AGREEMENT ON INTERNAL TRADE
APPELLATE PANEL

IN THE MATTER OF AN APPEAL FROM THE REPORT OF THE PANEL REGARDING THE DISPUTE BETWEEN SASKATCHEWN AND QUÉBEC CONCERNING DAIRY BLENDS, DAIRY ANALOGUES AND DAIRY ALTERNATIVES DATED MARCH 31, 2014

SUPPLEMENTARY SUBMISSION OF MANITOBA, INTERVENOR
Re. Standard of Review

Supplementary Submission dated October 7, 2014

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SUPPLEMENTARY SUBMISSION
(Re. Standard of Review)

1. The "standard of review" analysis is a crucial aspect of any hierarchical decision-making process. It serves to delineate the role and function of one decision-maker, where they are called upon to review a decision previously made by another decision-maker.

Overview – Standards of Review

2. In Canadian law, the standard of review analysis has become an integral aspect of most any multi-level decision-making process. Historically, it has applied within the traditional court hierarchy – appeals from lower courts to higher courts in both civil and criminal matters. More recently, it has come to be applied in the context of judicial review of administrative action – culminating in the Supreme Court of Canada's seminal decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9 (mentioned in Alberta's initial Submission, beginning at para. 6).

3. In addition, the standard of review analysis applies in the context of judicial review or appeal from decisions made in civil arbitrations, governed by provincial *Arbitration Acts*. In fact, the very point of the Supreme Court of Canada's decision in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 – mentioned by Québec as the reason why it wanted to submit a Supplementary Written Submission – was to clarify the role and function of a court dealing with an appeal from an arbitral tribunal under a provincial *Arbitration Act*.

4. By definition, an arbitration proceeding occurs under a contract – an arbitration agreement – inherently engaging principles of contract law. Because of that, there was uncertainty about the scope of a court's appellate jurisdiction where an *Arbitration Act* limits appeals to "questions of law". Historically, within the court hierarchy, appeal courts held that appeals would be limited to only "questions of law" emerging from trial court decisions. But then they also found that when it came to contracts, they would interpret "question of law" broadly – basically, anything that amounted to an interpretation of the contract. As a result, the meaning of a "question of law" within contract law could be applied to mean that an appeal from an arbitral tribunal, even if limited to questions of law, could be very broad.

5. With its decision in *Sattva*, the Supreme Court of Canada has resolved the matter. The historical approach to "question of law" in contract is to be abandoned [see para. 50 of *Sattva*]. The law is to be applied in a way that is consistent with the equivalent law for judicial appeals more generally, and for judicial review of administrative action. That is, the scope of what is reviewable by a court as a question of law from an arbitral decision is considerably narrow. In addition, the Supreme Court of Canada has also held that the reasonableness standard of review will "almost always apply" to a judicial appeal held in relation to an *Arbitration Act* proceeding [see para. 75 of *Sattva*].

6. Another area in which the "standard of review" analysis has started to become infused is within administrative decision-making hierarchies – whether before, or in absence of, any involvement by the courts. In *Newton v. Criminal Trial Lawyers' Association*, 2010 ABCA 399 (mentioned in Alberta's initial Submission, beginning at para. 6), the Alberta Court of Appeal has held that an administrative appellate Board, when dealing with an appeal from a decision previously made by a statutory hearing officer (i.e. a first-level decision-maker), should conduct an appeal from the record created before the hearing officer. And it should also generally undertake the review using a reasonableness standard – although limited exceptions were made for the use of the correctness standard for specific categories of questions [see paras. 82 to 84 of *Newton*].

Identifying the Presumptive Standard of Review for an AIT appeal

7. Turning to the dispute resolution process under the Agreement on Internal Trade (the "AIT"), this is a unique decision-making process that does not fit squarely into the other categories of processes already mentioned. It is neither a court-based appeal process, nor a judicial review process, nor a layered *Arbitration Act* process. It is a dispute resolution process, self-contained within a unique inter-jurisdictional trade agreement.

