

**IN THE MATTER OF THE
AGREEMENT ON INTERNAL TRADE
and
IN THE MATTER OF A REQUEST UNDER THE AGREEMENT
made by
CANUK SALES LIMITED
to commence dispute resolution proceedings vis-a-vis
THE PROVINCE OF ONTARIO**

**Jack Gerow
Screener**

Dated this 26th day of November 1999

This is an intervention under the **Agreement on Internal Trade** ("AIT").

The parties in this matter are Canuk Sales Limited and the Province of Ontario.

The AIT is an agreement between Canada, the Provinces and Territories. They executed it on July 18, 1994. The objective of the AIT is **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**. The parties to the AIT agreed and recognized that **enhancing trade and mobility within Canada would contribute to the attainment of this goal**. The Internal Trade Secretariat was formed to support and administer the AIT. It describes the AIT as follows.

... an intergovernmental agreement signed by the First Ministers of Canada. It came into force in 1995 to increase the profile of internal trade by addressing obstacles such as labour mobility and discriminatory procurement practices that are faced by Canadian companies. It was a broadened trade focus, brought about by freer international trade and recent advancements to transportation and telecommunication systems, that brought these inconsistencies into perspective as trade barriers.

The establishment of the AIT marks a significant achievement in helping to remove the existing interprovincial trade barriers, prevent the erection of new barriers and harmonise interprovincial standards. These actions reduce extra costs to Canadian businesses by making the process of internal trade more efficient, increasing market access for Canadian companies and facilitating work mobility for tradespeople and professionals. Companies are taking advantage of the open trade environment provided by the AIT which allows them to be more competitive nationally, and globally.

The AIT is grounded on six general rules, established to prevent

governments from erecting new trade barriers and to reduce existing barriers.

The six general rules cover the following concepts: no discrimination; right of entry and exit; no obstacles, legitimate objectives, reconciliation and transparency.

Canuk Sales Limited, on October 26, 1999, initiated a request under Chapter Seventeen (Dispute Resolution Procedures) for a Person-To-Government intervention. In effect, Canuk Sales Limited argued that the Province of Ontario is in breach of the AIT general rules including the right of entry and exit to Ontario markets and presence of improper obstacles in Ontario. More specifically, Canuk Sales Limited asserts that the Province of Ontario's ***Edible Oil Products Act*** (the "Act") is measure in breach of the AIT. Such breach leads Canuk Sales Limited to challenge this Act pursuant to Chapter Seventeen of the AIT. The AIT at Chapter Seventeen provides as follows:

- 1. Each Party shall, before the date of entry into force of this Agreement, appoint an individual (the "screener") to review requests made under Article 1712(1) or (2). The screener shall be independent of government and capable of making an independent decision on the merits of the request. Notice of the appointment shall be delivered to the other Parties and the Secretariat.***
- 2. Each Party shall establish the process to be used by its screener for the review of requests.***
- 3. Where notice is provided under Article 1712(3), the screener of the Party that delivered notice to a person under Article 1711(4) or (5) or Article 513(5) or (6) (Bid Protest Procedures - Provinces) shall, within 30 days after the date of its delivery,***

review the request to determine whether the person should be permitted to commence dispute resolution proceedings.

4. *In deciding whether the person should be permitted to commence dispute resolution proceedings, the screener shall take into account the following:*
 - a) *whether the complaint is frivolous or vexatious;*
 - b) *whether the complaint has been instituted merely to harass the Party complained against; and*
 - c) *whether there is a reasonable case of injury or denial of benefit to the person or, in the case of a trade union, injury or denial of benefit to its members.*
5. *Where a dispute resolution proceeding is commenced under Article 1712(1)(a), the screener shall also determine the chapter of Part IV under which the person shall proceed.*
6. *On determination of the applicable chapter, the person and the Party complained against shall attempt to resolve the matter using the dispute avoidance and resolution process provided in that chapter. This paragraph does not apply in cases where the person has already exhausted such process.*
7. *The screener shall decide whether to accept or reject the person's request within 30 days after the date of delivery of the request. If the screener rejects the person's request, the screener shall, within that 30 day period, provide written notice to the person of the screener's decision, including the reasons for the decision. If the screener determines that the person may proceed, the screener shall, within that 30 day period, provide written notice, including the reasons, to the person, the Party that refused to initiate proceedings or request a Panel, the Party complained against and the Secretariat. Failure to provide such notice to the person within the 30 day period is deemed to be an approval.*
8. *If the screener determines under paragraph 7 that the person may proceed, then the person and the Party complained against may agree to proceed directly under Article 1715 or 1716.*

Canuk Sales Limited, in its submission to this intervention, relies upon Article 402 and 403 of the AIT. Chapter Four (General Rules) reads, in part, as follows:

Article 402: Right of Entry and Exit

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.

Article 403: No Obstacles

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.

Articles 402 and 403 must be read in conjunction with Article 404. It provides as follows:

Article 404: Legitimate Objectives

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 trade restrictive than necessary to achieve that legitimate objective; and***
- (d) the measure does not create a disguised restriction on trade.***

Canuk Sales Limited sold, in Ontario, products under the label **Semblance**. Such products fall within the definition of **imitation dairy products** and are regulated at the Provincial level, not the Federal level. In consequence, national standards have

not been developed at this time regarding the regulation of imitation dairy products.

