

# Annexe 19



# **EDIBLE OIL PRODUCTS DISPUTE**

## **PANEL HEARING**

Mount Baton Salon  
Delta Chelsea Hotel Toronto  
33 Gerrard Street West  
Toronto, Ontario  
Thursday, July 22, 2010

**BEFORE:** Mr. Bryan Schwartz - Chairperson  
Ms. Madeleine Renaud - Panelist  
Mr. Lorne Seitz - Panelist

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1 Toronto, Ontario

2 --- Upon commencing on Thursday, July 22, 2010

3 at 9:02 a.m.

4 MR. SCHWARTZ: Good morning  
5 everybody. Is everyone ready to proceed? I am  
6 Bryan Schwartz. I will ask my fellow panelists to  
7 introduce themselves.

8 MS. RENAUD: I am Madeleine  
9 Renaud.

10 MR. SEITZ: Lorne Seitz.

11 MR. SCHWARTZ: We have a court  
12 reporter in effect here. Transcripts will be  
13 available within three business days after the end  
14 of today, I understand. The next order of business  
15 is if the representatives to the parties could  
16 introduce themselves. You have the agenda, so you  
17 know which order you are going in. Maybe you could  
18 just introduce yourselves in that order.

19 MR. RADCLIFFE: I am Robert  
20 Radcliffe here on behalf of Ontario, and beside me  
21 I have Bobby Seeber who is also with the province  
22 of Ontario.

23 MR. SCHWARTZ: Thank you very  
24 much.

25 MS. VOGEL: My name is Shawna

1 Vogel. I am with the government of Alberta, and  
2 this is Mr. Peter Kuperis from Alberta as well.

3 MR. THOMAS: Mr. Chair, Jeff  
4 Thomas representing the province of British  
5 Colombia. With me is Danielle Park.

6 MR. SCHWARTZ: Thank you,  
7 everyone. You all have the written version of the  
8 agenda. We were planning to stick with that. I  
9 guess there is no need to go over that any further.  
10 We will have a break at sometime in the morning,  
11 you will be relieved to know, but exactly when  
12 depends on how much different parties set aside, so  
13 we can't do that in advance.

14 As pre-hearing communications  
15 indicated, within your allocation of time is the  
16 time spent of our asking questions. Your answering  
17 is included in the time allotted to you. I  
18 understand from my fellow panelists that we will  
19 have some questions. Are there any logistical  
20 questions we have to address before Alberta can  
21 proceed? We have the audio/visuals ready to roll  
22 there. Thank you very much. Feel free to proceed  
23 whatever you are ready.

24 PRESENTATION BY ALBERTA:

25 ARGUMENT BY MS. SHAWNA VOGEL:

1 MS. VOGEL: Thank you. Alberta is  
2 first on the agenda. As I said, my name is Shawna  
3 Vogel. Mr. Kuperis is with me and he is the Branch  
4 Head, Domestic and International Trade Policy,  
5 Alberta Agriculture and Rural Development and he  
6 will be speaking as well. I would like to  
7 introduce with us as well is Shawn Robbins on my  
8 left, Executive Director Trade Policy - Domestic,  
9 International and Intergovernmental Relations.  
10 Beside him is Lorraine Andras, Associate Director,  
11 Internal Trade, International and Intergovernmental  
12 Relations. As well, beside Lorraine on behalf of  
13 Saskatchewan is Mr. Sidney Friesen, Senior Policy  
14 Analyst, Trade, Competitiveness and Agri-Food  
15 Development Government of Saskatchewan, so he is  
16 attending as well. Thank you for your attention to  
17 this matter.

18 I thought I would start with  
19 asking what is this dispute about? In a nutshell,  
20 this hearing is about Ontario continuing to  
21 restrict internal trade by continuing to prohibit  
22 the possession, manufacture, purchase and sale of  
23 most dairy blends in Ontario. The original panel  
24 examined Ontario's prohibition and treatment of  
25 dairy blends and analogues -- although dairy



1 analogues is just not the subject of this hearing  
2 -- and determined that they were inconsistent with  
3 the AIT. Following the panel report Ontario  
4 repealed the Edible Oil Products Act, lovingly  
5 referred to as the EOPA, and at the same time  
6 enacted amendments to Regulation 753; Grades,  
7 Standards, Designations, Classes, Packing and  
8 Marking, and Regulation 761; Milk and Milk  
9 Products, to the Milk Act.

10 Under the guise of compositional  
11 standards and through a complicated labyrinth of  
12 provisions, the regulations continue to prohibit  
13 the sale and manufacture of dairy blends with the  
14 same limited exceptions as the EOPA, and as such,  
15 are inconsistent with the AIT. The regulations  
16 continue to enforce Ontario's discriminatory  
17 treatment of dairy blends, except with a lot more  
18 words than in the EOPA. As mentioned, I do note  
19 that the EOPA provisions regarding dairy analogues  
20 were not replaced by the regulations and so they  
21 are not at issue before this panel.

22 This dispute is over the same  
23 measure which continues to be inconsistent with the  
24 AIT. Under article 200 of the AIT, a measure is  
25 defined as, "Legislation, regulation, directive,

1 requirement, guideline, program, policy,  
2 administrative practice or other procedure." The  
3 panel report described the scope of the dispute as,  
4 "Access to the Ontario market for dairy blends and  
5 dairy analogues." This dispute the policy and  
6 practice of the Ontario government has not changed  
7 since the panel report.

8                               What this dispute is not about:  
9 This dispute is not about consumer protection.  
10 Ontario argues that the regulations are necessary  
11 for consumer protection. Simply put, the federal  
12 and other Ontario legislation which governs the  
13 production and sale of food are sufficient to  
14 protect the consumer without the need for these  
15 regulations. The consumer information or confusion  
16 concerns raised by Ontario are met by federal  
17 labelling requirements. The food safety issues  
18 raised by Ontario are met by federal and provincial  
19 food safety legislation. Consumer protection does  
20 not require a ban on the manufacture and sale of  
21 dairy blends. Mr. Peter Kuperis here will be  
22 providing more information on this issue.

23                               MR. SCHWARTZ: If I could just  
24 interject there; a question of justification is one  
25 that you haven't had a chance to respond to in

1 detail in terms of what Ontario has now put  
2 forward, so it is definitely something we are very  
3 much interested in. We understand that there  
4 wasn't much of an effort at justification in the  
5 original panel proceeding. Now we have had a set  
6 of detailed arguments explaining why these measures  
7 are justified. We don't have in writing your  
8 specific responses to those because of course you  
9 couldn't anticipate what was going to be said, but  
10 that would be very useful to us if you could deal  
11 with that in some depth.

12 MS. VOGEL: I will be. Both  
13 myself and Mr. Kuperis will be dealing with that.  
14 We could either deal with it in the course or we  
15 could actually turn to it now if that would be  
16 better for the panel.

17 MR. SCHWARTZ: Whichever way you  
18 are most comfortable.

19 MS. VOGEL: Right now I am just  
20 trying to provide a bit of an overview and then we  
21 intend to address the issues in more depth and  
22 speak quickly given the limited time. Feel free to  
23 ask more questions about that because it doesn't  
24 count into my time. The other thing I want to  
25 point out is there is no national void in

1 regulating dairy blends that Ontario somehow needs  
2 to fill. The National Food Safety Legislation is  
3 adequate to protect the consumer. Finally, this  
4 hearing is not about a theoretical or a  
5 hypothetical measure.

6                                   At the hearing and in the panel  
7 report, the Ontario memo summarizing the detailed  
8 proposals of the Dairy Farmers of Ontario to amend  
9 the regulations under the Milk Act and to  
10 re-regulate dairy blends was identified, it was  
11 raised, it was reviewed, it was discussed. In that  
12 context and as a result, the panel made a specific  
13 finding that any replacement measure that would  
14 have the same effect as Section 3 in the licensing  
15 requirement of the EOPA and that would not be  
16 permissible under Article 404, Legitimate  
17 Objective, which we will deal with later, would be  
18 likewise inconsistent with this agreement.  
19 Notwithstanding, Ontario represented to the panel  
20 at the hearing that it would not re-regulate dairy  
21 blends under the Milk Act. The regulations were  
22 made December 23, 2004, filed December 24, 2004,  
23 came into effect January 1, 2005, and then were  
24 subsequently published in the Ontario Gazette on  
25 January 8, 2005. This occurred at the same time as

1 the EOPA was repealed. Thus, barely three months  
2 after the panel hearing and less than two months  
3 after the panel report, Ontario on one hand  
4 repealed the EOPA and at the same time,  
5 re-regulated dairy blends by their amendments to  
6 the regulations under the Milk Act and implemented  
7 the recommendations of the Dairy Farmers of Ontario  
8 that were before the panel and discussed in the  
9 panel hearing. This was done without Ontario  
10 providing the proposed measure to Alberta or to any  
11 province for review and comment as required by the  
12 AIT. Had Ontario complied with their transparency  
13 obligations, it is very likely that the text of the  
14 regulations would have been before the parties at  
15 the hearing.

16 MR. SCHWARTZ: I don't have the  
17 exact reference, but I think Ontario says when they  
18 admit that they did not comply with all the  
19 transparency requirements, but when they did  
20 introduce the new measures, they didn't get any  
21 comment from the other parties.

22 MS. VOGEL: We do not disagree  
23 with that but let's understand; first of all, how  
24 did they advise and when did they advise? On  
25 December 22 the e-mail came from Ontario to the

1 parties saying, "We are going to repeal the EOPA  
2 January 1, and by the way, we are thinking about  
3 amendments and dairy blends." I will just make a  
4 note to provide you with that reference. I have it  
5 in our submission but I will just get that  
6 reference. It was by e-mail. Clearly there  
7 weren't a lot of business days between December 22  
8 and January 1. Second of all, the transparency  
9 obligations require proposed text, explanation,  
10 opportunity to comment, and all we had from Ontario  
11 was, "Well, we are thinking about this." By the  
12 way, December 22, lo and behold, effective January  
13 1, the new regulations.

14 MS. RENAUD: Is the e-mail  
15 produced somewhere?

16 MS. VOGEL: Yes, it is. It is in  
17 the Alberta submission.

18 MS. RENAUD: You can give us the  
19 reference later. That is fine.

20 MS. VOGEL: It is attachment 9 to  
21 the Alberta submission. We are now at the summary  
22 panel process. How did we get here? Article  
23 1702(2) of the AIT provides for the establishment  
24 of this summary panel to determine whether or not  
25 the measure that was the subject of a pre-existing

1 dispute is or would be inconsistent with the AIT.

2                                   Let's understand the context of  
3 the summary panel procedure. There was a new  
4 chapter 17 enacted in 2009 and it put in place new  
5 enforcement provisions for dispute settlement.  
6 Indeed, there was a lot of discussion at the time  
7 about how to deal with outstanding disputes. I  
8 don't know if Danielle is going to talk about it,  
9 but Danielle Park who is with us on behalf of  
10 British Columbia was involved in all those  
11 discussions in which the chapter 17 process was  
12 discussed. At the time, there was a realization  
13 that if we are going to this new enforcement  
14 process, what do we do with the outstanding  
15 disputes? It was very clear to all parties at the  
16 time that there were four outstanding disputes  
17 under the old process that had to be dealt with and  
18 there had to be a mechanism to bring these old  
19 disputes into the new enforcement procedures  
20 including the current dispute.

21                                   MR. SCHWARTZ: Is there an  
22 authoritative list of outstanding disputes on which  
23 this was included?

24                                   MS. VOGEL: The list of  
25 outstanding disputes authoritative, they were

1 listed in a number of places. Certainly on the  
2 website of the AIT there is a list of all the panel  
3 reports. As well, and as part of the Alberta  
4 submission, we list a number of the reports to the  
5 Ministerial Committee on Internal Trade and records  
6 of decisions of the Ministerial Committee on  
7 Internal Trade and those discuss the outstanding  
8 disputes. That is at the Alberta submission on  
9 page 7 and footnote 26.

10                                   Essentially all disputes that are  
11 ongoing, they are tracked and parties have to  
12 report in to these various committees. With  
13 putting in the new chapter 17, there is a  
14 recognition, "How do we deal with these outstanding  
15 disputes?", because under the old process, there  
16 was a different enforcement mechanism. Thus, the  
17 summary panel mechanism was brought into effect to  
18 transition the old disputes to the new enforcement  
19 mechanisms. Ontario argues that these regulations  
20 aren't measures that were subject of the  
21 pre-existing dispute on the basis that the EOPA was  
22 the only measure before the panel. That is why  
23 Ontario characterizes Alberta's arguments as  
24 referring to hypothetical measures. In our  
25 submission, pages 4 to 8, we provide our argument



1 on why this measure was the subject of the  
2 pre-existing dispute.

3                   Let's understand practically what  
4 was before the panel. The complaints were  
5 initiated and at the time the complaints were  
6 initiated, the EOPA was in effect. After the  
7 initial launch of consultations, Alberta and  
8 British Columbia became aware of the Dairy Farmers  
9 of Ontario lobby to have the regulations to the  
10 Milk Act and the Milk Act itself be used to  
11 re-regulate dairy blends. The writing was on the  
12 wall for EOPA; everybody knew that. Indeed  
13 Ontario, at the hearing, didn't even contest the  
14 finding that the EOPA was inconsistent. They  
15 didn't even make representations. Everybody knew  
16 it was on its way out. It was also clear from the  
17 discussion at the hearing that there was this very  
18 detailed proposal from the Dairy Farmers of Ontario  
19 on how to re-regulate dairy blends; do it under the  
20 Milk Act.

21                   MR. SCHWARTZ: When you say "very  
22 detailed", it is very clear that there was some  
23 sort of proposal to use the regulations. It is  
24 clear from the original panel report that Ontario  
25 said they had no intention to use that route at the

1 time. Is there anything on the record about what  
2 specifically these regulations were going to  
3 contain or was it just a generic proposal; there  
4 will be some regulations under the Dairy Act?

5 MS. VOGEL: In our attachments --  
6 sorry, I am just going to ask Shawn to provide me  
7 with that binder. In our submission we have, as an  
8 attachment, the -- sorry, I am going to have to get  
9 back to you with that attachment.

10 MR. SCHWARTZ: I am just asking  
11 because Ontario is saying these are, in some  
12 significant ways, different measures. We were just  
13 interested in how much we can match up what was  
14 indicated and disavowed at the time of the original  
15 panel report versus what was actually produced.  
16 Was it just a generic Dairy Farm thing; do  
17 something with the regulations, or was it as  
18 specific as what Ontario came up with in December  
19 was in fact already being proposed earlier in the  
20 fall?

21 MS. VOGEL: I will provide you  
22 with the reference to the memo that summarized the  
23 Dairy Farmers of Ontario suggestions. I would  
24 suggest to you that, first of all, the fact that  
25 the Dairy Farmers of Ontario suggested to

1 re-regulate under the Milk Act is a fairly detailed  
2 recommendation in itself. The Milk Act had a  
3 certain scheme dealing with milk and it was a  
4 scheme to re-regulate dairy blends. The idea is to  
5 essentially replicate the ban, so the Dairy Farmers  
6 are suggesting, "Well, you can do it under the Milk  
7 Act." What did Ontario do? They did it  
8 specifically under the Milk Act.

9                   The other point is that the EOPA  
10 allowed some very limited exceptions of dairy  
11 blends and that is specifically the flavouring,  
12 that the fluid milk and milk beverages could have a  
13 small percentage of flavouring. That is exactly  
14 what we see in the Milk Act and that is, the Dairy  
15 Farmers of Ontario wanted the same restrictions to  
16 apply. What we had then is the suggestion, "Okay,  
17 fine. Let's get rid of the EOPA." Indeed, Ontario  
18 didn't even argue against it. But then we had,  
19 right in front of the panel, the idea that it would  
20 simply be re-regulated under the Milk Act, that  
21 dairy blends would be re-regulated again, and  
22 indeed they were. It is not like the regulations  
23 have a different scheme than the EOPA; what was  
24 allowed under the EOPA is allowed under the  
25 regulations, no more, no less, except for the

1 omega-3 fat which now can be put in.

2 MR. SCHWARTZ: Ontario had said  
3 that the scope of the legislation is narrowed  
4 because it doesn't apply to analogues anymore.

5 MS. VOGEL: That it is narrower?

6 MR. SCHWARTZ: Narrower, yes.

7 MS. VOGEL: We don't contest that  
8 it doesn't apply to analogues, but what the panel  
9 said is, "What is the scope of this dispute?" It  
10 specifically addressed that and I believe it was  
11 page 1 or page 2 of the report. The scope of the  
12 dispute is the access of dairy blends and dairy  
13 analogues to the Ontario market.

14 MR. SCHWARTZ: Do we have any  
15 information on the record as to how much narrower  
16 the overall impact of the measures are if you  
17 exclude analogues? Are analogues a small part of  
18 the overall market, a large part?

19 MS. VOGEL: I can't answer what  
20 the analogues are in terms of the market. I can  
21 answer what industry believes the dairy blend scope  
22 would be.

23 MR. SCHWARTZ: In its own right,  
24 and you have given us information about how  
25 valuable the potential market is. The reason I am

1 asking is there is this issue of Ontario says,  
2 "It's measures or measures or measures," and that  
3 is a narrowed concept in dispute. One submission  
4 you have made is, "Yes, but these are replacement  
5 measures, so they are, in substance even if not in  
6 form, the same measures." One respect in which  
7 Ontario says they are different is we are not  
8 regulating analogues now. Is that a ten percent  
9 reduction or an 80 percent reduction in the market  
10 or does it matter as long as it is included?

11 MS. VOGEL: I suggest do you it  
12 doesn't matter because what are we dealing with  
13 under the AIT? Under the AIT, measures have to  
14 comply with these obligations. You are right, we  
15 had in front of the original panel dairy analogues,  
16 dairy blends. The treatment of both products were  
17 found to be inconsistent. The panel comes up with  
18 its recommendation which is: "It's inconsistent,  
19 so you have to remedy the inconsistency." What  
20 does Ontario do? Without a doubt, they remedy the  
21 inconsistency with the dairy analogues.

22 We still have a measure that was  
23 before the original panel and is inconsistent with  
24 the AIT. Fixing half the problem doesn't mean the  
25 rest of the problem doesn't continue. The half of

1 the problem, whether that half accounts for what  
2 percentage of potential trade or volume of product,  
3 I don't know. I think it is irrelevant. You still  
4 have not remedied the measure that was inconsistent  
5 with AIT. You are continuing to treat dairy blends  
6 exactly the way you did. The matter was before the  
7 panel, the panel said, "That is inconsistent," this  
8 is a pre-existing dispute, that measure is still  
9 inconsistent.