8. Québec argues that there are indicia from within the AIT which suggest that the nature of the appellate process under the AIT is intended to use the correctness standard of review. Manitoba disagrees.

9. As Manitoba has argued in its initial Submission, the purpose of an appeal under the AIT should be narrow and focused. In fact, nothing that has been argued by Québec – either in its initial Submission or in its Supplementary Written Submission – actually contradicts or refutes that position. And for good reason. AIT appeals should be limited to decisional outcomes, and answers should be given on appeal to only those questions that are materially significant to the dispute in question. Moreover, parties should not be allowed to present new arguments for the first time on appeal.

10. That being the case, it is submitted that use by the Appellate Panel of the deferential standard of reasonableness as the presumptive standard is the approach that will be entirely consistent with the purpose and intent of the appellate function under the AIT. It also will be consistent with trends throughout the other categories of hierarchical decision-making processes mentioned above. The strong trend is that appellate review should be based, presumptively, on the reasonableness standard. The correctness standard is appropriate only in relation to the most exceptional of grounds raised on appeal or review, and would be inconsistent with the purpose of a narrow and focused appeal. Otherwise, the role of the first-level decision-maker is significantly diminished.

11. The Appellate Panel was only added to the AIT in 2009. Prior to that, the entire dispute resolution process under the AIT was limited to a single and comprehensive decision-making level: the Dispute Panel. There was no appeal or review of any kind. In fact, the addition in 2009 of the Appellate Panel was for Government-to-Government disputes only. Person-to-Government disputes continued to be directed to one single and comprehensive decision-maker, with no prospect of an appeal.

12. The addition of the Appellate Panel to the AIT was not intended to change the fundamental character of the Dispute Panel for Government-to-Government disputes. The Dispute Panel continues to have and play the same crucial decision-making role and function that it always had, and it continues to be fully equipped to handle the complete scope of decision-making that is called for under the AIT – regardless of whether there is any appeal. As such, the appeal procedure under the AIT is supplemental and inherently exceptional, and is intended to be called upon only for limited purposes: it is a "true appeal". It is a deferential safety valve in the event of a fundamental (i.e. unreasonable) error on the part of the Dispute Panel.

13. The addition of the Appellate Panel to the AIT was not intended to diminish, reduce or otherwise change the role or importance of the Dispute Panel. Even after 2009, parties to any Government-to-Government dispute (including intervenors) can, and must, continue to present their entire cases in full to the original Dispute Panel. Unnecessary appeals can, and must, be discouraged. The true heart of the dispute resolution process continues to remain with the Dispute Panel.

14. It is submitted that use of the correctness standard as the presumptive standard for AIT appeals would needlessly encourage appeals. In fact, if the correctness standard is to be used other than exceptionally, it will cause parties to start viewing the Dispute Panel quite differently. It will diminish the significance of the Dispute Panel, and Parties will start targeting their cases and framing their strategies for ultimate resolution, not by the Dispute Panel itself, but by the Appellate Panel. Parties could even start planning around some of the unique aspects of the AIT appeal procedure to their strategic advantage.

15. Nowhere is the availability of a strategic advantage more evident than when it comes to the role of intervenors on appeal. An intervenor can participate fully before the Dispute Panel (i.e. present and make both written and oral submissions). However, on appeal that same intervenor can only submit a written submission, and otherwise has no standing to make any oral submissions at the hearing. If the correctness standard is to be applied to all appeal

grounds by the Appellate Panel, then intervenors will suffer significantly. They will be entirely frozen out from offering submissions on any arguments made, questions asked, and points discussed during oral argument. And yet, the Appellate Panel would be making its decision under a correctness-based standard.

16. This point is exemplified in this appeal by looking to Québec's introduction into its argument on this appeal of a discussion about section 55 of the FPA in relation to its Ground of Appeal 2. Fundamentally, Manitoba argues that this Ground of Appeal is not one that needs to be addressed. However, if this were to be an issue that would require substantive consideration by the Appellate Panel, this is a point of argument that likely would be explored more comprehensively at the appeal hearing – for the panel to fully appreciate its significance. However, none of the intervenors would be able to engage or be engaged in this aspect of the discussion at the hearing.

