quebec. That is why we have taken these measures. You can't play around with an appealing and attractive product in just any way at all and benefit, from a substitute or a devious approach...

**Mr. Dion:** From a counterfeit.

**Mr. Trudel** ... from a counterfeit, or assimilate your product with the reputation that the other has built even when it doesn't have the qualities and the properties

C. Translation of excerpt at paragraph [110]:

[32] Section 4.1 of the Act is designed to restrict the use of certain terms that are expressly reserved to the dairy industry for designation of a dairy product substitute. Parliamentary proceedings surrounding the adoption of this section in previous laws indicate the intention of the legislator to protect producers in the dairy industry by preventing their competitors, who produce and market margarine, from using the word butter to describe their products. In a detailed study of Bill No. 123 - An Act to amend the Agricultural Products, Marine Products and Food Act and other legislative provisions (as amended), the following exchange took place with regard to section 4.1 of the Act and they establish that the purpose of this Act is the same as that which prevailed in the earlier legislation:

**Mr. Trudel:** So, on page 20, 4.1 essentially reproduces subsections a and b of Section 28 of P-30? we bring that into P-29 in respect to dairy product substitutes, which reads as follows:

It is prohibited:

a) to use for designating a substitute, the words "milk," "cream," "butter," "cheese," or a derivative of one of these words;

b) to use for designating a substitute, words, trademarks, names or images that evoke the dairy industry.

**Mr. Vallières:** Is that it is a complete restatement of the text?

**Ms. Bernier (Nicole):** The only change is that, instead of "substitute," we have "dairy product substitute" to not widen the scope of P-30, Section 28, because P-30 applies to dairy products. So there may be substitutes for other products. We do not want to widen. That is to say, the wording provides that this is the only change.

**Mr. Trudel:** So you understand that this is an extremely important section.

**Mr. Vallières:** Yes. When I say to you: pass me the butter...

[. . .]

**Mr. Trudel:** Yes, it's important, because words and images take on a meaning. They mean something, why? Because dairy farmers in particular have developed a quality product. And, of course, there are a lot of people who might want to use this for their own profit without using the product itself. So that's why the status quo, as sought for dairy products, is embedded in the law.

[33] It is not for the Court to question or challenge this legislative orientation aimed at protecting the interests of dairy producers by prohibiting the use of the word "butter" to refer to margarine. [citations omitted]

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