10 MR. SCHWARTZ: The scope may be  
11 less but in your submission that is actually  
12 irrelevant. If you banned apples and oranges and  
13 now you only ban apples, it doesn't matter because  
14 either way, you are banning apples.

15 MS. VOGEL: Yes. We knew the  
16 apples and oranges were inconsistent. Just by  
17 fixing the oranges, doesn't mean you can ignore  
18 that you haven't fixed the apples.

19 MR. SCHWARTZ: You say the effect  
20 is the same either way; it's an outright ban.

21 MS. VOGEL: It's an outright ban  
22 except for a couple limited exceptions, and the  
23 limited exceptions --

24 MR. SCHWARTZ: Which are the same  
25 as before.

1 MS. VOGEL: -- are the same as  
2 before.

3 MR. SCHWARTZ: What about purpose?  
4 I think purpose comes up in Ontario's submission.  
5 Can you tell us anything about whether we should  
6 view these proposed replacement measures as being  
7 qualitatively different because there is some sort  
8 of purpose that is different than the original  
9 purpose?

10 MS. VOGEL: First of all, you have  
11 the same treatment of the product. In the first  
12 hearing, Ontario doesn't even justify its product,  
13 it doesn't deal with purpose, it doesn't even argue  
14 legitimate objective. It does not provide any  
15 response. We now have a situation where the  
16 treatment is the same, there are a lot more words  
17 to get to the same treatment, but the treatment is  
18 the same. Now, all of a sudden, we are arguing,  
19 "Well, actually there is a legitimate objective."  
20 First of all, it raises the question: Why are you  
21 arguing that now when you readily realized that  
22 there was no legitimate objective for the same  
23 policy, the same measure, before? That is the  
24 first point.

25 MS. RENAUD: Is it your position

1 that we shouldn't even be considering Article 404  
2 for justification at this stage?

3 MS. VOGEL: No, I wouldn't say to  
4 you that you can't consider it because Ontario has  
5 put before you that there is a legitimate objective  
6 and I do recognize that the panel said that any  
7 replacement measures that don't meet a legitimate  
8 objective are therefore inconsistent. I don't  
9 think you are prohibited from looking at legitimate  
10 objective, but I am suggesting that you have the  
11 same policy and the same treatment and you did not  
12 advance and did not believe there was a legitimate  
13 objective at the time. You now replace it with  
14 some different words, but you have the same policy.  
15 Why is there now a legitimate objective when there  
16 wasn't one before? We will be addressing the  
17 specific allegations of legitimate objective that  
18 Ontario has brought forward and provide you with  
19 our belief that it does not meet the legitimate  
20 objective test in any event.

21 The panel may have found it  
22 difficult to make its way through the regulations.

23 I think everybody in this room agrees that they  
24 are very difficult to try and make their way  
25 through. My experience was every time I read them,



1 I thought something different was happening and I  
2 came to different interpretations. We have  
3 attempted, in the chart at the back of our  
4 submission, to try and put together the sections  
5 that kind of hold together and are relevant, but  
6 they are very difficult. Indeed, if we are having  
7 that difficulty and we have been tasked in our  
8 various roles here to understand them, I have great  
9 sympathy for industry who is trying to figure out  
10 what product they can sell and not sell and how to  
11 do it.

12                               Essentially these regulations take  
13 us to the same place as the EOPA. I think one of  
14 the most helpful pieces I found in trying to  
15 understand the regulations was the info sheet that  
16 the Ministry of Agriculture and Food Ontario put  
17 out with the implementation of the regulations.  
18 That is at Appendix B, tab 6 of our submission.  
19 Again, not being in the industry, I am sure we all  
20 can find it a bit confusing talking about fluid  
21 milk and filled milk, so I would ask you to have a  
22 look at that info sheet. It essentially summarizes  
23 what these regulations do. The amendments to  
24 Regulation 753, it says, has the effect of  
25 prohibiting filled milk.

1                   The amendments to Regulation 753  
2 designate filled milk as fluid milk products and  
3 set a compositional standard that applies to most  
4 fluid milk products including filled milk. That is  
5 an important part to identify in on; the  
6 compositional standard for fluid milk. This new  
7 compositional standard, the info sheet says,  
8 provides that subject to some very limited  
9 exceptions, fluid milk products including filled  
10 milk cannot contain any fat or oil other than milk  
11 fat. It is very clear that that is what the  
12 regulations are saying; if you have a fluid milk,  
13 you cannot have anything other than milk fat, you  
14 cannot have vegetable fat or vegetable oil. The  
15 sale and manufacture for sale of fluid milk  
16 products that do not comply with the standard is  
17 prohibited. This effectively prohibits the sale  
18 and manufacture for sale of all products that fit  
19 within the definition of filled milk.

20                   What the regulations do is  
21 essentially set compositional standards as a way of  
22 defining the product. What is this product? It is  
23 this. Then if the product that you wish to  
24 manufacture or sell does not fit within that  
25 definition which is essentially a compositional

1 standard, i.e., what can be in the product and what  
2 can't be in the product, then you can't sell it or  
3 manufacture it. We have the EOPA which did it very  
4 cleanly in a two sentence prohibition saying  
5 essentially you can't sell a milk product that has  
6 any vegetable oil or vegetable fat in it except for  
7 a very small amount of flavouring. We get to the  
8 same place with the regulations.

9                   The regulations also deal with the  
10 dairy vegetable oil spreads. The way I have been  
11 trying to understand the regulations is we have the  
12 kind of fluid milk which is milk, milk beverages,  
13 cream, et cetera, but then we have the spreads.  
14 The spreads has its own definition and where you  
15 have a dairy vegetable oil spread that is competing  
16 with butter, it has to have at least 50 percent  
17 milk fats. Apparently if you have 50 percent milk  
18 fat and 50 percent vegetable oil, you can sell that  
19 product. If you have 40 percent milk fat and 60  
20 percent vegetable oil, you can't. It is illegal.  
21 You have spreads that, in the U.S., in Europe, are  
22 sold. They are sold as substitutes for butter and  
23 they have all sorts of compositional standards. We  
24 can point to some products called Land O'Lakes in  
25 the U.S. which is, for example, 80 percent

1 vegetable oil and 20 percent milk fat. Those are  
2 illegal in Ontario. The consumer cannot obtain  
3 them, the manufacturer cannot process them.

4                                   Ontario argues that somehow this  
5 legislative ratio is necessary to protect  
6 consumers. Bluntly put, why is the consumer  
7 protected at that ratio and what is so dangerous  
8 about a product that has 55 percent vegetable oil  
9 versus 50? It doesn't make sense. It also goes to  
10 the legitimate objective because anything that  
11 intuitively just doesn't make sense, one wonders  
12 how one can advance that as consumer protection.  
13 You also have a ridiculous situation where you  
14 could have a manufacturing or processing plant that  
15 is in Alberta and it can make this product, and yet  
16 you can't in Ontario. The consumer can buy this in  
17 Alberta, can't buy it in Ontario.

18                                   MR. SCHWARTZ: What about the  
19 manufacturing safety argument?

20                                   MS. VOGEL: Mr. Kuperis will  
21 definitely be addressing that in manufacturing  
22 safety.

23                                   MR. SCHWARTZ: Sure.

24                                   MS. VOGEL: In summary though just  
25 in advance of Mr. Kuperis, we are not here to argue

1 that the regulations and rules about the handling  
2 of milk and particularly fluid milk should be done  
3 away with. That is not with this is about. This  
4 is about the dairy blends. What Ontario has done  
5 is broad brush, "Well, we don't want the dairy  
6 blends. We know there are all these problems with  
7 milk, so there are problems with dairy blends."  
8 But there are not. No one is arguing that milk  
9 should not be handled in accordance with the  
10 federal and provincial laws on that. Thus, Alberta  
11 submits that this dispute is properly before the  
12 summary panel because it is the same measure, we  
13 have the same policy, same program, and it is  
14 clearly still unresolved.

15 I would like to turn to the  
16 particular question that you were asking about the  
17 consistency with the AIT and the legitimate  
18 objective. As I noted before, this was not an  
19 argument that Ontario felt even needed to be raised  
20 in front of the panel. There was a simple  
21 acceptance that the EOPA was inconsistent with the  
22 AIT and yet here we are having to look at that  
23 issue. I do also note that the panel was put in an  
24 interesting position because the whole issue of  
25 re-regulating dairy blends was raised and Ontario

1 was specifically asked if they were going to  
2 re-regulate. This was in the panel hearing in  
3 September. The panel was told specifically they  
4 were not intending to pursue it and yet, less than  
5 90 days later, we have the regulations which do  
6 exactly that.

7                               The panel did, in its report, look  
8 at compliance with the AIT even though Ontario did  
9 not defend the AIT. It specifically looked at  
10 Chapter 4 and all the various requirements that it  
11 must make. The panel did come to the conclusion,  
12 looking at the ban on dairy blends and dairy  
13 analogues, that it was inconsistent with the AIT.  
14 We have been arguing that what we have here is the  
15 same measure, and therefore, the panel's view of  
16 its inconsistency should not change. Indeed, I  
17 don't believe this panel even has to go into a very  
18 detailed examination because we are talking about  
19 the same measure, the same treatment, and it has  
20 already been found to be inconsistent by the  
21 original panel.

22                               MR. SCHWARTZ: But the AIT does  
23 allow a party that has been the subject of a  
24 previous negative report to still defend it. It  
25 seems to contemplate you can make fresh arguments

1 but the onus is on you.

2 MS. VOGEL: First of all, the onus  
3 is on Ontario and Ontario must demonstrate that its  
4 measures are consistent with the AIT. This panel  
5 is not prohibited from looking at that. My  
6 suggestion is that the matter has already been  
7 reviewed by the original panel and I invite this  
8 panel to adopt that because we have a measure that  
9 is the same. Having said that, I would like to  
10 turn the various sections.

11 Again, the onus is on Ontario to  
12 prove it is consistent, but I would just like to go  
13 on the various sections starting with in Chapter 4.  
14 Article 401, entitled Reciprocal  
15 Non-discrimination -- often referred to in trade  
16 agreements as national treatment -- essentially  
17 requires that where you have products that are  
18 competitive or substitutable goods, and we clearly  
19 have this. We have the spreads, for example, under  
20 the regulations. Those spreads are being used  
21 instead of butter. Indeed the regulations say  
22 where you have a dairy blend spread that is being  
23 sold as a substitute for butter, so we do have  
24 similar competitive goods. We have milk beverages  
25 and we have consumers who are looking to have milk

1 beverages with vegetable oil added. Ontario is  
2 going to say to you, "Oh, they are not competitive  
3 goods. This is milk, these are dairy blends." The  
4 fact is that the consumer who is looking for  
5 something to put on their toast goes in front of  
6 the grocery aisle and they can see margarine, they  
7 can see butter, and they can part milk fat/part  
8 vegetable oil which is the dairy blend spread.  
9 Same thing with the beverages. What the AIT tells  
10 you is: You can't treat milk products better than  
11 the way you treat the goods that compete or are  
12 substitutable for them. Indeed, we are in that  
13 situation. There is no ban on butter, there is no  
14 ban on milk, we have a ban on dairy blends that  
15 have more than a minute amount of vegetable oil as  
16 flavouring. Clearly Article 401 is a problem for  
17 these regulations. The regulations are  
18 inconsistent.

19 Ontario recognizes that the  
20 regulations prohibit the possession, manufacture,  
21 and sale of dairy blend products. I refer you to  
22 paragraphs 257, 267, and 270 of their submission.  
23 Ontario specifically says they recognize that the  
24 regulations prohibit the possession, manufacture,  
25 and sale of these products. That is not even in



1 debate. Article 402, Right of Entry and Exit,  
2 essentially says a party can't have a measure that  
3 restricts or prevents the movement of persons,  
4 goods, across provincial boundaries. You can't  
5 bring it into Ontario and you can't sell it into  
6 Ontario, the dairy blends. Article 402 is a  
7 problem for the regulations. The regulations are  
8 inconsistent.

9 MR. SCHWARTZ: Excuse me, but the  
10 margarine report does seem to take a much narrower  
11 view of 402. Are they wrong?

12 MS. VOGEL: I could never say that  
13 a panel review is wrong.

14 MR. SCHWARTZ: You may speak  
15 freely.

16 MS. VOGEL: I argued the margarine  
17 case and obviously my remarks were to suggest that  
18 the panel take a wider view of that. They chose  
19 not to.

20 MR. SCHWARTZ: All right.

21 MS. VOGEL: Article 403 says that  
22 you can't have a measure that is an obstacle to  
23 internal trade. The Ontario submission clearly  
24 agrees that the measures are an obstacle to trade.  
25 You can also take a look at page 43 as well where

1 there is a specific reference to the measures being  
2 an obstacle to trade. Ontario, although it tries  
3 to argue that the measures comply with Article 4,  
4 throughout the submission in the paragraphs that I  
5 have mentioned, they do recognize that the  
6 regulations are non-compliant with Chapter 4 and  
7 are an obstacle to trade. Really, the focus of the  
8 Ontario argument is on the legitimate objective;  
9 however, our submission and my remarks have shown  
10 you very briefly how the regulations are contrary  
11 to Chapter 4. As I said, you can find with those  
12 paragraph references, Ontario is in agreement. The  
13 real question is whether it is a legitimate  
14 objective.

15 I do want to address one matter  
16 that is different here than it was before the  
17 original panel, and that is the obligations of  
18 transparency. Article 406 and Article 907 are very  
19 clear on the actions that a party must take if it  
20 is going to introduce a new measure. The  
21 transparency obligations are one of the  
22 cornerstones of any trade agreement including the  
23 AIT. The parties have all come together and agreed  
24 that we want to reduce obstacles to trade. The  
25 only way we can know if there is an obstacle to

1 trade is if we are transparent with each other and  
2 our regulations and measures that can potentially  
3 be a problem are provided to the other parties so  
4 that we can then consult and work out any problems  
5 we may see.

6 I mentioned that on December 22  
7 there was an e-mail with a reference to there would  
8 be consideration given to re-regulating dairy  
9 blends. That is in the face of the representation  
10 to the panel that they were not considering it,  
11 From December 22 to January 1, all of a sudden we  
12 have regulations that are effective. I was with  
13 the Government of Alberta at one point in  
14 Legislative Policy and I can certainly say that my  
15 experience is to draft a legislation, get it  
16 approved, and get it into effect, doing it between  
17 December 22 and January 1 would have been a  
18 miracle. The process, certainly had it occurred in  
19 Alberta, would have been a process that started  
20 considerably earlier. If Ontario had met its  
21 transparency obligations, it is very likely that  
22 the proposed text of the measure might have even  
23 been in front of the panel at the time because look  
24 at the timing.

25 Let's look at legitimate objective

1 because that is a question to ask of the panel. I  
2 am going to try and talk about that fairly quickly  
3 because of the limited time. Someone is keeping  
4 track of time. Can you tell me how much of my  
5 actual time I have used?

6 MS. VOGEL: I have used 30? All  
7 right. Let's turn to legitimate objective and that  
8 is Article 404. There are two initial comments I  
9 want to make. First of all, the onus is on the  
10 party asserting legitimate objective to demonstrate  
11 that its measure meets the four requirements of  
12 Article 404. In this hearing, the onus is on  
13 Ontario in two ways. Number one: Ontario has the  
14 general overall onus in the summary panel to  
15 demonstrate that its measure is not inconsistent.  
16 With the legitimate objective argument, they have  
17 to demonstrate that their measure meets all four.  
18 Please note that it is an "and". They must meet  
19 all four; A, B, C, and D.

20 The first one is the purpose of  
21 the measure. Indeed, Ontario provides extensive  
22 argument on the purpose of the measure being  
23 consumer protection and health safety. Certainly  
24 those are listed objectives under the definition of  
25 legitimate objective, but Mr. Kuperis will be

1 addressing this a bit more. You can't simply  
2 allege consumer protection. One of the key  
3 arguments that Ontario makes in terms of consumer  
4 protection is that consumers are going to be  
5 confused. Whether it is a dairy spread or a dairy  
6 blend, they are going to be confused because they  
7 are going to think that it should be a milk  
8 product. The example was given that if somebody is  
9 buying a dairy blend spread as a substitute for  
10 butter, they are going to expect it should have a  
11 bunch of butter, so that is why it should be 50  
12 percent butter. It doesn't make sense. Second of  
13 all, the consumer is going to be confused because  
14 you have products that have vegetable oil in them.  
15 The simple answer is labelling. Everybody can  
16 read. The federal government requires labelling in  
17 any event, and Mr. Kuperis will talk about that.  
18 You can't simply allege consumer protection or that  
19 consumers are going to be confused. Products have  
20 to be labelled in any event. That is going to take  
21 care of the entire question of consumer  
22 misinformation or consumer confusion. The same  
23 argument was made in margarine as to why margarine  
24 had to be coloured differently in the margarine  
25 panel. The panel came to the same conclusion;

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1 labelling. That is all you need. You don't need  
2 to ban. We don't have labelling regulations here,  
3 we have a ban.

4                   The other argument is the whole  
5 safety. Certainly we are provided with a very  
6 extensive description of safety issues. We,  
7 however, have not been provided with any evidence  
8 that a compositional requirement, i.e., percentage  
9 of milk fat versus percentage of vegetable oil, is  
10 necessary for consumer health and protection.  
11 Handling of milk? Absolutely. We have lots of  
12 regulations but that is not what this is about.  
13 You can't argue without any evidence that a certain  
14 percentage of milk fat versus vegetable oil fat is  
15 necessary for consumer protection. Indeed,  
16 proponents of dairy fat and proponents of vegetable  
17 fat make all sorts of different health claims but  
18 that is not what this is about. Just because there  
19 are different claims as to what might be a  
20 preference as to percentages of vegetable oil and  
21 milk fat, that is not a basis for arguing,  
22 "Therefore, the consumer has to be protected and we  
23 are going to ban this product." There is no  
24 evidence that this product is dangerous. Indeed,  
25 you and I can go and buy this product in Alberta,

1 we can buy it in British Colombia, we can go to the  
2 U.S. and eat it, we can go to Europe and enjoy a  
3 lot of products that are dairy blends. This is not  
4 an inherently dangerous and illegal product.

5                   There is also a large discussion  
6 about the dairy industry as a standardized product.

7 You will have seen that term and what that really  
8 means is that there is extensive federal regulation  
9 on the dairy industry; use of dairy terms, if you  
10 are going to advertise the product as being a  
11 certain type of dairy product, it has to meet  
12 certain standards. That is fine, but just because  
13 dairy is a standardized and highly regulated  
14 product doesn't mean some other product needs to  
15 be. As Mr. Kuperis will talk about, the national  
16 regulatory food scheme doesn't go to every category  
17 of food and highly regulate it, and say what it has  
18 to have and not have; rather, there are federal  
19 regulations on labelling, there are federal  
20 regulations on food handling and safety without a  
21 doubt, but we don't have specific regulations  
22 dealing with zucchinis and we don't have special  
23 regulations dealing with canned beans. There is no  
24 need to do it for dairy blends.

