AGREEMENT ON INTERNAL TRADE

APPEAL FROM THE REPORT OF
ARTICLE 1703 PANEL REGARDING THE DISPUTE BETWEEN
SASKATCHEWAN AND QUÉBEC CONCERNING
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SUPPLEMENTARY WRITTEN SUBMISSION OF QUÉBEC (APPELLANT) CONCERNING THE APPROPRIATE "STANDARD OF REVIEW" ON A QUESTION OF LAW BY AN APPELLATE PANEL

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I. BACKGROUND AND SUMMARY

1. On September 17, 2014, the Appellate Panel authorized Québec to produce — no later than September 24, 2014 — a written submission concerning the "standard of review." Québec required this authorization to address the contention that the standard of "reasonableness" applies to the appellate review of a decision in first instance on a question of law raised by implementation of the Agreement on Internal Trade (AIT).

2. Québec does not agree with that contention. The standard of "correctness" is the only one consistent with the function vested specifically in the Appellate Panel, which is to help ensure the legal rigour of the government-to-government dispute arbitration process. In addition, the analytical process in *Dunsmuir*[1] is relevant only in respect of judicial review. This is not the case of the appeal contemplated under Article 1706.1 AIT, at the final stage of an arbitration process, when a specialized body (an Appellate Panel) conducts an appellate review of the decision of another specialized body (a first-instance Panel).

II. ARGUMENTS

A. The "correctness" standard: the only standard consistent with the wording of the AIT and with the effectiveness of the appeal mechanism instituted in 2009

3. Clearly, the Parties added an appeal mechanism in 2009[2] to help ensure the legal rigour of the "government-to-government dispute"[3] arbitration process.

4. Appeal then became the final stage in the arbitration process. That process is governed entirely by the AIT. It is independent and separate from the judicial process. Article 1707.4 states that a report of the initial Panel is not final if

[1] *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190.
[2] Article 1706.1 AIT was added to Chapter Seventeen on October 7, 2009, when the chapter was rewritten in the Tenth Protocol of Amendment.
[3] Articles 1702-1709 AIT and corresponding annexes.

"appealed," whereas the report of an Appellate Panel will always be "final" and will never be "subject to judicial review."

5. That said, the Panels, no matter what the stage of the process, all have a similar composition[4] and a similar method of operation,[5] although an Appellate Panel is always composed of three members[6] selected from a separate roster[7] that includes only individuals with "expertise in Canadian administrative law or the resolution of disputes arising under Canadian administrative law."[8] At the first-instance level, only one-fifth of the individuals on the roster need to have expertise in administrative law.[9]

6. Although the AIT specifically ensures that all of the members composing an Appellate Panel have expertise in administrative law, it does not mean that their expertise is limited to that discipline. All the more so as paragraph 2 of Article 1704 AIT explicitly requires that all individuals appointed to a Panel, whether first-instance or appellate, must be "qualified." Indeed, it must be presumed that the Parties intended to entrust arbitration of a dispute relating to implementation of the AIT to individuals with expertise qualifying them to understand the issues, at both the appellate and the first-instance levels.

7. An Appellate Panel is therefore a specialized arbitral body, benefitting from all the expertise that is necessary and desirable to decide a question of law raised by implementation of the AIT. This expertise is closely comparable to that of a first-instance Panel.

[4] Article 1706.1, para. 2 AIT.
[5] Annex 1705(1) AIT.
[6] See, concerning the composition of a Panel and the number of its members: Articles 1704, para. 2-5 AIT (first-instance and appellate) and 1706.1, para. 2 AIT (appellate).
[7] See, concerning the two rosters: Annex 1704(2), para. 7-11 AIT (appellate); para. 1-6 (first-instance).
[8] Annex 1704(2), para. 9(a) AIT.
[9] Annex 1704(2), para. 4.1 AIT.

8. Applying the standard of "reasonableness" would be tantamount to sterilizing an appellate arbitration mechanism for which Article 1706.1 is supposed to guarantee access to the Parties, at the risk of thus adversely impacting the overall balance of the AIT, struck through lengthy negotiations in the interest of each province and territory and in the interest of Canada as a whole. It is surely no coincidence that an appellate level was added to the arbitration process in 2009, at the same time that the Parties agreed to subject themselves to enforceable monetary penalties.[10]

9. A closer look at Article 1706.1 is in order. Paragraph 1 grants a right of appeal to any Party to a dispute alleging that the first-instance Panel "erred in law, failed to observe a principle of natural justice or acted beyond or refused to exercise its jurisdiction" [our emphasis]. This wording shows that appeal is designed to give full authority to the Appellate Panel to correct an "error in law" committed, in its view, by the first-instance Panel, as the Parties did not limit the object of the appeal to a review of excesses of jurisdiction, particularly excesses of jurisdiction that may result from the unreasonableness of an "error in law."

10. The same article, this time at paragraph 4, states that an Appellate Panel shall, on the completion of the hearing, produce a report with reasons which "may confirm, vary, rescind, or substitute the report of the [initial] Panel, in whole or in part, or refer the matter back to [that] Panel for re-hearing." This wording contains no restriction in respect of the Appellate Panel's authority to substitute "in whole or in part" its own report for the report of the first-instance Panel.

11. In short, "correctness" is the only standard consistent with the function that the Parties vested in the Appellate Panel in 2009. In order to fulfil its function fully and effectively, this highly specialized arbitral body does not merely have to review the "reasonableness" of a first-instance decision on a question of law. It has the authority to carry out an exhaustive review of any question of law raised by

[10] Article 1706.1 AIT was added to Chapter Seventeen on October 7, 2009, by the Tenth Protocol of Amendment.

implementation of the AIT. It has full latitude to make a decision, without being bound in advance by a "reasonable" solution adopted in first instance.