17. As an intervenor on this appeal, Manitoba accepts the reality of the limitations that apply at the appeal stage under the AIT. That is what was negotiated. But Manitoba is unable to agree with the argument that the presumptive intention of the AIT is to have the appeal conducted under the correctness standard. It simply cannot be that an intervenor becomes procedurally stripped of any ability to respond to an issue that is set to be decided under the correctness standard, at the culminating point of the procedure where the ability to comment matters most.

18. The result of using the correctness standard as the presumptive standard on appeal would be utterly unfair. Otherwise, where a party finds itself opposed by intervenors, it will be able to prepare and deliver its oral submissions with the knowledge that whatever it says orally at the appeal is free from the risk of being corrected, contradicted or rebutted by any of the intervenors – some of whom may have the particular knowledge or expertise about certain aspects of certain issues.

19. It is submitted that it is not the intention of the appellate function under the AIT to both reduce the role of intervenors on appeal and give the Appellate Panel a correctness-based review function. The only appropriate standard of review is reasonableness.

Choice of Standard of Review on this Appeal

20. Ultimately, even if the presumptive review standard is reasonableness – as it is in other contexts in Canadian law – the question that needs to be answered is whether there are some questions that might nevertheless warrant use of the exceptional standard of correctness.

21. Looking back to Manitoba's discussion in its initial Submission about the Grounds of Appeal, it is submitted that none of the grounds of appeal that are being advanced in this matter call for application of the correctness standard. In fact, some grounds of appeal require no standard of review, because they do not require answers – whether based on the application of principles of appeal, or for jurisdictional reasons under the AIT.

22. For reasons explored in the initial Manitoba submission, Grounds of Appeal 1 (Scope of Chapter Nine) and 2 (Scope of Article 402 Obligation) require no answer on appeal. Therefore, no standard of review analysis is required. And – as already argued – any question regarding sections 7.1 and 7.2 of the FPA require no answer, and therefore no standard of review.

23. Ground of Appeal 3 (Application of Principles of Interpretation to Articles 405 and 905) might call for an answer – at least as it relates to FPA section 4.1(1). However, it is not entirely clear how an answer might be warranted, given that these points as argued are not contextualized within the analytical framework that has been used by the Dispute Panel in its reasons. But the likelihood is that if this is a relevant question, then it goes to the reasonableness of the Dispute Panel's decision.

24. Grounds of Appeal 4 (Finding of Inconsistency with Article 403) and 5 and 8 (Article 404 – Legitimate Objectives) – again, to the extent these grounds relate to section 4.1(1) of the FPA –

are really aimed at the heart of the Dispute Panel's decision. This is because they seek to challenge, firstly, that section 4.1(1) is inconsistent with Article 403, and secondly, that the legitimate objectives test has not been met.

25. However, these grounds of appeal, as argued, are broad-based challenges to the Dispute Panel's overall conclusions in light of the evidence as a whole. They do not seek to identify any "extricable question of law" on which the Dispute Panel's analysis might have been in error. To this end, these grounds of appeal as framed are not questions of law. They are questions of mixed fact and law. They are not, therefore, appealable under the AIT.

26. With respect to Ground of Appeal 6 (Right to Establish Technical Measures), it is submitted that the same reasoning applies as for this ground as it does for Ground of Appeal 3. As such, if this is a relevant question, then it goes to the reasonableness of the Dispute Panel's decision.

27. Ground of Appeal 7 (Relief in the Interim) should be reviewed for reasonableness. The Dispute Panel's decision to grant interim relief is a discretionary decision, and must be made on the basis of facts presented and submissions made at the hearing. The very structure of the AIT is premised on the understanding that a party might be required to comply by enacting legislation. And so, once it is established that Québec as a Sovereign Province has the ability to comply (whether it be through its executive or legislative competencies), then the standard of review should be reasonableness, not correctness.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 7TH DAY OF OCTOBER, 2014

Denis Guénette, General Counsel