25                   I am going to briefly address B,

1 C, and D. Even if this panel finds that the  
2 purpose of the measure is to achieve legitimate  
3 objective -- and I put to you that just simply  
4 asserting consumer protection is not enough. You  
5 have to show how you are protecting the consumer  
6 and why your measure is a consumer protection  
7 measure. B says that the measure does not operate  
8 to impair unduly the access. We have a ban. If  
9 that doesn't impair unduly the access of a product,  
10 I don't know what does. Labelling requirements  
11 don't impair unduly access. What we have is a  
12 prohibition on a variety of products. Unless you  
13 meet a limited definition of product, you cannot be  
14 in the market.

15 C: The measure is not more trade  
16 restrictive than is necessary. A ban on product is  
17 as trade restrictive as you can get. We don't have  
18 a trade restriction, we have a trade prohibition.  
19 It is clearly more trade restrictive than necessary  
20 because as Mr. Kuperis will show, you only have to  
21 require labelling and labelling is required in any  
22 event.

23 Finally, the measure cannot create  
24 a disguised restriction on trade. Ontario had the  
25 same measure before the first panel, couldn't



1 justify it at that basis, now is justifying it, but  
2 the fact is when you have a ban on product, it is  
3 not even a disguised restriction on trade. It is a  
4 clear restriction on trade.

5 I want to quickly address injury.  
6 I am going to talk quickly because I am going to  
7 address it in one minute. Number one: What is the  
8 test? The margarine panel tells us that denial of  
9 an opportunity is injury. We do not have to show a  
10 whole host of products lined up on the border that  
11 are not allowed into Ontario. Denial of  
12 opportunity is sufficient. We have a ban on  
13 product. That is a clear denial of opportunity. I  
14 refer you to Appendix B, tab 11 of our submission.  
15 We have a letter from the Vegetable Oil Industry  
16 of Canada to Alberta talking about the estimates of  
17 the market that would have developed and is not,  
18 and the injury and the size of the industry that is  
19 affected by the ban. I can also tell you that VOIC  
20 has recently received a letter and provided it to  
21 us from Golden Gate Margarine -- we just received  
22 that but I am happy to provide copies to the panel  
23 and all parties afterwards -- which identifies that  
24 it has competitors in other provinces and in the  
25 U.S. which can manufacture a butter/vegetable oil

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1 blend that it cannot because it has higher than 50  
2 percent. It estimates the value of the lost  
3 opportunity as \$5 million to \$6 million just for  
4 that particular company.

5                               Let's remember that we are not  
6 just talking about products a consumer will go and  
7 buy, we are also talking about products that go  
8 into other products. For example, bakeries will  
9 use, in producing its baked goods, a  
10 butter/vegetable oil blend as part of the  
11 ingredients into its bread. In Ontario you can't  
12 get the percentage blend that you want if you want  
13 like an 80/20; therefore, Golden Gate Margarine  
14 also identifies the size of the industry that had  
15 they had the ability to access and develop products  
16 like yogurt and vegetable oil spreads you can find  
17 in Europe, like different kinds of whipped toppings  
18 you can find in Europe, they estimate a \$20 million  
19 to \$30 million dollar industry that they are not  
20 able to take part of and they are not able to  
21 supply because of the ban.

22                               Therefore, we request that the  
23 summary panel find that the regulations are the  
24 same measures, the same policy, and indeed  
25 replacement measures as identified by the panel.

1 The panel made it clear that if Ontario intended to  
2 adopt a similar measure, it had to do so in  
3 accordance with transparency requirements and it  
4 had to meet the AIT. Any replacement measure  
5 would be considered to be inconsistent with the  
6 AIT. That is exactly what we have. The panel was  
7 very prescient. The panel just didn't put in these  
8 clauses out of the goodness of its own heart. The  
9 fact is, everybody knew what was happening and  
10 there were going to be replacement measures and  
11 they were suggested and they were in front of the  
12 panel. Why else would the panel not put in the  
13 provision saying, "If you are going to put in  
14 replacement measures, they are going to be  
15 inconsistent with the AIT."

16 I would like to turn to Mr.  
17 Kuperis who will provide the view from industry.  
18 ARGUMENT BY MR. PETER KUPERIS:

19 MR. KUPERIS: Yes, I would like to  
20 provide some comments particularly around the  
21 legitimate objectives, but I would like to begin  
22 with a few comments about the general context of  
23 these regulations. Trade and dairy alternatives,  
24 dairy substitutes, and dairy analogues have been  
25 frustrated for many years by regulatory barriers to

1 their production and sale. As is evident from the  
2 legislative committee transcripts and the report of  
3 the Federal Provincial Agri-Food Inspection  
4 Committee at attachment 21 in Ontario's submission,  
5 the only group that consistently expresses concern  
6 regarding the production or sale of dairy blend  
7 substitutes or alternatives is dairy farmers.

8                   As the Agri-Food Inspection  
9 Committee reports show, a wide variety of  
10 stakeholders were consulted during the review of  
11 the federal regulatory regime governing dairy  
12 products and their alternatives. No opposition to  
13 the provincial deregulation of dairy substitutes,  
14 blends, and alternatives was expressed by food  
15 processors, grocers, dairy processors, or  
16 particularly, from consumer groups. The only group  
17 that expressed opposition was dairy farmers. This  
18 is entirely logical and entirely to be expected.  
19 Canada's dairy system is based on milk production  
20 quotas that are calculated on the basis of the  
21 total milk fat needed to supply the Canadian  
22 market. Any product that can decrease the use of  
23 milk fat in Canada is a threat to that system and  
24 to the economic interests of dairy farmers.  
25 Alberta believes the true purpose of Ontario's

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1 regulations is to protect the economic interest of  
2 Ontario dairy farmers. It is no coincidence that  
3 the regulations reflect the recommendations of the  
4 Dairy Farmers of Ontario during the original  
5 dispute.

6                                 Now I would like to speak to  
7 legitimate objectives. Ontario claims that the  
8 regulation's requirement for licensing, a  
9 prohibition on filled milk products, and a  
10 compositional and labelling requirements for dairy  
11 blends are necessary to protect the health and  
12 safety of Ontario consumers and for consumer  
13 protection; namely, to prevent consumers from being  
14 deceived as to the composition, nature, or  
15 qualities of filled milk products and dairy blends.  
16 We contend that the purpose of the regulations is  
17 not to achieve those legitimate objectives. The  
18 regulations impair unduly the access of dairy  
19 blends to the Ontario market, they are more trade  
20 restrictive than necessary, they are a disguised  
21 restriction on trade contrary to Article 404.

22                                 First I will deal with protection  
23 of human, animal, and plant life for health.  
24 Ontario submitted extensive material on food safety  
25 risks posed by raw milk and dairy products that

1 aren't handled, processed, or stored in the safe  
2 manner. This is one of the reasons put forward for  
3 the regulations. There is an extensive regulatory  
4 scheme in place, both federally and provincially,  
5 under Ontario legislation. It is not necessary to  
6 prohibit the sale of dairy blends for health or  
7 safety reasons. There is an extensive federal  
8 regulatory network that ensures the safety of all  
9 food products for Canadians. The Federal Food Drug  
10 Act and regulations require that all food be  
11 processed in a safe and sanitary manner. This Act  
12 and its regulations require any food to be  
13 manufactured, stored, packaged, sold, or  
14 transported in a safe manner. The Federal Dairy  
15 Products Act and their regulations have provisions  
16 governing the safe preparation of dairy products.  
17 For example, they specifically prescribe bacterial  
18 and other standards for dairy products such as  
19 cream, butter, and milk powders that could be used  
20 in a dairy blend.

21                                   The Federal Dairy Regulations,  
22 section B008002.2; requires the pasteurization of  
23 milk used for any purpose including the use of milk  
24 in another food. Ontario doesn't contend that  
25 vegetable oils are not prepared safely under the

1 Federal Food Regulations. Taken together, the  
2 Federal Requirements requiring pasteurization of  
3 milk and the safe packaging, handling, storage,  
4 transportation, and sale of dairy products and  
5 similar regulations for the safe production of  
6 vegetable oils are sufficient to guarantee the  
7 safety of anyone who consumes them together in the  
8 form of a filled milk product or a dairy blend.

9 In addition to the federal  
10 regulatory scheme, Ontario has its own legislation  
11 and regulations adding a further layer of  
12 protection. Ontario's Food Safety and Quality Act,  
13 Health Protection and Promotion Act, Milk Act and  
14 regulations all add to the federal requirements and  
15 ensure that any food is prepared in a safe manner.

16 In its submission, Ontario discusses the dangers  
17 posed by raw milk but fails to describe the  
18 extensive regulatory requirement by both Canada and  
19 Ontario that act to minimize and prevent these  
20 dangers.

21 The Ontario Health Protection and  
22 Promotion Act requires the pasteurization of milk  
23 in a plant licensed under the Ontario Milk Act  
24 unless it is used in another manufacturing process  
25 that results in it being pasteurized. The Dairy

1 Farmers of Ontario general regulation under the  
2 Ontario Milk Act requires that dairy farmers only  
3 sell their milk to the Dairy Farmers of Ontario.  
4 The Dairy Farmers of Ontario then sell that milk to  
5 the dairy processor. The dairy processor is  
6 required to pasteurize the milk. Other  
7 requirements under the Ontario Milk Act and  
8 Regulations mandate safe processing, storage,  
9 transportation, packaging, and sale of dairy  
10 products. The Food Safety and Quality Act of  
11 Ontario imposes requirements for the safe  
12 processing, handling, storing, packaging, and  
13 sale of other food products. There is a very  
14 extensive regime guaranteeing the safety of dairy  
15 products and other food products, both federally  
16 and provincially. It is simply not necessary to  
17 ban filled milk or fluid blend products.

18                   There is also consumer protection  
19 and I will deal with that next. At the federal  
20 level, the Dairy Products Act and Regulations and  
21 the Consumer Packaging and Labelling Act and  
22 Regulations act to prohibit consumer deception and  
23 the misrepresentation of non-standardized dairy  
24 products as standardized dairy products. In  
25 addition, the Canadian Food Inspection Agency Guide





1 provide precise direction on how they must be  
2 labelled.

3                               This current legislative scheme is  
4 adequate and the regulations that Ontario enacted  
5 and that are the subject of this dispute are not  
6 needed. The legislative scheme is considered  
7 adequate by eight other provinces, the federal  
8 scheme, who do not prohibit dairy blends. Ontario  
9 asserts the federal, legislative, and regulatory  
10 system is inadequate but fails to provide any  
11 evidence that this is the case. Concern raised by  
12 Ontario is hypothetical and no evidence of an  
13 actual occurrence of fraud is presented. A report  
14 from 1965 is not proof of the inadequacy of the  
15 federal, legislative, and regulatory oversight of  
16 foods in 2010.

17                               We would like to raise several  
18 issues for Ontario to address. In the case of  
19 filled milk products, Ontario simply prohibits them  
20 with two limited exceptions. Ontario fails to  
21 explain why the two exceptions do not deceive  
22 consumers, but other filled milk products would.  
23 Further, Ontario must explain why some filled milk  
24 products are safe enough to be allowed and others  
25 are not. Why does Ontario allow a milk product

1 containing 0.5 percent of vegetable fat as a  
2 flavouring agent or adding another 5 percent  
3 vegetable fat containing omega-3 fatty acids for a  
4 product that could potentially have a total of one  
5 percent vegetable fat but prohibits this product  
6 with, say, 1.1 or 1.2 percent vegetable fat or a 2  
7 percent vegetable fat product? Are filled milk  
8 products with more than 1 percent vegetable fat  
9 somehow less safe than the products which Ontario  
10 has chosen to allow? Ontario's particular measures  
11 pertaining to dairy spreads impose a composition  
12 standard, that is, a minimum milk fat content on  
13 the allowed blends and prohibits any that don't  
14 meet this standard. Ontario has failed to explain  
15 why a composition standard is necessary for food  
16 safety. Is a 50 percent milk fat spread inherently  
17 safer than a 49 percent milk fat spread?

18                                   Standardized dairy products are  
19 used with other food ingredients to produce many  
20 products like breads, confectionary goods, sweets,  
21 spirits, soups, sauces, salad dressings. What is  
22 different? These all occur within the same  
23 regulatory scheme I have described. What is  
24 different in the blending of dairy products with  
25 margarine or vegetable oils that requires these

1 measures, in particular, the imposition of a  
2 composition standard on dairy blends? Ontario also  
3 asserts that the same composition standard is  
4 necessary for preventing consumer deception;  
5 however, labelling would be more than adequate. In  
6 fact, Ontario does allow a certain number of  
7 spreads meeting the composition standard and  
8 requires a labelling regime. Why not extend that  
9 to all possible types of dairy blends and all  
10 possible compositions? There is also federal  
11 labelling regulation that covers all of that again  
12 and would prevent deception of consumers.

13                   Lastly, I would like to speak a  
14 little bit about Ontario's assertions around damage  
15 and injury. Ontario could simply allow the full  
16 range of possible blends, institute a labelling  
17 requirement if it felt necessary, to prevent  
18 consumer deception and leave it to the marketplace  
19 to determine the eventual success of any product.  
20 Ontario's actions have an effect well outside of  
21 its borders. Ontario has a population of 13  
22 million; that is about 38 percent of Canada's  
23 consumers. The actions of a government that will  
24 affect 38 percent of the consumers of a product are  
25 going to have an effect far outside of that

1 province. A new product or a niche product aimed  
2 at consumers is far more likely to succeed if you  
3 can sell it across the entire country and if you  
4 can sell it in the largest market within that  
5 country. If you add Ontario's restrictions on  
6 blends to Quebec's complete prohibition on blends,  
7 you have 62 percent of Canada's consumers prevented  
8 from buying these products. You have 62 percent of  
9 the market interfered with.

10                               It is no surprise that we have a  
11 very limited range of these products available in  
12 Canada. If you compare us to the United States  
13 where there is much less regulation of these  
14 products, there is a much wider range of them  
15 available. It is simply not a coincidence that the  
16 interference of Ontario, alongside the prohibition  
17 in Quebec, has had a very large effect on the type  
18 of products that are available.

19                               To conclude, a compositional  
20 standard is not necessary to meet Ontario's  
21 concerns. Labelling regimes are adequate at the  
22 federal level to prevent consumer deception. Even  
23 if the panel would agree with Ontario that there  
24 are deficiencies with the federal scheme, then  
25 Ontario could simply correct those deficiencies

1 through its own labelling scheme. Also, there is  
2 more than adequate federal and provincial  
3 protection for consumers for food safety reasons  
4 existing already. These regulations are not  
5 necessary to meet legitimate objectives. Thank  
6 you.

7 MR. SCHWARTZ: Thank you very  
8 much. Where are we in terms of time?

9 MS. MAGNIFICO: I think about five  
10 minutes.

11 MR. SCHWARTZ: I assume you are  
12 reserving that. Thank you. I believe the  
13 intervener for British Columbia is next.

14 PRESENTATION BY BRITISH COLOMBIA:

15 MR. THOMAS: Thank you, Mr. Chair.  
16 Before I commence my brief presentation, I will  
17 ask Ms. Park to make a couple comments.

18 ARGUMENT BY DANIELLE PARK:

19 MS. PARK: I am just going to  
20 speak very briefly on this matter of interest to  
21 the Government of British Columbia. As stated in  
22 our brief, our government has a keen interest in  
23 seeing AIT parties comply with their obligations  
24 under the agreement. That is why our Minister  
25 endorsed the revised chapter 17 along with all

1 other AIT Ministers, a chapter that met Premier's  
2 direction of a dispute resolution mechanism that  
3 achieves the goal of successful implementation of  
4 panel results. The issue before you today, we  
5 submit, remains a clear cut case of noncompliance.

6 The original panel found injury. This injury  
7 still affects the oil seed industry, including the  
8 British Columbia oil seed industry, since Ontario  
9 has maintained its policies regarding dairy blends  
10 almost six years after the original panel report  
11 was issued. We are hoping this hearing sees an end  
12 to this injury.

13 ARGUMENT BY JEFFERY THOMAS:

14 MR. THOMAS: Can I suggest that  
15 the panel might want to have the Ontario submission  
16 available because I would like to refer to a number  
17 of paragraphs. I think it would be beneficial if  
18 you could review them specifically. Let me just  
19 begin by clearing some underbrush and reinforcing  
20 some of the arguments that Alberta has made.  
21 First, with respect to the issue as to whether or  
22 not this matter is property before the panel, we  
23 fully support Alberta's submissions in this regard.  
24 In particular, our view is that at the time of the  
25 initial panel, it was Ontario's policies with

1 respect to dairy blends and dairy analogues that  
2 were before the panel. Ontario's policy with  
3 respect to dairy blends remains the same today as  
4 it did at the time of the initial panel, that is,  
5 the sale of those products are for the most part  
6 prohibited with some exceptions. That policy  
7 remains the same and it is that policy that is  
8 still before this panel.

9 MR. SCHWARTZ: And a measure under  
10 the AIT is not confined to legal instruments  
11 including policies.

12 MR. THOMAS: Correct. The  
13 definition in Article 200 is broad, it is  
14 comprehensive, and it specifically makes reference  
15 to policy. Secondly, and perhaps more importantly  
16 --

17 MR. SCHWARTZ: And policy can  
18 include an implicit policy. It doesn't have to be  
19 set out in a formal policy statement if it  
20 continues to be embodied in another legal  
21 instrument.

22 MR. THOMAS: Completely support  
23 that position, sure. Secondly, for years Ontario's  
24 compliance with the original panel report has been  
25 the subject of continual discussion amongst AIT



1 parties. To a very significant degree, Ontario's  
2 response to the original panel report, its adoption  
3 of the very amendments that we are speaking of  
4 today, was the motivating factor that prompted the  
5 AIT parties to negotiate this special summary  
6 process. It was designed to address compliance  
7 with previous panel reports. Ontario was directly  
8 and significantly involved in the negotiation of  
9 this special process.

10 In light of the long and ongoing  
11 concern expressed over Ontario's failure to bring  
12 itself into compliance, we submit that there can be  
13 no doubt that in negotiating this special process,  
14 the parties specifically intended that Ontario's  
15 compliance with the original panel report,  
16 including these amendments, would be assessed  
17 through this process and by this panel. There can  
18 be no doubt in that regard.