B. Non-relevance of the analytical process in *Dunsmuir*, at the final stage of an arbitration process, when a specialized body conducts an appellate review of the decision of another specialized body

12. Over the years, the Supreme Court has developed a complex analytical process designated most often, in the jargon of administrative law, as "pragmatic and functional approach" or, since *Dunsmuir*, "standard of judicial review analysis."[11]

13. The contention that the standard of "reasonableness" applies at the appeal level under Article 1706.1 lies in the premise that the second stage of an arbitration process would be subject — formally or at the very least by analogy — to this analytical process.

14. In administrative law, this premise is not founded.

15. At the outset, there's a reason for the word "judicial" in the expression "standard of judicial review analysis." As for the standard of "reasonableness," it is deemed to reflect an obligation of "judicial deference," a concept where the word "judicial," once again, is neither insignificant nor superfluous.

16. The reason is simple. The analytical process in *Dunsmuir* concerns, by definition, the relationship between the judiciary and administrative decision-makers.[12] That is why this process is applicable — and relevant — only in the context of "judicial

[11] *Dunsmuir*, *supra*, note 1, para. 63 (Bastarache and LeBel JJ.). See also some of the most significant judgments among the dozens that have dealt with this analytical process: *Union des employés de service, Local 298* v. *Bibeault*, [1988] 2 S.C.R. 1048; *Canada (Director of Investigation and Research)* v. *Southam Inc.*, [1997] 1 S.C.R. 748; *Pushpanathan* v. *Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982; *Dr. Q* v. *British Columbia (College of Physicians and Surgeons*), 2003 SCC 19, [2003] 1 S.C.R. 226; *Smith* v. *Alliance Pipeline*, 2011 SCC 7, [2011] 1 S.C.R. 160.

[12] *C.U.P.E.* v. *Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 S.C.R. 559, para. 5 (Bastarache J., dissenting, but this general statement is not at issue).

review," that is, when judicial bodies have to determine if the "rule of law" demands their exceptional intervention in an administrative process.[13]

17. Such "judicial review" can be carried out by way of appeal, provided however that appellate jurisdiction is given to a judicial body.[14] For example, *Sattva Capital Corp.* v. *Creston Moly Corp.*, released August 1, 2014,[15] openly draws on the analytical process in *Dunsmuir* for conducting an appellate review of a commercial arbitration decision, but in the context where the laws of British Columbia gave appellate jurisdiction to that province's Court of Appeal (a judicial body).

18. In fact, *Sattva* rejects the idea that an Appellate Panel does not truly have expertise, beyond the general principles of administrative law, to address the issues of a dispute relating to implementation of the AIT. In the view of Rothstein J., "where parties choose their own decision-maker, it may be presumed that such decision-makers are chosen either based on their expertise in the area which is the subject of dispute or are otherwise qualified in a manner that is acceptable to the parties."[16]

19. In short, "judicial deference" and the standard of "reasonableness" that it reflects serve to prevent "judicial review" from paralyzing administrative action; a specialized arbitral body must not draw on these concepts to paralyze itself.

20. Further, the principle whereby the analytical process in *Dunsmuir* supposes that a judicial body is reviewing an administrative process explains why this analytical process has no relevance in judicial appeal from judgments by another judicial body. In this context, the usual meaning of the word "appeal" must apply, as

[13] *Dunsmuir*, *supra*, note 1, para. 27-29 (Bastarache and LeBel JJ.).
[14] *Dr. Q*, *supra*, note 11, para. 21 (McLachlin C.J.).
[15] 2014 SCC 53, para. 102-106 (Rothstein J.).
[16] *Id*., para. 105 (Rothstein J.).

described in *Housen,*[17] which commands that the standard of "correctness" applies to any question of law.[18]

21. For the same reason, we might add, the analytical process in *Dunsmuir* will have no relevance at the final stage of an other than judicial process, when a political or specialized body conducts an appellate review of the decision of another political or specialized body. For example, in *Canadian National Railway Co.* v. *Canada (Attorney General)*, released May 23, 2014,[19] Rothstein J. — the same judge who, a few weeks later, would pen the Court's reasons in *Sattva* — gave a broad scope to the legislative remedy authorizing the Governor in Council (an administrative body) to vary or rescind any decision of the Canadian Transportation Agency (another administrative body). He acknowledged that the Governor General had full authority to decide a question of law or jurisdiction, as the Act "does not contain any express limitations on the Governor in Council's authority" and "[t]here is no language in the provision that suggests the Governor in Council's authority is in any way circumscribed, nor is the Governor in Council's authority restricted to answering issues of fact or policy"[20] [our emphasis].

22. To paraphrase that ruling, there is no language in Article 1706.1 that suggests the Parties wished to restrict the authority of an Appellate Panel (a specialized arbitral body) when conducting an appellate review of the decision on a question of law by a first-instance Panel (another specialized arbitral body). The standard of "correctness" will apply automatically and without restriction at the final stage of the arbitration process. The analytical process in *Dunsmuir* cannot be casually inferred to minimize the object of the appeal mechanism outlined in Article 1706.1, even by analogy.

[17] *Housen* v. *Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, para. 8 (Iacobucci and Major JJ.).
[18] *Dr. Q*, *supra*, note 11, para. 43 (McLachlin C.J.).
[19] 2014 SCC 40.
[20] *Id*., para. 37 (Rothstein J.).

THE WHOLE, RESPECTFULLY SUBMITTED, at Québec City, this September 24, 2014.

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