Semblance was removed from Ontario retail grocery stores because it was in violation of the Province of Ontario's ***Edible Oil Products Act (EOPA)***. Under the ***EOPA*** at Article 3.3.(1) ***no person shall manufacture or sell an edible oil product, other than oleomargarine, manufactured by any process by which fat of oil other than that of milk has been added to or mixed or blended with a dairy product in such manner that the resultant edible oil product is an imitation of or resembles a dairy product.***

The Province of Ontario concluded that ***Semblance*** is ***an imitation of or resembles a dairy product*** under the ***EOPA*** and accordingly cannot be sold in the Province of Ontario. Canuk Sales Limited maintains that such prohibition is a breach of the AIT at Articles 402 and 403 as presented above.

On October 26, 1999, Canuk Sales Limited initiated an application for an intervention under Article 1712 of the AIT. Article 1712 provides as follows:

1. ***A person of a Party may commence dispute resolution proceedings in respect of all matters, other than those covered by Chapter Five (Procurement), where the person has received:***
 - a) ***notice under Article 1711(4) that a Party will not initiate dispute resolution proceedings on the person's behalf; or***
 - b) ***notice under Article 1711(5) that a Party will not request the establishment of a panel.***

2. ***A person of a Party may commence dispute resolution proceedings in respect of matters covered by Chapter Five (Procurement) where the person has received:***
 - a) ***notice under Article 513(5) (Bid Protest Procedures - Provinces) that a contact point will not initiate dispute resolution proceedings on the person's behalf; or***
 - b) ***notice under Article 513(6) (Bid Protest Procedures - Provinces) that the Party in whose territory the person is located will not request the establishment of a panel.***
3. ***The person requesting the commencement of dispute resolution proceedings shall provide written notice to the Party that refused to initiate proceedings or request a panel, to the Party complained against and to the Secretariat.***
4. ***A person may not commence proceedings under this Article if the person has failed to:***
 - a) ***request a Party to initiate dispute resolution proceedings under Article 1711(1);***
 - b) ***request a contact point to initiate dispute resolution proceedings under Article 513(5) (Bid Protest Procedures - Province); or***
 - c) ***commence any applicable dispute avoidance and resolution process listed in Annex 1701.4 that may be invoked by the person;***

within two years after the date on which the person acquired, or should have acquired, knowledge of the alleged inconsistent measure and knowledge that the person incurred loss or damage or suffered a denial of benefit.

In response to the application of Canuk Sales Limited, the Province of Ontario submits as follows:

With regard to the indicia to be considered by the Screener as set out under Article 1713.4 of the AIT, Ontario submits the following:

- 1. It is Ontario's position to the appropriate resolution of this issue rests in the development of a national consensus for regulating dairy product imitations and blends. A uniform, national regulatory framework will allow for the withdrawal of existing provincial legislation, including the Edible Oil Products Act. Ontario is actively steering such a process. It is a process which take time.***
- 2. Far from ignoring AIT obligations, Ontario has a work plan in place which contemplates of the resolution of Mr. Whetstone's complaint within 12months. Ontario is currently engaged in consultations with a both industry and provincial/federal governments to implement this work plan.***
- 3. Ontario risks scuttling the aforementioned national initiative if it were to act unilaterally, as the disputant requests. It is only through a national regulatory framework that a remedy might be arrived at which addresses the consistent treatment of the disputant's product nationwide, not merely its trade flow between British Columbia and Ontario. National treatment is key principal of the AIT.***

Based upon the material and submissions before me, I have decided that Canuk Sales Limited should **not** be permitted to commence dispute resolution proceedings under the AIT. In making my decision, I have taken into account whether the complaint is frivolous or vexatious; whether the complaint has been instituted merely to harass the Party complained against; and whether there is a reasonable case of injury or denial of benefit to the person or, in the case of a trade union, injury or denial of benefit to its members. To be more specific, I find that the application of Canuk Sales Limited is **vexatious** in the sense that such

application is without reasonable or probable cause or excuse. I find that the Province of Ontario is making a best effort to deal with the issue of national standards for the kind of products at issue here. Such national standards would assist in removing any interprovincial trade barriers impacting imitation dairy products.

I am satisfied that the expressions of the Province of Ontario with respect to seeking a national regulatory framework that will allow for the withdrawal of existing provincial legislation, including the **EOPA**, are bone fide and made in good faith. There is no compelling submission before me to the contrary. Furthermore, in my opinion, the **EOPA** is an enactment designed to achieve a **legitimate objective** within the meaning of Article 404 of the AIT. The nutritional quality of substitutes for dairy products is now a matter of public interest and political concern just as it was when the **EOPA** was first introduced. Any discussion regarding any amendment to or a repeal of the **EOPA** does not lessen value the legitimate objective behind the **EOPA**. Furthermore, it is only speculative what any amendments, to or repeal of, the **EOPA** may cause in terms of consequential legislation or regulations impacting dairy products and imitation dairy products. Clearly, an enactment to manage nutritional values is a legitimate undertaking for a government. This is not to say, of course, that there are immediate nutritional quality concerns with respect to any product produced by Canuk Sales Limited.