19 MS. RENAUD: Is there any official  
20 record of that?

21 MR. THOMAS: With respect to the  
22 record, I can refer you to the various minutes of  
23 the CIT Ministers where the outstanding disputes  
24 were continually discussed. Then there are the  
25 directions from Premiers with respect to improving

1 the dispute settlement process so as to improve  
2 overall compliance with the AIT. In light of that  
3 context, our submission is there can be no doubt  
4 that it was intended that these amendments would be  
5 reviewed through this special process.

6 MS. RENAUD: But there is no  
7 formal documents stating that this particular  
8 pre-existing dispute would be subject to the  
9 summary panel review, is there? That is my  
10 question.

11 MR. THOMAS: Off the top of my  
12 head, I cannot refer you to a specific document  
13 that says this dispute would be subject to this  
14 process. What I can tell you is that there were  
15 only four outstanding compliance issues with  
16 respect to four previous panels. If you make  
17 reference to the Alberta submission at Appendix B,  
18 tab 3, those outstanding disputes are made  
19 reference to. Since that time, Quebec has brought  
20 itself into compliance with the margarine panel and  
21 the time has now expired so that the other two  
22 outstanding compliance cases cannot be brought  
23 forth. This is the only case that can ever be  
24 brought before the special process.

25 MR. SCHWARTZ: Is there a public

1 record document which says that of the outstanding  
2 disputes, this was the primary motivating factor in  
3 producing the summary panel procedure?

4 MR. THOMAS: No, Mr. Chair. I  
5 freely admit that there is no specific document  
6 that stats that. That is our submission.

7 MR. SCHWARTZ: All right.

8 MR. THOMAS: On burden of proof, I  
9 believe the panel understanding reasonably clearly  
10 that the burden in this case lies with Ontario. In  
11 a number of instances in their brief they imply  
12 that the burden is with the complainant and/or with  
13 the interveners to prove their case. That is  
14 clearly not what the reverse onus in paragraph 3 of  
15 Annex 702 says. The burden here lies with Ontario.

16 Let me move to the meat of my  
17 presentation. First of all, are the measures at  
18 issue here in compliance with Ontario's obligations  
19 under the agreement? In this regard, I want to  
20 focus exclusively on Article 403. British Columbia  
21 doesn't concede for the a moment that Ontario's  
22 measures comply with any of the other substantive  
23 obligations and we fully support Alberta's  
24 arguments in that regard, but let me focus on 403.  
25 British Columbia's submission is that the panel

1 doesn't have to do a lot of work in this area  
2 because Ontario does all the work for you. They  
3 concede in their brief that the measures do not  
4 comply with Article 403 and I will take you through  
5 those concessions.

6                   First, if I can ask you to look at  
7 paragraph 200 which is at page 43. Here, Ontario  
8 states, "Ontario concedes that the amendments  
9 pertaining to filled milk products could, in  
10 theory, operate to create an obstacle to internal  
11 trade." Then, if I could get you to turn to  
12 paragraph 270 which is at page 57. Here, Ontario  
13 states, "Ontario acknowledges that the relevant  
14 sections of Regulation 753 that pertain to filled  
15 milk products effectively prohibit the sale of such  
16 products in Ontario."

17                   MS. RENAUD: Which paragraph is  
18 that? I'm sorry.

19                   MR. THOMAS: That's 270, page 57.  
20 That is with respect to filled milk. With respect  
21 to the spreads, at paragraph 257, page 55, Ontario  
22 states:

23                                   "The disputing party notes  
24                                   correctly that the  
25                                   composition standard for

1 dairy edible oil spread and  
2 light dairy edible oil spread  
3 would not permit a product to  
4 be distributed and sold in  
5 Ontario that was composed of  
6 less than 50 percent milk  
7 fat." (As read)

8 I cannot think of any clearer  
9 obstacle to trade than an outright prohibition on  
10 the sale of a product, and Ontario admits that the  
11 sale of those products are prohibited in Ontario.  
12 Article 403 prohibits all measures that operate to  
13 create an obstacle to trade. Irrespective of  
14 whether Articles 401 or 402 may also be violated,  
15 in our submission, by Ontario's own admission,  
16 there can be no doubt that the amendments violate  
17 Article 403.

18 Then I think we get to the meat of  
19 the case. Can Ontario justify its measures under  
20 the legitimate objective exception of Article 404?

21 I emphasize a point that Ms. Vogel made. First of  
22 all, Ontario bears the burden of showing that it  
23 meets the requirements of Article 404. Secondly,  
24 Ontario must show that it meets all four factors of  
25 Article 404; not simply subparagraph A, but all

1 four.

2 What I would like to do is focus  
3 on subparagraph C. Under subparagraph C, the party  
4 attempting to rely on this exception must  
5 demonstrate that the measure at issue is no more  
6 trade restrictive than is necessary to achieve the  
7 legitimate objective. This element clearly  
8 requires that the party not just demonstrate that  
9 the underlying purpose of the measure is to pursue  
10 one of the listed objectives, that party must  
11 demonstrate that the legitimate objective could not  
12 be obtained through the use of any other measure  
13 reasonably available to it that had a less trade  
14 restrictive effect. Bearing in mind Ontario's  
15 burden here, in order to successfully product its  
16 measures under Article 404, Ontario must prove to  
17 you that there are no other options reasonably  
18 available to it to obtain its stated objectives  
19 other than a complete prohibition on the a sale of  
20 filled milk products and spreads composed of less  
21 than 50 percent milk fat. Again, bearing in mind  
22 this burden that Ontario has here, I scoured  
23 Ontario's brief in an attempt to find where it  
24 requires that proof. I couldn't find it. I  
25 suggest to you that Ontario has effectively ignored

1 the specific requirements of subparagraph C in its  
2 brief because it knows that it cannot meet its  
3 burden in this regard.

4                                 Let me take you through  
5 specifically the Ontario arguments that it presents  
6 in its brief with respect to subparagraph C.  
7 Again, it is important to understand that with  
8 regard to the legitimate objectives exception, it  
9 divides its products between the spreads and the  
10 filled milk products because it advances different  
11 justifications for these two types of products.  
12 With respect to spreads, recall as Ms. Vogel  
13 explained, there is this 50/50 distinction that  
14 Ontario makes in law that spreads containing less  
15 than 50 percent oil are permitted while those that  
16 contain more than 50 percent oil are prohibited.  
17 Importantly, Ontario in its brief does not justify  
18 this distinction on a health related basis.  
19 Rather, if I can get you to refer to paragraph 262  
20 in Ontario's brief at page 56, it says:

21                                 "The amendments address the  
22   risk of consumer confusion  
23   with standardized butter or  
24   margarine. Standards of  
25   formulation do not apply to

1 all dairy blends, that is,  
2 the prohibition on sale does  
3 not apply to all spreads."

4 (As read)

5 Instead, the commission has  
6 addressed an area where it felt there was the  
7 greatest chance of consumer confusion, and  
8 therefore, the most compelling need for consumer  
9 protection measures addressed in the amendments.  
10 Importantly, it is not a health related concern  
11 here. They are saying it is consumer confusion.  
12 Why then does the commission believe that there is  
13 a greater chance of consumer confusion if a spread  
14 contains more than 50 percent oil? The answer to  
15 that question is provided at paragraph 259. Here  
16 Ontario states:

17 "Since consumers will use  
18 dairy edible oil spread as a  
19 substitute for butter, there  
20 is an expectation that the  
21 product will be predominantly  
22 butter in its composition. A  
23 product that has less than 50  
24 percent milk fat as a  
25 percentage of the products



1 total fat or oils would pose  
2 a greater likelihood of  
3 deceiving the consumer about  
4 the true nature of the  
5 product." (As read)

6 With all due respect, this  
7 position is simply nonsensical. If a consumer is  
8 using a product specifically because it is not  
9 butter, why would the consumer then have the  
10 expectation that it is mostly butter? More  
11 importantly, Ontario fails to provide any evidence  
12 whatsoever that this alleged issue of increased  
13 consumer confusion cannot be adequately addressed  
14 through labelling. Why is it that such labelling  
15 requirements are considered to be adequate and  
16 appropriate up to 49 percent oil but not beyond?  
17 We don't know. Why don't we know? Because Ontario  
18 provides no explanation.

19 Secondly, with respect now to  
20 filled milk products, here Ontario purports to rely  
21 on the legitimate objective of protecting human  
22 health, not consumer protection. But again, it  
23 provides absolutely no proof that the complete  
24 prohibition on the sale of filled milk products is  
25 the least restrictive method of achieving that

1 objective. Again, let me take you specifically  
2 through Ontario's arguments in this regard. I will  
3 move along quickly here, Mr. Chair. Your probing  
4 questions have required me to divert from the  
5 content of my presentation. At 271 Ontario argues  
6 that there is a human health risk inherent in the  
7 production, storage, and transportation of milk and  
8 that these risks are the same for filled milk.  
9 Importantly, they say that the risks are the same.  
10 Not greater, the same. Why is it if the risks are  
11 the same, that milk is not prohibited in Ontario?  
12 The reason that it isn't prohibited is because  
13 there is a method and a manner in which milk can be  
14 satisfactorily produced and sold and the same  
15 applies with respect to filled milk.

16 I am going to just skip through a  
17 couple of minor points. Go to paragraph 275 of the  
18 Ontario submission where Ontario states that there  
19 is no requirement that food processors inform  
20 consumers that the milk used in a filled milk  
21 product has had the milk fat removed. Assuming,  
22 for the sake of argument, that this is a correct  
23 statement of the law -- and British Columbia  
24 certainly does not concede that that is to be the  
25 case -- why can this issue not be adequately

1 addressed through a labelling requirement? Again,  
2 Ontario does not demonstrate to you, as it is  
3 required to do so, why this concern cannot be  
4 adequately addressed through a complete  
5 prohibition. In summary on the substantive  
6 obligations, Ontario measures, by their own  
7 admission, do not comply with 403 and they cannot  
8 and do not meet the requirements of Article 404.

9                   Let me just close with a couple of  
10 comments. First of all, one with respect to time  
11 for compliance. In Ontario's brief they argue that  
12 should they be found not to be in compliance, that  
13 they should be given a period of 18 months in order  
14 to bring themselves into compliance. With all due  
15 respect, Ontario has shown that in this area it can  
16 regulate or re-regulate with remarkable speed. We  
17 would ask that the same standard be applied should  
18 any non-compliance be here, and we suggest that  
19 Ontario should be given no more than 90 days.

20                   Finally, let me close with a  
21 comment about what we consider this dispute to be  
22 really about. It is not about health, it is not  
23 about consumer protection. Ontario grows virtually  
24 no oil seeds, however, it does have a significant  
25 dairy industry. In our submission, it is very

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1 telling that the amendments at issue here have been  
2 implemented by Ontario under the Dairy Act. Why is  
3 this telling? Because it clearly demonstrates what  
4 the underlying purpose of the measures are. I take  
5 you to page 11, paragraph 50 of Ontario's brief.  
6 There, Ontario quotes from the Milk Act, the  
7 purpose section of the Milk Act under which the  
8 amendments have been passed. To quote, "The  
9 purpose and intent of this Act is: a. To  
10 stimulate, increase, and improve the producing of  
11 milk within Ontario." (As read)

12 We submit that this dispute is and  
13 always has been about Ontario's continuing efforts  
14 to stimulate and increase the production of milk  
15 within Ontario and thereby protect its dairy  
16 industry to the detriment of all other products  
17 that might potentially compete with Ontario milk.  
18 Thank you for your time. Those are our submissions

19 MR. SCHWARTZ: One of my  
20 colleagues has a question for you.

21 MR. SEITZ: From your comments and  
22 from the comments from Alberta, one gets the  
23 impression -- and correct me if I am wrong -- that  
24 if Regulation 751 was changed to remove the  
25 prohibition on filled milk and spreads that are

1 prohibited in 753, but 761 remained as it is, then  
2 in fact that would remove most of your concerns.  
3 Am I correct or not? Or is there something about  
4 761 in its own right and not just its references to  
5 composition standards and bans in 753. Is there  
6 something in 761, in its own right, that the  
7 complainant parties and the interveners have a  
8 problem with?

9 MR. THOMAS: Mr. Seitz, I have to  
10 admit that your understanding of the regulations is  
11 far superior to mine. I don't even know what you  
12 are referring to when you say 761..

13 MR. SEITZ: 761 deals basically  
14 with licensing, as I understand it.

15 MR. THOMAS: I guess my basic  
16 response would be that British Columbia is not  
17 going to articulate specifically how Ontario must  
18 bring itself into compliance with the regulations  
19 or whether I have dealt in detail with whether or  
20 not a licensing requirement may or may not be  
21 consistent with the regulations, with the AIT, but  
22 there is no doubt that the primary concern that  
23 British Columbia has is the outright prohibition.  
24 If the prohibition was eliminated and products  
25 safely manufactured outside the province could be

1 imported and sold into Ontario, then British  
2 Columbia would not necessarily have a problem. If  
3 instead Ontario has a requirement that requires the  
4 product to be manufactured in Ontario in a licensed  
5 facility, yes, British Columbia would have a  
6 problem with that.

7 MR. KUPERIS: If I could take a  
8 moment or two to address that as well. I skipped  
9 over licensing in my remarks due to time  
10 constraints, but now given the opportunity, I will  
11 address it. Ontario indeed does require the dairy  
12 blends or dairy spreads prepared with something  
13 other than butter to be prepared in a facility  
14 licensed under the Milk Act. Alberta notes that  
15 lots of dairy products are used to manufacture all  
16 sorts of food goods like soups, sauces, salad  
17 dressings, confectionary, baked goods, and these  
18 aren't required to be prepared in a plant licensed  
19 under the Ontario Milk Act. Ontario needs to  
20 establish why, in particular, this is required for  
21 dairy spreads and not for these other goods.

22 MR. SCHWARTZ: I have a question  
23 for both of you. You didn't have much time, either  
24 party, to deal with remedies. Obviously and  
25 naturally, you spent most of your time dealing with

1 whether there was a breach. This panel a facing a  
2 challenge that no other panel has faced before  
3 because if we find in favour of the position that  
4 these measures are the same measures as before,  
5 somehow equivalent, we in effect create the first  
6 legally binding order ever under the AIT process.  
7 Ontario has expressed the concern about just how  
8 much does finding one particular measure give you,  
9 as a panel, an ongoing mandate to supervise things  
10 in the future? The fact that a particular set of  
11 measures is invalid raises concerns of the panel  
12 saying, "From now, henceforth and forever, are  
13 going to regulate. We, the panel, will have  
14 supervision over how you regulate dairy products."

15                     Alberta, you have limited the  
16 generic restriction you asked for to introducing  
17 similar non-compliant measures. I think British  
18 Columbia has a similar restriction. How long does  
19 that mandate last? What is the definition of  
20 similar? How do we avoid this situation that just  
21 because we have been implicated as a panel in one  
22 particular measure, Ontario raises the concern  
23 which seems to be a serious one about you can't,  
24 just because you have done something that is  
25 non-compliant in one case, give a particular panel

1 an indefinite mandate to supervise measures in the  
2 future? Any comments about that from either party?

3 MS. VOGEL: I have a couple  
4 comments. I think if you and I were to discuss  
5 that question in the abstract without reference to  
6 this particular product and case, I think we would  
7 have great difficulty and could have a very  
8 interesting and difficult discussion. This case I  
9 think makes it simpler because of the history and  
10 the product.

11 First of all, given the history of  
12 the case where the EOPA is challenged, it is not  
13 defended, indeed representations are made that it  
14 will be repealed, a party is asked about its intent  
15 to re-regulate, it says it won't re-regulate and lo  
16 and behold it does, that raises the concern from  
17 the Alberta perspective of, "Are we going to keep  
18 doing this? Are we doing to get an e-mail telling  
19 us that the regulations are being repealed?", and  
20 new regulations are brought in. We have a unique  
21 situation here.

22 In terms of Ontario's argument  
23 that these regulations are so complex, how are we  
24 going to bring them into compliance and how are we  
25 going to redraft this if the panel finds that these



1 regulations are inconsistent? Our answer is  
2 actually fairly simple. The Milk Act and milk  
3 regulations do not need to deal with dairy blends.  
4 We are not asking for a repeal of the Milk Act and  
5 Milk Act regulations, we are asking generally that  
6 the portions dealing with dairy blends be removed  
7 because Ontario should not be regulating dairy  
8 blends.

9 I point to attachment 21 of the  
10 Ontario submission in which the  
11 Federal/Provincial/Territorial Agri-Food Inspection  
12 Committee produced its report. It was a committee  
13 of representatives of all the provinces and the  
14 federal government. They assembled in 1998 to  
15 review the regulatory status of dairy product  
16 analogues and blends in Canada. We have a full  
17 federal/provincial/territorial committee that  
18 reviewed this. I just want to point to you the  
19 third and fourth paragraph on that first page which  
20 says, first of all:

21 "With the exception of the  
22 Dairy Farmers organizations,  
23 all groups contacted support  
24 the position that provinces  
25 should deregulate products

1                   that imitate or resemble  
2                   dairy products, whether or  
3                   not they contain dairy  
4                   ingredients." (As read)

5                   So that is the analogues and the  
6 blends. It was the dairy producers that were  
7 concerned. The last paragraph:

8                   "After reviewing all comments  
9                   received during the  
10                  consultation, the working  
11                  group --"

12                 Ontario is a part of that.

13                 "-- continues to hold the  
14                 view that provinces should  
15                 defer to federal regulatory  
16                 processes with respect to all  
17                 products that imitate or  
18                 resemble dairy products. The  
19                 working group contends that  
20                 the priority issues of dairy  
21                 terminology, consumer  
22                 information, labelling, and  
23                 fraud are adequately  
24                 addressed federally." (As  
25                 read)

1                   So the answer is, the instruction  
2 to Ontario is: To bring your legislation into  
3 consistency with the AIT, you deregulate and do not  
4 regulate dairy blends. I think you asked me what  
5 happens if they re-regulate, do you still have  
6 jurisdiction?

7                   MR. SCHWARTZ: There has been a  
8 lot of discussion; prohibition is excessive,  
9 prohibition is not the least restrictive measure,  
10 maybe labelling is a different requirement. What  
11 are we supposed to do if we draft a remedy here?  
12 Are we supposed to say, "Thou shalt never label  
13 again," and leave it all to the federal process?  
14 Even if we find a breach in this case and even if  
15 we say that this is wrong, at what point -- I know  
16 this is not an easy question to answer, but that is  
17 why we are asking. We are not finding it easy  
18 either. How would we limit our authority so that  
19 we don't have indefinite supervisory authority over  
20 Ontario in this area which is certainly problematic  
21 in terms of maintaining the process?

22                   MS. VOGEL: In a way I think your  
23 issue is not different from other panels in the  
24 sense that if you make a finding of inconsistency  
25 -- which panels, that is their job to determine if

1 something or not is inconsistent and the order then  
2 is to bring it into compliance -- a regular panel  
3 has to do that as well and then the AIT takes over  
4 and we have this new process leading to compliance  
5 and enforcement. I guess the easiest way, if your  
6 finding is that they must bring into compliance,  
7 then we head down the compliance and enforcement.  
8 Because we have seen the re-regulation behaviour,  
9 that is where this concern comes from. I suspect  
10 if this was a different product, a different  
11 history, we wouldn't have as much concern.

12 MR. SCHWARTZ: Thank you. British  
13 Columbia, is there anything you wanted to add about  
14 that? By the way, we will have to add a little  
15 time to Ontario at the end.

16 MR. THOMAS: I certainly support  
17 Alberta's submission and recognize this is a very  
18 difficult area. Perhaps the answer might lie in,  
19 first of all, the finding of non-compliance. In  
20 British Columbia's submission, there is no  
21 justification for the outright ban. Ontario has  
22 certainly provided none, so in British Columbia's  
23 submission the panel would be able to, in its  
24 remedies, craft a direction that said that Ontario  
25 would abstain from reintroducing similar

1 non-compliant measures -- in particular, the  
2 outright ban on the sale of these products because  
3 they simply have not justified that ban -- and  
4 develop that recommendation as a specific direction  
5 to Ontario not to re-regulate through use of the  
6 ban.

7 MR. SCHWARTZ: Thank you very  
8 much. Would this be a good time for everybody to  
9 have a break? Ten minutes, thank you.

10 --- Short Recess at 10:39 a.m.

11 --- Upon resuming at 10:55 a.m.

12 MR. SCHWARTZ: Is everyone ready  
13 to proceed? We seem to have some of our audience.  
14 This will affect box office receipts, but we will  
15 continue nonetheless.

16 PRESENTATION BY ONTARIO:

17 ARGUMENT BY ROBERT RADCLIFFE:

18 MR. RADCLIFFE: Mr. Chair and  
19 panel, I am Robert Radcliffe here representing the  
20 province of Ontario. Beside me I have Bob Seeber.  
21 We have also added Dagny Ingolfsrud who will be  
22 making part of the submissions in response to what  
23 you have heard earlier with respect to federal  
24 legislation and what it does and what it doesn't  
25 do. She is very familiar with that area and will

1 be addressing that.

2                               We have slides here. We don't  
3 have a remote but I will wave my arm each time we  
4 are to go to the next slide. If you could go to  
5 the first slide. By way of overview, in our  
6 submission the summary panel was established to  
7 determine whether a measure, and I emphasize the  
8 word "a" measure, was the subject of a pre-existing  
9 dispute is or would be consistent with the  
10 agreement. In our submission, the amendments to  
11 the Milk Act and the impact on fluid milks and  
12 dairy edible spreads was not part of the  
13 pre-existing dispute. It just wasn't part of it.  
14 What we are dealing with here is a new and distinct  
15 matter. Ontario submits first that the panel  
16 should decline Alberta's request for summary  
17 judgment if that is how it is to be characterized  
18 because the amendments under review are not actual  
19 or proposed measures that were before the panel in  
20 2004.

21                               In the alternative, and the second  
22 part of our argument, should the panel decide that  
23 the pre-existing dispute has been established, it  
24 will be our submission that the amendments are not  
25 inconsistent with the obligations under the

1 agreement. In the further alternative, we will be  
2 arguing that the amendments serve a legitimate and  
3 essential purpose and can be justified on that  
4 basis.

5                                   Could we go to the next slide?  
6 Again, I think it is helpful just to touch for a  
7 moment on the background of this case. In 2004,  
8 the dispute centred on the application of the  
9 Edible Oils Product Act and its impact on the sale  
10 and imitation of a specific cheese imitation  
11 product. Following the hearing, of course, the  
12 panel issued its report in November of 2004 and the  
13 panel concluded that Section 3 of the EOPA was not  
14 consistent with Article 401, 402, and 403 and the  
15 permissions were permissible under Article 404.  
16 Ontario, at that point in time at that end of that  
17 year, repealed the legislation.

18                                   Next slide, please. In terms of  
19 the follow up to the original dispute, as things  
20 unfolded I have indicated that the legislation was  
21 repealed, the imitation cheese product that was in  
22 dispute was allowed to be marketed in Ontario.  
23 Alberta subsequently or has conceded in its  
24 submission that in terms of repeal of the EOPA that  
25 the matter of dairy analogues has been resolved, so

1 that is really not an issue in dispute. Since  
2 2004, Alberta has not once brought to Ontario's  
3 attention any specific product to which there is a  
4 complaint or concern regarding problems with this  
5 agreement.

6                   Next slide, please. The present  
7 dispute deals with measures under the Ontario Milk  
8 Act which you have heard relating to dairy  
9 products. The dispute involves amendments to the  
10 Regulations 753 and 761 that you have heard about  
11 already. The measures address the manufacture,  
12 labelling, and sale of designated milk products,  
13 dairy blends -- which are filled milk products --  
14 dairy edible oil spread, and light dairy edible oil  
15 spread.

16                   I would like to take you to  
17 paragraph 134 of the province's submissions.  
18 Paragraph 134 deals with the current status in  
19 Ontario with respect to dairy blends. There was  
20 some suggestion that what Ontario did was simply  
21 replace the Edible Oil Act with new legislation  
22 that did the same thing, and that just isn't the  
23 case. These paragraphs at 134 through 136 are very  
24 important for the panel to look at. We are dealing  
25 with a very, very small segment now in terms of the



1 fluid milk piece and the edible oil spreads.  
2 Paragraph 135, by way of illustration, says, "Some  
3 new products are now available for sale including  
4 dairy edible oil spread and light dairy edible oil  
5 spread." As an example, Gay Lea Foods Co-operative  
6 Limited introduced Gay Lea spreadable butter with  
7 canola oil. Going down:

8 "The spreadable light  
9 formulation was introduced  
10 following changes made by the  
11 commission to Regulation 753  
12 at the request of industry in  
13 May 2007. Both of these  
14 product formulations are  
15 available for purchase in  
16 Ontario grocery stores." (As  
17 read)

18 Again, given the limitations on  
19 our time here, 134 through 136 set out the current  
20 status. I think 135 is also important because it  
21 illustrates a responsiveness on the part of Ontario  
22 to making amendments and dealing with certain  
23 changes as well.

24 Alberta characterizes the dispute  
25 as simple case of Ontario's non-compliance with the

1 agreement and the findings and the recommendations.  
2 In our submission, that isn't the case at all. The  
3 purpose of a summary proceeding is to address the  
4 measure that was the subject of the pre-existing  
5 dispute. If I could take you to Article 1702(2).  
6 I'm sure you are familiar with it, but it is the  
7 annex. Under chapter 17 of the agreement, a  
8 summary panel may be established under article  
9 1702(2) to determine whether or not the measure  
10 that was the subject of a pre-existing dispute is  
11 or would be inconsistent with the agreement. The  
12 amendments are not a dispute that was an actual or  
13 proposed measure before the panel in 2004. It is  
14 our submission that the mandate of the panel is to  
15 consider whether government measures, either actual  
16 or proposed, are consistent with a party's  
17 commitment.

18                   If I could take you to paragraph  
19 35 and 36 of the report itself -- I will just take  
20 you to the key point. With respect to the issue of  
21 making determinations regarding proposed measures,  
22 the panel indicated in their finding number 8 --  
23 there is an A, B, and C and in the submissions of  
24 the other parties, they refer to paragraph A and B  
25 but haven't really addressed subparagraph C.

1 Subparagraph C provides that there is currently no  
2 such measure or proposed measure to be considered  
3 by this panel and it is therefore premature for  
4 this panel to consider the consistency of  
5 suggestions by an interested group and their  
6 hypothetical implementation by the respondent.

7                   In our submission, the previous  
8 panel made it very clear that they weren't in a  
9 position to deal with this kind of situation in a  
10 hypothetical situation. They made no  
11 recommendations regarding future regulation by  
12 Ontario of dairy blends. The amendments are not  
13 replacement measures, as I have indicated, and  
14 differ in their application, scope, and purpose as  
15 well. The subject matter of the original dispute  
16 was this imitation cheese product which is now  
17 marketable in Ontario. That was the dispute that  
18 was actually being dealt with.

19                   The agreement is not meant to  
20 facilitate a dispute in the hypothetical, which is  
21 what Alberta and the interveners are supporting in  
22 terms of their argument. What they are trying to  
23 do is ask you to deal with a hypothetical situation  
24 rather than a concrete situation that we submit is  
25 required in this circumstances of this case.

1 MS. RENAUD: What is Ontario's  
2 position with respect to the meaning of "measure"  
3 in 1702(2)? What was the measure that was before  
4 the previous panel?

5 MR. RADCLIFFE: The measure was  
6 the earlier legislation which was repealed by  
7 Ontario and the only issue in dispute was whether  
8 or not this imitation cheese could be marketed in  
9 Ontario or whether there was a problem with  
10 Ontario's legislation.

11 MS. RENAUD: Then how do you  
12 reconcile that with 1702(2) which says that the  
13 summary panel is established to determine whether  
14 or not the measure that was the subject of the  
15 pre-existing dispute is or would be inconsistent  
16 with this agreement? The previous panel made a  
17 finding as to whether the EOPA was inconsistent  
18 with the agreement, so does that mean a summary  
19 panel has no purpose, even under 1702(2)?

20 MR. RADCLIFFE: I suppose if  
21 Ontario had not repealed the earlier legislation or  
22 hadn't taken steps to deal with that in some way or  
23 had moved forward with legislation that dealt with  
24 the product in an identical way, the summary panel  
25 would have jurisdiction to deal with that and it

1 would make sense. But in this instance, it is our  
2 submission that what we are really dealing with is  
3 a completely new situation. Yes, the summary panel  
4 is here and is prepared to deal with it, but as a  
5 preliminary issue, it is our submission that this  
6 isn't properly before you as a summary panel  
7 because we are dealing with something new.

8 MR. SEITZ: Just to elaborate on  
9 that, are you suggesting then that the obligations  
10 of a party is just to abide by the specific  
11 recommendation of a panel or the spirit intent and  
12 intent of the panel's findings and recommendations?

13 Does spirit and intent of what the original panel  
14 found enter into that, or is it only specifically  
15 defined as the narrow words associated with the  
16 recommendations only?

17 MR. RADCLIFFE: In our submission,  
18 the province responding to the recommendation  
19 should do it in good faith and appropriately, but  
20 it is focused on that specific finding of the  
21 earlier panel. To get off into this hypothetical  
22 speculation is not what is contemplated in our  
23 view.

24 MR. SEITZ: So the fact that the  
25 panel in 8B specifically talked about any

1 replacement measures that would have the same  
2 effect as Section 3, and yes, there were no  
3 specific regulations in front of it at that time,  
4 but there are now. Is it your position that there  
5 is no follow through from the finding of 8B that is  
6 carried through to a summary panel? At that time  
7 there weren't any but as of January 1, there were,  
8 which was after the panel.

9 MR. RADCLIFFE: That would have  
10 the same effect as Section 3? I think that that is  
11 fair to say that Ontario could not and should not  
12 be putting something in place that had the same  
13 effect as Section 3; however, at some point in time  
14 you have to deal with the specifics. That was  
15 focused on the kinds of subject matter that was  
16 under that legislation at the time, and that isn't  
17 what we are dealing with here. We are dealing with  
18 something different. Certainly the legislation and  
19 the regulations were dealing with a different  
20 purpose. We are not dealing with the same items at  
21 all. In conclusion on that part of our argument,  
22 it is our submission that the panel -- this is not  
23 properly part of the subject matter for the  
24 pre-existing dispute.

25 The second part of our argument

1 deals with the amendments and whether they are  
2 inconsistent with the agreement. I think in light  
3 of the arguments that have been put forward by  
4 Alberta and the intervener, there may not be value  
5 added in taking you through 401 and 402 and why we  
6 think that there is not a problem there. With  
7 respect to Article 403, it is clear the agreement  
8 states that subject to Article 404, each party  
9 shall ensure that any measure it adopts or  
10 maintains does not operate to create an obstacle to  
11 internal trade.

12                                 In our submission, the amendments  
13 with respect to the dairy edible oil spreads are  
14 consistent with Article 403 for the reasons set out  
15 in Ontario's submissions at paragraph 201. If I  
16 could just take you there. That is at page 44 of  
17 our submissions at the top on the left. For  
18 spreads that are dairy blends and which resemble  
19 and are intended for use as substitutes for butter,  
20 the amendments do not operate to create an obstacle  
21 to internal trade as is the case for standardized  
22 butter. The amendments contain requirements for  
23 product labelling, composition, and identity.  
24 These requirements have not been shown by the  
25 disputing party or the interveners to have affected

1 competitive opportunities for anyone in any manner.  
2 There is nothing in the regulations that restrict  
3 the interprovincial movement of the ingredients  
4 that could be used to make such spreads or the  
5 finished product itself. In our submissions, the  
6 dairy edible spreads do not run afoul of Article  
7 403. We do concede, as has been pointed out by  
8 Alberta, that in terms of the filled milk products,  
9 as things presently stand, there is a virtual  
10 prohibition in terms of the sale of those kinds of  
11 products. We will get on to the justification for  
12 that later on in my submissions.

13 MR. SEITZ: Can I just ask a  
14 question? Why specify substitutes for butter? I  
15 understand that other spreads that are substitutes  
16 for other products that may contain some dairy  
17 products, like cheese or products of that nature,  
18 are allowed but not a substitute for butter. Why  
19 specify butter? That is a question that I have.

20 MR. RADCLIFFE: That is a very  
21 good question. My understanding is that when these  
22 regulations were moved forward, it was felt that  
23 there was a need to protect these consumers.  
24 Health related issues arose and butter and filled  
25 milk were the two areas that were identified at



1 that time as requiring some care and some control.  
2 It could well be that you have other kinds of  
3 spreads similar to a cottage cheese or whatever  
4 that aren't regulated and I suppose as things move  
5 down the road, concern could be identified with  
6 respect to that typed of spread as well, but those  
7 were the two items. The filled milk and the butter  
8 were identified in the first instance and that is  
9 what the province went forward with.

10 MR. SCHWARTZ: In terms of  
11 understanding what the purpose, objective,  
12 rationale is, I just want to give you an  
13 opportunity to point us to something if I missed  
14 this. I actually can't find anything on the record  
15 where there is a regulatory impact statement, an  
16 explanation from the commission itself as to the  
17 whys and wherefores, testimony, or anything that  
18 actually substantiates the answers to the kind of  
19 questions that my colleague asked. In the section  
20 where you are discussing the justification, there  
21 doesn't seem to be any references to any materials  
22 which would give us background there. We are left  
23 to infer what the purposes might be from measures  
24 that were adopted, but there doesn't seem to  
25 actually be anything on the record to substantiate

1 any particular inferences.

2 MR. RADCLIFFE: Mr. Chair, if I  
3 could have a moment, I will just check. My  
4 understanding is that there is nothing of that  
5 nature. The process moved very quickly at the end  
6 of 2004. It was felt that there was a need to  
7 regulate these two areas; the filled milk and the  
8 spread or the butter imitation. There isn't  
9 anything specific that we can point to.

10 MR. SEITZ: What you are saying is  
11 that the need for the speed essentially was because  
12 the Edible Oils Protection Act was being thrown  
13 out, there was a speed to immediately bring  
14 something in as of January 1 to replace those  
15 provisions in the Edible Oil Products Act.

16 MR. RADCLIFFE: Not to replace the  
17 provisions, but there was a gap there I guess in  
18 terms of the filled milk and the dairy edible oil  
19 spread. Again, this is a situation where the  
20 complainant, Alberta, hasn't provided any evidence  
21 that any competitive opportunities for actual  
22 products have been affected.

23 MR. SEITZ: I am Sorry for jumping  
24 in a lot, but you do tend to raise things that a  
25 question immediately pops up. To some extent, this

1 is a general interpretation issue. The fact that  
2 Ontario is the largest market in the country, do  
3 you not think that in fact a prohibition on a  
4 particular product in the largest market in the  
5 country is going to have some negative impact on  
6 producers to develop substitutes or to develop  
7 products of that nature? When 38 percent of the  
8 market is not open to you -- in a market that is  
9 relatively small, a Canadian market -- the issue of  
10 a prohibition on a product, does that not result in  
11 producers hesitating to even go down the path of  
12 trying to develop a product of that nature?

13 MR. RADCLIFFE: Again, it is sort  
14 of theoretical. At this point in time, there is  
15 nothing specific. There is not another province  
16 saying, "Look, Ontario, we want to market it. Why  
17 can't we do it?" There is nothing concrete like  
18 that that we are dealing with. It is all, as I  
19 say, speculation. I'm not sure that there is  
20 anything else I can....

21 The other thing that I was going  
22 to mention was that this was put in place as an  
23 interim measure. I guess interim starts to grow  
24 long after a period of six years, but there were  
25 ongoing discussions in terms of how the provinces

1 in Canada could cooperate in terms of moving  
2 forward and developing policies and how these  
3 issues were to be approached. That is the other  
4 piece of this. Again, there was haste in terms of  
5 moving forward with these regulations, but it was  
6 intended at that stage to be an interim measure.

7 I would like to take you now to  
8 Article 404. Alberta and British Columbia have  
9 gone through the various A, B, C, D in terms of the  
10 legitimate objectives and justifying the measures.

11 Ontario, dealing first with A, submits that there  
12 are the two relevant legitimate objectives: Health  
13 protection and consumer protection. Article 200  
14 defines what we mean by a legitimate -- the article  
15 deals with protection of human health and consumer  
16 protection.

17 First, from our point of view or  
18 in our submission, Ontario is addressing here the  
19 protection of human life and health with these  
20 measures. The production and processing of milk  
21 products involves inherent risks. You see this  
22 illustrated in the news not so long ago where it  
23 involved meat as opposed to milk, but listeriosis  
24 was the outcome because of certain problems. There  
25 were a number of deaths and illnesses arising out

1 of that kind of issue. The manufacturing of filled  
2 milk products and dairy edible oil spreads presents  
3 similar risks in terms of ensuring that people  
4 don't fall ill as a result of using the product.  
5 The amendments require that the plants where the  
6 milk is processed is licensed under the Milk Act.  
7 Licensed plants are subject to all the requirements  
8 of Regulation 761.

9 By bringing filled milk products  
10 and dairy edible oil spreads within the provincial  
11 scheme that regulates dairy products, the  
12 objectives are recognized under the agreement. The  
13 regulations also promote consumer protection  
14 through labelling and compositional standards.  
15 Consumer confusion can be genuine and I think it is  
16 a genuine concern for Ontario to address that.

17 MR. SCHWARTZ: As Alberta  
18 mentioned right at the beginning, it is very  
19 complex regulations and it is not always easy for  
20 us, at least me, to understand all the details.  
21 How does the licensing requirement for manufacture  
22 compare with EOPA?

23 ARGUMENT BY DAGNY INGOLFSRUD:

24 MS. INGOLFSRUD: Perhaps I could  
25 address that. The licensing requirement currently

1 only applies to the dairy edible oil spreads  
2 because as we have conceded, the manufacture and  
3 sale of filled milk products has been effectively  
4 prohibited. The licensing requirement only applies  
5 to a certain category of the dairy edible oil  
6 spreads. If dairy edible oil spreads are made with  
7 the sole dairy ingredient being butter, they don't  
8 have to be made in a licensed plant. The various  
9 requirements that would govern the processing under  
10 Regulation 761 would not apply to those dairy  
11 edible oil spreads where the only dairy ingredient  
12 is butter. However, if a dairy edible oil spread,  
13 one of these butter substitutes, is made from any  
14 other dairy ingredient -- it could have butter but  
15 if it has any other dairy ingredient -- then  
16 Regulation 761 and the licensing requirement in the  
17 Milk Act applies. It must be made in a plant that  
18 is licensed by Ontario and all of the relevant  
19 plant premises, operational facility processing  
20 standards, and Regulation 761 apply.

21 MS. RENAUD: So effectively,  
22 product from outside of Ontario cannot be sold in  
23 Ontario.

24 MS. INGOLFSRUD: No, actually our  
25 regulations do not say that. They do not govern

1 the out of province processing. The issue of  
2 governing processing out of the province is  
3 generally regarded as a federal matter under the  
4 division of powers under the Constitution Act. If  
5 you look to federal legislation, it is the Canada  
6 Agricultural Products Act that generally regulates  
7 processing of food products and registers  
8 establishments that process certain specific kinds  
9 of food products. The problem with the dairy  
10 blends is that the federal specific regulations  
11 governing registered dairy establishments don't  
12 apply to dairy blends right now.

13                   We have the Canada Agricultural  
14 Products Act and the regulations are reproduced in  
15 our materials. They are at tabs 11 and 12, the  
16 regulations are at tab 12. There is a very  
17 comprehensive dairy products regulation that says  
18 if you are making dairy products for  
19 interprovincial movement, interprovincial trade,  
20 they have to be made in a federally registered  
21 establishment. There is a plethora of premises and  
22 operational and processing standards that apply  
23 under those federal regulations. The problem is,  
24 those regulations do not appear to apply to dairy  
25 blends because the definition of dairy product in

1 those regulations excludes anything that contains  
2 edible oil. We have a scheme of a federal  
3 regulation that would apply to dairy products for  
4 the processing that safeguard the health and safety  
5 certainly if the product is being made in another  
6 province to come into Ontario, but it doesn't apply  
7 right now.

8 MS. RENAUD: It doesn't apply or  
9 it doesn't appear to apply?

10 MS. INGOLFSRUD: On a plain  
11 reading, it does not appear to apply. We have made  
12 some efforts to talk to federal officials at the  
13 CFIA and we have not been successful in our efforts  
14 in having them say that their regulations do apply.  
15 They don't seem to be generally aware of the issue  
16 with blends. They were asked specifically about  
17 filled milk products and the reply that we got from  
18 the person who made a reply is they thought they  
19 might be an illegal product, period, under the  
20 Federal Food and Drugs Act as an adulterated milk  
21 product. That was not an official high level  
22 position that we got. Our impression is that this  
23 issue of blends is something that has not been  
24 given, from the little feedback we have had, very  
25 full consideration, the health and safety aspects.

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1                   Ontario has been giving it  
2 consideration. It does have concerns. That is why  
3 Ontario has done what it can do under the Milk Act  
4 and required that if the spreads are manufactured  
5 in Ontario and they include dairy ingredients  
6 beyond butter, that they have to be made in one of  
7 our licensed plants. That applies, to get back to  
8 your question, only if they are made in Ontario.  
9 We aren't regulating the processing of them outside  
10 of the province because we can't do that. We can't  
11 set detailed processing standards and enforce them  
12 against an out of province processor to go and  
13 inspect and enforce what someone is doing out in  
14 Quebec.

15                   MS. RENAUD: I understand that but  
16 does the licensing requirement mean that if you are  
17 not licensed in Ontario then the product cannot be  
18 sold in Ontario?

19                   MS. INGOLFSRUD: No, it does not.

20                   MR. SEITZ: But under 753, filled  
21 milk cannot be sold in Ontario, regardless of  
22 whether it is produced in Ontario.

23                   MS. INGOLFSRUD: Yes. To be  
24 clear, perhaps it is my comments, to say that right  
25 now the licensing requirement only applies to the

1 spreads and certain of the dairy edible oil  
2 spreads.

3 MR. SEITZ: The question that I  
4 had asked the complainants, if in fact 753 did not  
5 prohibit filled milk and edible spreads containing  
6 over 51 percent milk fat, if that were not there  
7 but 761 still applied which essentially would say,  
8 "Okay, filled milk and these spreads are allowed in  
9 Ontario but they must be produced in a licensed  
10 plant." Would that address the issue of the public  
11 health issues because it is all of your licensing  
12 provisions that would apply? What would be the  
13 public health issue about that?

14 MS. INGOLFSRUD: I don't think  
15 Ontario has had the opportunity to address that in  
16 detail. I don't want to usurp my colleague's role  
17 here because he has already indicated the measures  
18 that are before you, the actual regulations, were  
19 introduced as interim measures and Ontario has been  
20 waiting for national meeting federal/provincial  
21 movement. It takes federal/provincial coordination  
22 normally to adequately regulate food products for  
23 health and safety purposes, so I don't think that  
24 it is possible to say that, for instance, it either  
25 would be necessary to have the whole of 761 apply

1 or not or whether there might be some additional  
2 provisions that might apply to address the health  
3 and safety.

4 MR. SEITZ: When I look at 761 I  
5 think it also includes a provision to license  
6 non-shopkeeper distributors -- I'm not quite sure  
7 what the word is -- which I assume essentially are  
8 wholesalers. Is that correct?

9 MS. INGOLFSRUD: The regulation of  
10 distributors under the Milk Act refers to  
11 distributors of what are designated as fluid milk  
12 products.

13 MR. SEITZ: That goes back to 753  
14 then as to what is designated.

15 MS. INGOLFSRUD: Yes. My  
16 colleague was suggesting that perhaps I finish my  
17 piece. I was going to try and perhaps clarify and  
18 little bit about what legislation does and does not  
19 apply to blends as Ontario understands it. Some  
20 comments were made by our colleagues with which we  
21 do not agree. I have already mentioned the Canada  
22 Agricultural Products Act dairy products  
23 regulations do not appear to us to apply to dairy  
24 blends because of their definition of dairy  
25 products. That appears to leave a very crucial gap

1 in terms of regulating certainly processing and  
2 dairy plant premises where products are made for  
3 interprovincial trade. It also leaves a gap in  
4 terms of standardization and identity standards and  
5 labelling for dairy products.

6                   The Food and Drug Act regulations,  
7 federally, do certainly have provisions about  
8 labelling that apply to all food products and we  
9 are not disputing that. The provisions in the Food  
10 and Drug Act regulations that apply to dairy  
11 products, which are found in our attachments in  
12 Volume 1 at tab 10 on page 245, there is a specific  
13 division in the Food and Drug Act regulations that  
14 compliments provisions in the Canada Agricultural  
15 Products Act regulations and deals specifically  
16 with dairy products and deals with standardization  
17 and special labelling requirements. Again, our  
18 reading is that it appears unlikely that these  
19 apply. We are not as sure in terms of whether the  
20 federal government would say that the Food and Drug  
21 Act Division 8 regulations would apply as we are in  
22 the Canada Agricultural Products Act because there  
23 is some question under the Food and Drug Act about  
24 whether filled milk products are allowed or whether  
25 they are considered illegal adulterated milk

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1 products. We weren't able to get an answer out of  
2 the federal government on that. It seems to be in  
3 the absence of products on the marketplace this has  
4 not become yet a burning issue. That is the Food  
5 and Drug Act regulations.

6 I believe Alberta has suggested  
7 that there are Ontario regulations that could fill  
8 some of the gaps. There has been a suggestion that  
9 there are provisions in our Food Safety and Quality  
10 Act or regulations under it that regulate dairy  
11 blends. That is not the case. That Act is an  
12 enabling Act. It does not contain any substantive  
13 provisions. Everything under it is done by  
14 regulation. There are no dairy regulations under  
15 that Act and no dairy blend regulations and there  
16 are none proposed. There are also restrictions in  
17 that Act on what we could do with respect to dairy  
18 blends that are primarily based on cow milk  
19 ingredients, so there is nothing there at the  
20 current time proposed or proposed that applies  
21 here.

22 It has been suggested that  
23 Ontario's Health Protection and Promotion Act  
24 somehow fills the gaps. That legislation does  
25 include a pasteurization requirement for raw cow,

1 goat, and sheep's milk but it does not contain nor  
2 do its regulations contain any detailed provisions  
3 governing the processing, sale, and distribution of  
4 dairy products. Instead, we have our Milk Act and  
5 the regulations under it. That is why the Milk Act  
6 is a vehicle in Ontario that can be and has at  
7 least been partially used to address some of the  
8 concerns about the specific dairy blends that are  
9 the subject of this proceeding before you today.  
10 If we hadn't made the amendments, then nothing in  
11 the Milk Act or regulations would apply to filled  
12 milk products or to the dairy edible oil spreads  
13 and nothing in the Milk Act or the regulations  
14 applies to dairy blends other than those two  
15 product categories right now. They aren't  
16 considered milk products under the Act.

17 MR. SEITZ: Can I just ask a  
18 question? The federal regulations with respect to  
19 federal regulated dairy plants -- I think that is  
20 the wording -- they would cover standardized milk  
21 products I presume, would they?

22 MS. INGOLFSRUD: Yes.  
23 Standardization of milk products is covered both by  
24 federal and provincial legislation. There is some  
25 necessity for that because compositional standards

1 are subject to division of powers issues. In some  
2 cases, they cannot be applied to products that are  
3 only made for sale and interprovincial trade if  
4 they aren't included in provincial legislation.  
5 There is quite a famous case concerning light beer  
6 that sets out that principle rather clearly, so if  
7 you look at food legislation across the country,  
8 you will find that there is a duplication where  
9 product is standardized. Usually you will see the  
10 standards and the name and the federal legislation,  
11 and that is either adopted or replicated in  
12 provincial legislation. That is to deal with the  
13 division of powers problems that can arise if you  
14 don't have that duplication.

15 MR. SEITZ: But from a public  
16 health point of view, do the federal regulations,  
17 the federal registered dairy plants, are their  
18 regulations sufficient from a public health point  
19 of view to address standardized dairy products in  
20 those plants, fluid milk?

21 MS. INGOLFSRUD: I want to be  
22 clear that our position is that the federal  
23 regulations dealing with plants and processing  
24 standards are the ones that primarily address the  
25 health issues. The compositional standards, we are

1 not suggesting are primarily directed at the health  
2 issues. The plant and processing standards that  
3 are directed at health at the federal level, number  
4 one, in our position do not appear to apply to  
5 dairy blends because of their definition of dairy  
6 product. Number two, they state clearly they only  
7 apply to premises where products are being made for  
8 interprovincial trade, so if you have a premise  
9 where the product is only being made for sale  
10 within Ontario, the federal regulations don't  
11 apply. That is why our licensing standards, in  
12 Regulation 761 for instance, were made to apply to  
13 the dairy edible oil spreads so that if somebody is  
14 making those in Ontario using dairy ingredients  
15 other than butter, there is a whole scheme that  
16 will regulate where they are made, how that place  
17 is staffed, equipped, the sanitation, the  
18 cleanliness, and the actual processing and handling  
19 to deal with the risks that I think are outlined  
20 pretty clearly in our submissions that are inherent  
21 in dealing with dairy products. Pasteurization  
22 does not deal with it in its own. Again, we have  
23 covered off why it doesn't and we do have an expert  
24 here if you had questions about that aspect.

25 MR. SEITZ: I have noticed the



1 reference to the fact that these were temporary  
2 measures, so that has now been five and a half  
3 years I guess. I also see in the agreement 405  
4 which suggests that provinces should seek to  
5 harmonize, to essentially find equivalent  
6 standards, things of this nature with other  
7 parties, has Ontario given any thought or made any  
8 efforts to discuss with other parties what their  
9 provisions are with respect to regulating  
10 production of milk or filled milk and whether in  
11 fact their standards are such that it would meet a  
12 similar objective is what Ontario is attempting to  
13 accomplish through 761, for example?

14 MS. INGOLFSRUD: I would just like  
15 to confer with my colleagues to see if any of us  
16 can answer that question. I am not sure that I  
17 can.

18 MR. SCHWARTZ: I want to check  
19 with our timekeepers here so we know how to  
20 calibrate our questions and so on.

21 MS. MAGNIFICO: We are about three  
22 quarters of the way through.

23 ARGUMENT BY BOBBY SEEBER:

24 MR. SEEBER: In response to the  
25 question posed, since 2004 there have been efforts

1 made to have the federal government step in. You  
2 heard submissions that there is a requirement that  
3 this be done in concert with the federal government  
4 and provinces. To date, the federal government has  
5 not made any movement on that.

6 MR. SCHWARTZ: Could I draw your  
7 team to tab 21 of your materials? There is a  
8 report of a working group here. I just want to  
9 make sure I have the facts right. Ontario  
10 participated in this Federal/Provincial/Territorial  
11 Agri-Food Inspection Committee on dairy products  
12 and analogues. There is a report of various  
13 stakeholder consultations. We have the dairy  
14 productions sector saying that the Dairy Farmers of  
15 Canada oppose the sale and manufacture of butter  
16 margarine blends in Canada. On the next page, last  
17 page, it says, "Working group believes the issue of  
18 dairy terminology is adequately addressed in  
19 current federal regulations." Is it a reasonable  
20 inference from that that the interim measure was a  
21 response to the dairy lobby and was essentially  
22 protectionist? Ontario is participating in a  
23 working group it reports. This is attachment 21  
24 again, February 8, 2001. It says, "Issue of  
25 terminology adequately addressed in current federal

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1 regulation." Earlier in the same report, which  
2 again I understand Ontario subscribes to, is a  
3 report that Dairy Farmers of Canada are opposed to  
4 the sale and manufacture of butter margarine blends  
5 in Canada which is listed separately from any  
6 consumer interest and concerns about consumer  
7 fraud. The report goes on to say that from a  
8 policy point of view, it is hard to justify the  
9 protectionist element.

10 MR. RADCLIFFE: Mr. Chair, I am  
11 trying to find this lot that you are referring to.

12 MR. SCHWARTZ: Tab 21.

13 MR. RADCLIFFE: Tab 21.

14 MR. SCHWARTZ: Yes. On the very  
15 last page under conclusions, second full paragraph,  
16 it says, "Working group believes that the issues of  
17 dairy terminology is adequately addressed in  
18 current federal legislation." It is the first  
19 sentence on the second full paragraph under  
20 conclusions on the last page. The previous page,  
21 under the bullet under dairy production sector, is  
22 seems that the Dairy Farmers of Canada are opposed  
23 to the sale and manufacture of butter margarine  
24 blends in Canada. You put the two together, it  
25 seems like the inference would be that Ontario

1 responded to protectionist pressure from the dairy  
2 farmers.

3 MS. INGOLFSRUD: I think, Mr.  
4 Chair, if you look at what our regulations did do  
5 and the fact that they were positioned as an  
6 interim measure and communicated as such at the  
7 time that they were made, that Ontario was clearly  
8 thinking about the full picture, the legitimate  
9 objectives, and the health and safety. The best  
10 evidence of that is the fact that the regulations  
11 on the dairy spreads differentiate between those  
12 that are made only with butter and those that are  
13 made with other dairy ingredients. Why was that  
14 distinction made? Because Ontario felt that if a  
15 dairy edible oil spread was made using butter, that  
16 the butter would have been made either in a  
17 licensed Ontario dairy plant or a federally  
18 registered dairy establishment under the CAPs Act,  
19 so there was no need to layer on the additional  
20 requirement that that particular formulation of  
21 spread have to be made in an Ontario licensed dairy  
22 plant with all of the requirements of Regulation  
23 761 because the ingredients that we felt caused the  
24 health concerns, the dairy ingredients, were  
25 already made in a dairy plant. However, the other

1 spreads that were made with other dairy  
2 ingredients, and it could be starting with raw  
3 milk, would pose the spectrum of risk. That was  
4 why the requirement that the spreads that were  
5 formulated with dairy ingredients other than butter  
6 have to be made in a licensed plant if they are  
7 made in Ontario and all of those requirements in  
8 761 that are directed at health and safety would  
9 apply to that.

10                               So no, it wasn't a knee jerk  
11 reaction to some proposals from dairy industry  
12 participants. Whatever proposals they made and for  
13 whatever reasons in the limited time there was,  
14 there was a concerted effort by Ontario to really  
15 look at proper public policy. The body that made  
16 these regulations, the Farm Products Marketing  
17 Commission, is an independent statutory commission.

18                               MR. SEITZ: If a spread is made  
19 that includes butter outside the province, can it  
20 be sold in Ontario?

21                               MS. INGOLFSRUD: Dairy edible oil  
22 spreads that are made outside of Ontario can be  
23 sold in Ontario if they meet the standards for the  
24 product that are set out in Regulation 753. Our  
25 licensing requirements do not apply to the making

1 of the spreads outside of the province of Ontario  
2 and our standards in 761 don't apply if the  
3 products are made outside of Ontario.

4 MR. SEITZ: But a spread that  
5 includes butter, because unless I misunderstood  
6 you, you had talked about the fact that a spread  
7 that includes butter made in an establishment in  
8 Ontario, the butter was made in a licensed  
9 establishment in Ontario, so the spread that  
10 includes butter doesn't necessarily have to be made  
11 in an establishment that is licensed under 761. Is  
12 that correct?

13 MS. INGOLFSRUD: That's right.  
14 First of all, the licensing and Regulation 761  
15 requirements don't apply if the spread is made  
16 outside of Ontario, whatever its composition.

17 MR. SEITZ: Including butter, all  
18 right.

19 MS. INGOLFSRUD: The point I was  
20 trying to make is that the distinction, when they  
21 are made within Ontario, is to answer the question  
22 about the document at tab 21. Why did Ontario  
23 institute these measures? Were they for legitimate  
24 objectives? I am saying it is clear that they were  
25 because that distinction was made dealing with the

1 health and safety issue and basically try not over  
2 regulate the processing of the spreads within  
3 Ontario where the processing itself didn't present  
4 the same safety risks as the processing of a spread  
5 did when it was made with the dairy ingredients  
6 other than butter.

7 MR. SEITZ: But the rationale I  
8 understand is because butter has already been  
9 processed, and therefore, its use in a spread then  
10 doesn't meet the health objective.

11 MS. INGOLFSRUD: That is the other  
12 thing to remember is that blends, whether they be  
13 filled milk products or dairy edible oil spreads,  
14 we can't assume that they are going to be made by  
15 someone taking a dairy product that has been made  
16 in a dairy plant, whether it is a federally or  
17 provincially regulated plant, and mixing it with  
18 edible oil. That is not the only formulation.  
19 People are going to start out with raw milk or  
20 other dairy ingredients that pose risks. It is not  
21 an answer to say pasteurization of the raw milk is  
22 enough and you can make it anywhere under any  
23 conditions. Our position is making these two  
24 categories of blends presents the same risks  
25 through the whole continuum; processing, packaging,

1 distribution, as do the equivalent traditional  
2 dairy products; regular milks and creams in the  
3 case of filled milks, and butter in the case of the  
4 dairy edible oil spreads, so the same concerns  
5 apply to that.

6 MS. RENAUD: Why do you have to  
7 prohibit filled milk products? Can't you just  
8 require that they be made in a plant that is  
9 federally...?

10 MS. INGOLFSRUD: We have to go  
11 back to what our submissions says; these were  
12 interim measures. We are recognizing we are a long  
13 way away from that and now we are before you.

14 MS. RENAUD: How long does interim  
15 last?

16 MS. INGOLFSRUD: There is an  
17 effort that everyone should be aware of to  
18 standardize and harmonize food standards generally  
19 across Canada. Ontario waiting for the federal  
20 government to lead national discussions -- and I  
21 say national meaning federal/provincial in this  
22 area -- is part of what is going on generally with  
23 respect to food regulation across the country in  
24 other types of foods and it is part of what is  
25 going on internationally as well with international



1 food standards and Canada is part of that dialogue.  
2 Ontario hasn't been delaying for the sake of  
3 delay. There is a genuine desire to try and see  
4 appropriate national standards which would involve  
5 consultation with all of the provinces where we  
6 could discuss the health and safety issues as well  
7 as the labelling and identity and whether products  
8 should be standardized across the country and it  
9 hasn't happened.

10 MR. SEITZ: I am having some  
11 difficulty understanding that. What you are saying  
12 is that you are not sure whether the federal  
13 regulations include filled milk products under  
14 their regulatory regime, the federal registered  
15 dairy plants.

16 MS. INGOLFSRUD: I'm saying two  
17 different things about two different pieces of  
18 federal legislation. In the case of the Canada  
19 Agricultural Products Act, if you look at their  
20 definition of dairy product it excludes anything  
21 that includes edible oils, so on a plain reading of  
22 their legislation, it does not appear to cover  
23 filled milk products. Our efforts to get answers  
24 from them on this have been unsuccessful. We are  
25 dealing with products that appear to be out there

1 in the hypothetical. If there were real products  
2 that we could point to, we might be able to get  
3 some clear answers.

4 In the case of the Food and Drug  
5 Act Regulations and the Food and Drug Act, we are  
6 not sure again what the federal/provincial position  
7 would be. Some prior experience on other products  
8 leaves some questions in our minds about whether  
9 they would treat a filled milk, let's say a two  
10 percent milk to be specific that contains two  
11 percent edible oil rather than two percent milk  
12 fat, whether they would treat it as an adulterated  
13 and therefore illegal milk product under the Food  
14 and Drug Act which a plain reading of that Act and  
15 the regulations suggest, or whether they would  
16 choose to somehow allow it to be made, called under  
17 different names, we are not sure what they do. The  
18 impression we are left with is they haven't faced  
19 this issue head on, quite frankly.

20 MR. SEITZ: It just seems to me  
21 that through 761 you are able license the sale and  
22 distribution of a product. Correct?

23 MS. INGOLFSRUD: Yes, within  
24 Ontario.

25 MR. SEITZ: I'm trying to identify

1 what would stop you from saying, for example, that  
2 a filled milk product can only be distributed in  
3 Ontario if it is produced in a federally registered  
4 dairy establishment in Canada. In other words  
5 then, you have filled in the gap that you say the  
6 federal regulation doesn't include which  
7 essentially is defining what it is because it is  
8 for sale in Ontario, separate from production which  
9 you could do essentially through 761.

10 MS. INGOLFSRUD: That is the kind  
11 of option that Ontario certainly could consider if  
12 it was to look at regulating rather than  
13 prohibiting filled milk products.

14 MR. SEITZ: I asked the question  
15 because --

16 MS. INGOLFSRUD: No, and I'm  
17 agreeing with you that that is certainly something  
18 that could be considered.

19 MR. SCHWARTZ: Where are we in  
20 terms of time?

21 MS. MAGNIFICO: We have about  
22 twenty more minutes.

23 MR. RADCLIFFE: That's includes  
24 reply?

25 MS. MAGNIFICO: Yes, it depends on

1 how you want to allocate it.

2 MR. RADCLIFFE: In terms of tying  
3 up the loose end in terms of 404, I will just refer  
4 you to that part of our written submissions where  
5 we dealt with that. We dealt with the  
6 justification in some detail but the B clause in  
7 404 you will find is dealt with at paragraphs 254  
8 and 260 of our submissions. I will just give you  
9 those references because we have time constraints.  
10 Clause C is dealt with at paragraphs 261, 262, and  
11 278 which deals with the filled milk. Paragraph D,  
12 in terms of meeting the requirements, is dealt with  
13 at paragraphs 265, 268 and also at paragraph 279.

14 It is our submission that Alberta  
15 has not demonstrated any impairment to internal  
16 trade. Again, they dealt with this on a very  
17 theoretical basis. I just refer you quickly to the  
18 Quebec Margarine Report where in that dispute the  
19 panel made the following observation. This is in  
20 our written submissions:

21 "As previous panels have  
22 found, it's unnecessary to  
23 engage in a detailed economic  
24 analysis of the measure's  
25 impact, rather it is open to

1 a panel to make a common  
2 sense determination as to  
3 whether the impugned measure  
4 has caused or would cause  
5 injury." (As read)

6 It is clear from the previous  
7 decisions as well that you don't have to show a  
8 dollar amount, but in our submission surely at some  
9 point you have to show some example of how there is  
10 an impact or a negative consequence as a result of  
11 the regulation. Alberta hasn't really done that  
12 apart from saying that this could be a problem.  
13 They haven't been able to identify a single product  
14 where in fact there was a problem.

15 I will quickly conclude the main  
16 part of our submissions. Again, going back to the  
17 very beginning, it is our submission that the  
18 amendments that we are dealing with here were not  
19 the subject of the pre-existing dispute. The  
20 amendments are new measures, they apply to a  
21 different set of food products, and are based on a  
22 policy purpose that seeks to promote health and  
23 consumer interest. There is no new evidence in  
24 this particular case that somehow this is impeded  
25 in provincial trade, the Milk Act and the

1 regulations. The amendments are necessary to  
2 fulfil legitimate objectives in terms of consumer  
3 protection and the protection of life and health.

4 Finally, it is important in terms  
5 of the integrity of the agreement that it would be  
6 our submission that where the panel deals with this  
7 matter, that it is dealt with in a concrete  
8 fashion, that we are not speculating about what  
9 could be or what should be, but we are actually  
10 dealing with the specifics of this case. Subject  
11 to what we may have to say by way of reply, those  
12 are our submissions.

13 MR. SCHWARTZ: This won't count  
14 against your time that you have set aside for  
15 reply, but with the complainants we had a last  
16 ditch set of questions. Anybody have any  
17 questions? I guess we are all questioned out at  
18 this point. To preserve the symmetry here, we  
19 understand your general point about one particular  
20 dispute not making Ontario under the wardship of a  
21 particular dispute settling panel indefinitely.  
22 Were we to decide that this was within our  
23 jurisdiction as some kind of a replacement measure  
24 and what you currently have on the books is  
25 offside, what would be your suggestion as to what

1 would be an appropriately restrained set of  
2 recommendations by this panel?

3 MR. RADCLIFFE: We have addressed  
4 that in our written submissions. Certainly we have  
5 suggested, and I can take you to the page, in the  
6 event that you were to make a finding against  
7 Ontario, Ontario is not in a position to  
8 immediately bring itself into compliance. It is  
9 not that easy to deal with a regulation in that  
10 fashion. What would need to be done, we would need  
11 some time. I think my colleagues across the way  
12 suggested, "Why can't you just do this in a few  
13 days?" As you will see from our recommendations,  
14 we were asking for 18 months in order to deal with  
15 that.

16 MS. RENAUD: What's your response  
17 to British Columbia who said you did it in 90 days  
18 the first time, you should be able to do it in 90  
19 days this time.

20 MR. RADCLIFFE: Perhaps my  
21 colleague can respond to that.

22 MS. INGOLFSRUD: That was an  
23 interim measure that needed to be put in place very  
24 quickly to provide the protections that we referred  
25 to in our submissions. It did not allow for what I

1 think the panel would want in terms of proper  
2 consideration of what regulatory measures really  
3 need to be put in place in detail to achieve  
4 legitimate objectives and meet the other tests in  
5 404. For instance, if you were to rule against  
6 Ontario's total prohibition on filled milk  
7 products, developing an appropriate regulatory  
8 scheme would need consideration of quite a number  
9 of issues and factors.

10 MS. RENAUD: But if you say they  
11 were interim measures, surely you have given some  
12 thought now as to what would be appropriate  
13 permanent measures.

14 MS. INGOLFSRUD: I think we have  
15 already indicated in our submissions that Ontario  
16 has been hoping to participate in a national  
17 effort, so this has not been on the agenda. That  
18 is one of the challenges that we would be facing.  
19 A short time period might result in, for instance,  
20 regulation that was overbroad to be on the safe  
21 side. To develop a proper response is going to  
22 take some time and to do the things that one would  
23 expect in making regulations, consultation with  
24 stakeholders, other provinces, that kind of thing.

25 MR. SEITZ: So your position is



1 still 18 months.

2 MR. RADCLIFFE: Just to add one  
3 small point to that, I think your question was  
4 couldn't we do something in terms of regulation  
5 that requires certain things to be dealt with  
6 within the federal facilities or places that were  
7 regulated by the federal legislation. Again, that  
8 may be a viable option, but it would involve  
9 consultation with Canada and Ontario itself isn't  
10 necessarily in a position to resolve this on its  
11 own.

12 MR. SEEBER: Just to add one other  
13 point to that because you make a very good point,  
14 in terms of being able to take a look at -- given  
15 that we have an interim measure in place --  
16 potential amendments to that, we have looked at  
17 very specific kinds of requests or demands that  
18 have come forward specific to a product. The  
19 regulations that we have in place have been  
20 flexible, there have been amendments made to it, we  
21 have never regarded them as being ridged. The last  
22 word basically on how the province needs the  
23 regulate those items, that has been something that  
24 has been an ongoing process and has been fluid  
25 based on specific product examples that have been

1 coming forth.

2 MS. INGOLFSRUD: Perhaps we could  
3 give the example so we are not confusing the panel.  
4 There has been one amendment to these measures  
5 since they were first instituted in 2005 and that  
6 was the addition of the light dairy edible oil  
7 spread category. That was in response to a  
8 specific industry request, so I think Bobby's point  
9 is that the process for making dairy regulations  
10 under the Milk Act is fluid, it evolves in response  
11 to specific requests. We haven't had further  
12 specific requests on either of these product  
13 categories, there hasn't been further work as a  
14 result, so it will take us time to develop an  
15 appropriate, for example, system of regulation for  
16 filled milk products were you to rule that the  
17 current prohibition isn't sustainable under the  
18 AIT.

19 MR. SCHWARTZ: With respect to the  
20 probability of amendments not being ridged, if it  
21 is in fact the case -- and I don't think Ontario  
22 concedes this -- that the current measure is an  
23 obstacle to product development, the uncertainty  
24 about whether you are going to get a break when you  
25 come forward and apply would still be an obstacle.

1 Right? The mere fact that you have exhibited  
2 flexibility in one case would not be it the fact  
3 that if the default role is you can't do this, that  
4 is deterrent to product development.

5 MS. INGOLFSRUD: Yes. The usual  
6 process in practice is that a processor who is  
7 wanting to decides the right time that they may  
8 have already invested money in R&D before they come  
9 forward and say, "We have a product that we would  
10 like to market that, for instance, doesn't appear  
11 to be a standardized product. We are not sure it's  
12 legal to sell it, will you please allow it?" To  
13 some degree, it is a business decision; at what  
14 point, how early? It is like anything else the  
15 government regulates. Business has to be mindful  
16 that something that is illegal presently, how much  
17 do they risk up front in investing before they try  
18 and get the government to agree to make it  
19 something that can be sold?

20 MR. SCHWARTZ: Thank you. Just to  
21 reiterate, you set aside ten minutes I believe.  
22 The exchange we just had won't count against you  
23 for that purpose. Did you want a short break  
24 before you do your reply? How much do you need?

25 MS. VOGEL: Ten minutes.

1 MR. SCHWARTZ: I have checked with  
2 a higher authority, and this time I am good to go,  
3 so ten minutes.

4 --- Short Recess at 12:17 p.m.

5 --- Upon resuming at 12:24 p.m.

6 MR. SCHWARTZ: I am informed that  
7 Alberta actually has not just five, but five to ten  
8 minutes, so go crazy.

9 MS. VOGEL: Thank you.

10 MR. SCHWARTZ: Ontario has 15 to  
11 20 minutes. If you want it, it is there for you  
12 but you don't need to take it.

13 MS. VOGEL: Thank you. I was  
14 wondering why the complaining party only got 60  
15 minutes and the respondent got 75.

16 MR. SCHWARTZ: We counted the  
17 intervener's time.

18 REPLY BY ALBERTA:

19 REPLY BY SHAWNA VOGEL:

20 MS. VOGEL: Mr. Thomas speaks in  
21 his own right, but we fully support each other.  
22 Let me not waste my five to ten minutes. I want to  
23 make three to four points. Number one, let's  
24 remember that the starting point for looking at the  
25 regulation of dairy blends as being an obstacle to

1 trade starts in chapter 9. Chapter 9, the  
2 agricultural chapter in 902.3, all the parties  
3 together identified what measures were technical  
4 barriers to trade, and 902.3 and the notification  
5 process under that, all parties agreed that the  
6 standards regarding dairy plants and imitation  
7 dairy products agreed by all parties as being  
8 technical barriers to trade. We don't have to  
9 spend a lot of time talking about whether these  
10 regulations, whether the EOPA, are barriers to  
11 trade; we all agreed at the beginning of the AIT  
12 they were. The panel report discusses this on  
13 pages 14 to 15.

14                               Second, I want to address the  
15 issue that was a significant portion of the  
16 discussion between the panel and Ontario. Ontario  
17 can regulate butter to its heart's content, it can  
18 regulate milk products, it can regulate dairy.  
19 This is not about that. Somehow Ontario takes the  
20 position, different from all the other provinces  
21 except Quebec, that if you take dairy, which is  
22 highly regulated both federally and provincially --  
23 and we are not arguing against that -- you then mix  
24 that with a vegetable oil and apparently some  
25 mystery health risk now comes, some magic problems

1 and concerns arise. Apparently if you take a dairy  
2 product and mix it with wheat to bake, if you are  
3 bakery, there are no special regulations for that,  
4 there is no special licensing requirement for that.

5 The federal and provincial general food safety,  
6 licensing, and labelling requirements are all fine  
7 apparently for that. Apparently if you take dairy  
8 and make a sauce, you don't have to have a special  
9 licensing, but somehow by the addition of vegetable  
10 oil rather than wheat or some other product, we now  
11 are in the realm of having to protect the consumer  
12 which all the other provinces, except for Quebec,  
13 no not feel the need to do. If this clearly was  
14 such a health issue, the other provinces and the  
15 federal government would be doing it.

16 The question was asked apparently  
17 to federal officials, "Are vegetable oils of dairy  
18 blends covered by the dairy regulations?" The  
19 answer appeared to be no. Of course they are not  
20 because there is no need to regulate dairy blends.

21 We are not contesting the need to regulate dairy,  
22 whether it is dealing with raw milk, pasteurization  
23 process, all sorts of regulations dealing with  
24 dairy both federally and provincially. That's not  
25 what this is about. Somehow Ontario feels that the

1 addition of that dairy to vegetable oil somehow  
2 becomes a health danger that no other province  
3 except for Quebec -- and we are hoping Quebec is  
4 listening -- thinks it is a problem. So all the  
5 federal regulatory general regulations and the  
6 provincial general regulations dealing with  
7 cleanliness of establishments, et cetera, applies  
8 to all products. We don't have a special bread  
9 licensing regulation, why do we have a dairy blend  
10 spread regulation? I did note the comment of the  
11 representative from Ontario that you do not need  
12 compositional standards and it is not directed at  
13 health issues. All right, then what are the  
14 compositional standards directed at? Clearly, to  
15 stop the product being produced and sold and being  
16 a competitor to the dairy products.

17 I do want to point out I had  
18 committed to get back to you with a couple of  
19 references from my presentation. The e-mail which  
20 advised Alberta and all other provinces of both the  
21 repeal of the EOPA, et cetera, is found at tab 9 of  
22 the Alberta submission. I would like to direct you  
23 to the -- it is printed on two pages. I want to  
24 reference the first and second paragraphs of the  
25 second page in which, on December 22, Mr. Seeber

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1 notified Alberta and the other jurisdictions that  
2 the commission is considering the regulatory  
3 amendments under the Milk Act to address milk  
4 products containing some edible oil based inputs.  
5 It is expected that the commission will render a  
6 decision on this matter in the near future.  
7 Clearly, the near future was the next day because  
8 those regulations came into effect within a week of  
9 that.

10                               The other point of that paragraph  
11 is that the reference to regulatory amendments are  
12 seen as a means to facilitate transition between  
13 the repeal of the EOPA and the development of  
14 effective national standards, as well as an effort  
15 to align Ontario with other provincial  
16 jurisdictions regarding the regulatory treatment of  
17 filled milk and butter margarine blends. We  
18 suggest that Ontario has had a long time to align  
19 itself and the time is now.

20                               I would like to also reference you  
21 to -- I had mentioned the summary of the dairy  
22 farmer position. You will find that in the  
23 original Alberta submission, Volume 3, tabs 22 and  
24 23 and it is referenced in the panel report  
25 footnotes 28 and 29.



1                         Lastly, I would like to talk about  
2 recommendations and process going forward. That is  
3 certainly something that is on the mind, we can  
4 tell, of the panel and ourselves. What is this  
5 panel to do at this point? We ask that you, first  
6 of all, find that the regulations are inconsistent  
7 with the AIT; second, Ontario be directed to bring  
8 its measures into compliance with the AIT. This is  
9 not a difficult task. This doesn't require 18  
10 months of consultation. If you take a look at the  
11 Milk Act regulations before and after the January 1  
12 amendments, you will see that what we had were  
13 regulations that dealt with milk and we then, by  
14 the amendments, defined milk to include dairy  
15 blends. You simply repeal those amendments that  
16 were made January 1 and you are back to where you  
17 were before. This doesn't require lots of  
18 consultation to figure out how to re-regulate dairy  
19 blends again. The federal government doesn't feel  
20 the need to regulate the, the other provinces don't  
21 because dairy is regulated, and there is no magic  
22 mixing dairy with vegetable oil.

23                         We also suggest that it is  
24 necessary that Ontario do this within 60 days  
25 because if you look at annex 1702 to chapter 17,

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1 you will see in section 6 that a disputing party  
2 may request that the secretary reconvene the  
3 summary panel as a compliance panel 60 days after  
4 the date on which a summary panel report is issued.

5 So the process is this: You now have your  
6 deliberations, you will ultimately issue your panel  
7 report, your role as a summary panel is over at  
8 that point, Ontario -- and we are hoping you will  
9 require Ontario to bring its measures into  
10 compliance -- then has to turn its mind to doing  
11 that and we can come back to you 60 days after your  
12 panel report and we will be coming back to you as a  
13 compliance panel at that point if Ontario has not  
14 made its measures consistent with the AIT. As I  
15 read the annex, your summary role is over, you then  
16 become a compliance panel, and then all the  
17 compliance panel provisions apply.

18 I do note with respect to the 18  
19 months consultation as well that had this not been  
20 this special summary process, had this been a  
21 "normal process" under chapter 17, then we would be  
22 able to come back to the panel to be reconstituted  
23 as a compliance panel a year after the panel  
24 report, so that would have given the party who is  
25 ordered to bring into compliance one year to do it,

1 so 18 months would even be outside that. I point  
2 to you Article 1707, paragraph 9. Even in the  
3 normal course, a party only has a year to bring  
4 itself into compliance. Clearly, the time period  
5 was shortened to 60 days under the summary panel  
6 proceeding under the annex 1702 because, let's face  
7 it, you are a summary panel because this dispute  
8 has been around for a long time. Again, those  
9 references are Article 1707, paragraph 9, which is  
10 the normal one year at which you can come back to  
11 the panel and reconstitute it as a compliance  
12 panel, yet you, as the summary panel, can be  
13 reconstituted as a compliance panel under annex  
14 1702, paragraph 6.

15 MS. RENAUD: I just want to make  
16 sure I understand your argument. You are saying  
17 that we cannot give Ontario more than 60 days. Is  
18 that right?

19 MS. VOGEL: That would be my  
20 argument, yes. Indeed, in a normal process it  
21 would be a year.

22 MS. RENAUD: Even if we gave them,  
23 let's say, six months, you could still make a  
24 request for a compliance panel within 60 days. Is  
25 that --

1 MS. VOGEL: It does say, "Or where  
2 an alternate implementation period has been ordered  
3 by the summary panel." It is within your  
4 jurisdiction to say six months. You will note that  
5 the standard is 60 days or an alternate period that  
6 you order. I am suggesting to you that the range  
7 under the normal compliance regular procedures  
8 would be a year, so to ask for 18 months --

9 MS. RENAUD: So a year would be  
10 like the ultimate limit.

11 MS. VOGEL: Exactly, but as I  
12 said, this isn't a difficult task. You simply  
13 repeal the amendments you put in. Just as an  
14 example to you, what happened in 2004 is you had  
15 the Milk Act regulations and you had Section 5, so  
16 if you are tracking through the regulations, you  
17 had your normal regulations and then what happened  
18 by the amendment is a new Section 6 went in that  
19 said, "Subject to subsection 7 and 8 --" Which is  
20 the flavouring. "-- a fluid milk product shall not  
21 contain a fat or oil other than milk fat." That  
22 prohibition was slid in there, you simply repeal  
23 that. I don't think you simply just go back to  
24 where you were. I don't think consultations are  
25 needed because I am very concerned that why you are

1 having consultations is, again, you are trying to  
2 re-regulate where the other provinces aren't and  
3 the federal government isn't because you don't have  
4 to regulate dairy blends. You don't have special  
5 regulations for so many other products that might  
6 have a dairy component such as bread, as I have  
7 said, croissants, which have a high product,  
8 because you are covered by federal and other  
9 Ontario provisions dealing with cleanliness of  
10 facilities and handling of food. All that is  
11 handled generically by, let's call it, generic food  
12 safety legislation which is what Mr. Kuperis  
13 referred to; the Federal Food and Drug Act.

14 MS. RENAUD: One of the arguments  
15 that was made in the written submissions of Ontario  
16 is that for filled milk products, because they are  
17 fluid and uncooked as opposed to baked products  
18 where the milk is cooked, there is an additional  
19 health risk. What is your answer to that?

20 MS. VOGEL: But there is not. The  
21 issue is that the milk product, the fluid milk or  
22 the milk fat, the dairy product has to be dealt  
23 with properly. Ontario has regulations that raw  
24 milk can't be sold, for example, so a producer who  
25 wants to make a dairy blend with raw milk plus

1 vegetable oil can't do that. There are  
2 pasteurization requirements, there are other  
3 requirements for the dairy component and those have  
4 to be met. Any producer that wants to use a dairy  
5 component has to be either processing the dairy,  
6 and they therefore have to fall under the dairy  
7 regulations, or they have to be purchasing it from  
8 a processor who is regulated to. But once the  
9 dairy product is intact, in a sense, once the dairy  
10 product complies with the specific federal and  
11 provincial rules, what is the magic in adding  
12 vegetable oil to it? How is that different than  
13 adding wheat to it? Why do we have to regulate  
14 that combination? Is there like a big chemical  
15 explosion that happens when you put dairy and  
16 vegetable oil versus dairy and wheat?

17                   The question is: Why are they  
18 regulating that? The more you regulate, the less  
19 products you have on the market that are  
20 competitive to dairy. Federal regulations dealing  
21 with dairy are adequate to protect dairy. You  
22 don't have federal regulations dealing with blends  
23 because you don't need specific blend related  
24 regulations; you have your general Food and Drug  
25 Act and all the other provisions that deal with

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1 food safety and handling and transport, et cetera.

2 There is nothing magic here.

3 MR. SEITZ: Let me give you a  
4 scenario that a filled milk product is made that is  
5 90 percent milk and ten percent vegetable oil. The  
6 milk, the 90 percent, has been produced in a  
7 regulated dairy plant. Is there any concern that  
8 yes, taking that milk product that has already been  
9 produced and gone through all of those processes,  
10 but then in the process of mixing it you are doing  
11 it in a plant that is not a licensed plant, is  
12 there no potential essentially for that to be  
13 contaminated? Milk is one of these things where in  
14 fact it is quite a culture for breeding bacteria  
15 and other things of this nature, so I am trying to  
16 see whether in fact there is a reason why milk is  
17 different when you are talking about significant  
18 proportions of milk.

19 MS. VOGEL: Let's not even talk  
20 about blending it. The milk is delivered by a  
21 truck to the local Mac's store. Now we have milk  
22 that complies with dairy requirements. If that  
23 milk is left sitting on a shelf and not put into a  
24 refrigerator, we have a significant health risk if  
25 that Mac's store sells it. That Mac's store is

1 under a regulation -- and I am sorry I can't point  
2 to it -- but it will either be federal or  
3 provincial dairy regulation or perhaps it is a food  
4 storage regulation that says, "You can't take  
5 products that need to be refrigerated and leave  
6 them on your shelf and sell them." I am pretty  
7 sure there is no Mac's storage of milk legislation.  
8 It is not unique. You always can regulate milk  
9 and it clearly has been done, but you don't have to  
10 go that step further because general food safety or  
11 the milk regulations themselves will protect. I  
12 would like to turn that to Mr. Kuperis for a  
13 moment.

14 MR. KUPERIS: It is a good  
15 question, but that doesn't seem to be a concern for  
16 Ontario with other dairy products that might leave  
17 a plant in a safe manner like cream that might be  
18 used in a pasta sauce or used in a restaurant as  
19 part of a pasta sauce, cheeses that might be used  
20 in a three-cheese pasta sauce, buttermilk that  
21 might be used in a ranch salad dressing,  
22 confections, there is a whole range of foods that  
23 combine dairy ingredients and other ingredients.  
24 Ontario expresses no concern about their  
25 preparation and appears to find the federal and its



1 own provincial scheme quite adequate there. We  
2 would question why just in the particular case of  
3 combining dairy ingredients with vegetable oils  
4 that this would suddenly become a concern.

5 MR. SCHWARTZ: Thank you very  
6 much.

7 MS. VOGEL: Do I have any time  
8 left? I was going to say if I did, Mr. Thomas  
9 might want a few seconds.

10 REPLY BY ONTARIO:

11 REPLY BY ROBERT RADCLIFFE:

12 MR. RADCLIFFE: I have three short  
13 points and then my colleague as well is going to  
14 touch on a response to this issue around the  
15 federal/provincial. There was some criticism in  
16 terms of Ontario not being transparent. We are  
17 mindful of our obligations there. There is no  
18 basis for the suggestion that somehow Ontario was  
19 acting in bad faith. We recognize that we should  
20 have been better in terms of what we did, but at  
21 the same time, there was notice provided to  
22 Alberta. It was a short timeline, but again, we  
23 are cognizant of our obligations under the  
24 agreement in terms of transparency and the  
25 importance of that.

1 I just wanted to point you to  
2 paragraph 309 of Ontario's submissions if you could  
3 turn to that page. In terms of the issue of what  
4 recommendations should be made, there at 309 there  
5 is an excerpt dealing with what is done in the  
6 international sphere. Paragraph 309 says:

7 "This is oppressed in an  
8 international trade law that  
9 it should be up to a party to  
10 determine how to best bring  
11 itself into compliance with  
12 recommendations made by a  
13 dispute panel." (As read)

14 Then they set out the provision  
15 there that is relevant. The part that is  
16 italicized, the sentence that is highlighted in the  
17 middle of the paragraph, "It is left up to the  
18 member to decide." In our submission, whatever  
19 recommendations you make, you have to leave some  
20 leeway for Ontario to make the decision as to the  
21 best way to do that.

22 The third point that I was going  
23 to touch upon was the issue of costs in the  
24 submissions of Alberta. They suggest that Ontario  
25 should bear the operational costs for the whole

1 proceeding today. In our submission, there are a  
2 variety of factors that can be taken into  
3 consideration under the annex of 1705 whether the  
4 disputant complied with Article 1700, the outcome  
5 of the proceeding, other relevant considerations,  
6 in our submission there is no reason why the  
7 operational costs should not be apportioned amongst  
8 the parties in the usual way. I will turn it over  
9 to my colleague.

10 REPLY BY DAGNY INGOLFSRUD:

11 MS. INGOLFSRUD: I am just briefly  
12 going to address the points Alberta has made  
13 suggesting that the dairy blends that are regulated  
14 under our amendments are similar to other food  
15 products that contain some dairy ingredients. In  
16 our submission, they aren't. Alberta started off  
17 by saying something about adding dairy ingredients  
18 to edible oils. That is what we are not talking  
19 about here and filled milk products are the best  
20 example of that. Filled milk products, by  
21 definition, are milks and creams to which some  
22 edible oil has been added to make a fluid product  
23 that people are going to buy at their store to use  
24 as a beverage or will be used commercially as an  
25 ingredient. We are not talking about adding dairy

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1 to edible oils, we are talking about dairy based  
2 ingredients, and in the case of the filled milk in  
3 particular, products that are very, very vulnerable  
4 to contamination.

5                   The second point that was made  
6 seemed to be a suggestion that the normal process  
7 for making the dairy blends would be to take a  
8 dairy product that had been made already in a  
9 regulated plant and add edible oil ingredients to  
10 it. There are no regulations that require that to  
11 be the case and that leaves us with a very large  
12 problem. Both the federal and the provincial dairy  
13 product regulations only apply to end products that  
14 meet the definitions of dairy products. Blended  
15 products, if they are made as blended products,  
16 don't meet those definitions. For instance, when  
17 you make filled milk products, it is like making  
18 the regular milk and cream you buy at the grocery  
19 store, you start with raw milk normally. There is  
20 nothing to stop someone, absent our amendments,  
21 from taking raw milk -- and yes, they would have to  
22 pasteurize it -- but they could make it in a  
23 premise that would not be recognized as a dairy  
24 plant under our Milk Act regulations and as far as  
25 we can tell, would not have to be a registered

1 federal establishment if that product was being  
2 made to cross the border. We submit that it is  
3 inaccurate to suggest that that protection is  
4 there, that these blends would always have to start  
5 with dairy products that were made in a regulated  
6 way under dairy specific legislation.

7 That brings us to the third point.

8 Even if a blend happens to be made using a dairy  
9 product that is made in a federally registered  
10 dairy establishment or one of our provincial  
11 licensed plants, we still have a huge risk of  
12 contamination once that dairy product enters the  
13 plant and is blended. The risks of contamination  
14 are continual through the further processing, the  
15 handling, the storage, the packaging, and the  
16 distribution. That is recognized in our Milk Act.

17 Fluid products in particular, yes, we do regulate  
18 them through the distribution end and for good  
19 reasons; to address all of those risks. Saying  
20 that a blend doesn't need to be regulated because  
21 you start it with a dairy product, you get your  
22 pasteurized milk in from a plant, but then you can  
23 make it somewhere else and make it, process it,  
24 package it, sell it through a series of  
25 distributors who aren't regulated does not address

1 the risks that are going to continue to exist  
2 through the further processing, packaging,  
3 handling, storage, distribution process. Our  
4 submission is that there are going to be really  
5 significant gaps if these products are not  
6 regulated.

7                           That leaves us with a last point  
8 about one of your recommendations. That is a very  
9 strong plea that if you happen to find against  
10 Ontario, that you do not go along with Alberta's  
11 recommendation that Ontario should not enforce its  
12 current bans, and in particular, the ban on filled  
13 milk products. It will leave huge gaps if Ontario  
14 was not to enforce that ban until it could develop  
15 an appropriate regulatory scheme and it is going to  
16 put consumers at very, very real health risks.  
17 Basically consumers, you and I, can go to the store  
18 then and buy products that can be made anywhere  
19 under any standards that look like our two percent,  
20 one percent milk or cream, serve them to our kids,  
21 our elderly, and they are not going to be made with  
22 any dairy specific health and safety standards,  
23 they are not going to be distributed with those  
24 dairy specific health and safety standards.

25                           MR. SCHWARTZ: You have no EOPA

1 now, you do have regulatory making capacity under  
2 the Milk Act although you could argue that that is  
3 problematic because the commission under there also  
4 has a mandate to promote the economic interests of  
5 the industry. If you wanted to do things like  
6 address inspection issues or labelling issues and  
7 this wasn't specifically linked to the Milk Act,  
8 does Ontario have legislation on the books that  
9 gives sufficient regulatory making authority or  
10 would you have to pass a new statute?

11 MS. INGOLFSRUD: We have some  
12 capacity under the Food Safety and Quality Act to  
13 regulate dairy blends, but we would have a  
14 potential problem where the primary ingredients are  
15 cow's milk. If the primary ingredients are from  
16 other dairy species, there is no problem, but there  
17 is a limitation in our Food Safety and Quality Act  
18 currently. The definition of food that puts real  
19 restrictions on how far we can go to regulate foods  
20 that are primarily based on cow's milk.

21 MR. SCHWARTZ: If I'm  
22 understanding you, you don't necessarily have  
23 regulatory authority to achieve objectives that are  
24 compliant with the AIT if such exist. On a current  
25 statute book, you have a problem because your more

1 generic legislation doesn't apply.

2 MS. INGOLFSRUD: It has this  
3 limitation with respect to cow's milk and cow milk  
4 products, otherwise it is very broad enabling  
5 legislation.

6 MR. SCHWARTZ: I am asking, as you  
7 might guess, if we were to hold that there was a  
8 breach and we order remedy and we are figuring how  
9 much time one issue might be, can you do this by  
10 regulation if you wanted to do some limited  
11 re-regulation?

12 MS. INGOLFSRUD: I think we have a  
13 substantial amount of regulatory capacity under the  
14 Milk Act, to be clear, when it comes to products  
15 that contain cow or goat's milk. We have  
16 additional capacity under the Food Safety and  
17 Quality Act when it comes to products that are  
18 based on dairy ingredients other than cow's milk.

19 MR. SCHWARTZ: Do you happen to  
20 know -- I wouldn't blame you if you didn't -- is  
21 there any general legislation in Ontario that gives  
22 the government authority to bring itself into  
23 administrative compliance with AIT rulings?

24 MS. INGOLFSRUD: Not that I am  
25 aware of.



1                                   MR. SCHWARTZ: All right. The  
2 reason I am asking again is if you try to do things  
3 under the Milk Act, again, there is the same  
4 potential objection which you have given a mandate  
5 to regulate or that has at least arguably a  
6 conflict of interest because part of its statutory  
7 mandate is promoting the economic interest of the  
8 industry. Anyway, that is something we will have  
9 to wrestle with if we get to that stage. Anything  
10 else you want to add there?

11                                   MR. RADCLIFFE: Nothing from us.

12                                   MR. SCHWARTZ: Thank you very  
13 much. Any other points anybody wanted to ask us  
14 about or raise before we wrap up the hearing today?  
15 As I said, my understanding is you can get a  
16 transcript within three business days. Thank you  
17 all for your cooperation and assistance.

18 --- Whereupon proceedings adjourned at 12:55 p.m.

I HEREBY CERTIFY THAT I have, to the best of my skill and ability, accurately recorded by shorthand and transcribed therefrom, the foregoing proceeding using real time computer aided transcription.

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Victoria Janda, Court Reporter

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