AGREEMENT ON INTERNAL TRADE

APPELLATE PANEL

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

SUPPLEMENTARY SUBMISSION ON BEHALF OF THE RESPONDENT GOVERNMENT OF SASKATCHEWAN

OCTOBER 7, 2014

SASKATCHEWAN MINISTRY OF JUSTICE AND THE ATTORNEY GENERAL
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SUBMISSION ON BEHALF OF THE GOVERNMENT OF SASKATCHEWAN

1. Introduction

[1] Saskatchewan files this submission in response to Quebec's Supplementary Submission, dated September 24, 2014, in which Quebec addresses issues relating to standard of review. This arises out of a direction from the Appellate Panel on September 17, 2014. At that time, a member of the Appellate Panel also expressed a wish to have addressed more specifically whether a different standard of review may apply to alleged errors of law in contrast with issues related to principles of natural justice or related to jurisdiction. Saskatchewan proposes in this submission to deal first with the latter issue.

[2] Saskatchewan observes and adopts the supplementary submissions of Manitoba and Alberta.

2. Standard of Review for Questions of Fairness and Jurisdiction

[3] Saskatchewan agrees specifically with the analysis of Alberta on the question of applicable standards of review for grounds of appeal not related to errors of law.

[4] A standard of review sometimes does not apply at all, depending on the nature and reasons for review. For example, if an original decision fails to give reasons of any kind to support a ruling, this may be noted by a reviewing body and potentially lead to a finding that the failure amounts to a breach of natural justice. Such a conclusion would not be based on correctness or reasonableness of the original Panel's decision (especially if there are no reasons to review). Rather, it would be a finding based purely upon the procedural behavior of the original panel.

[5] Similarly, a body that exceeds or fails to exercise its jurisdiction, in an absolute sense, is not reviewed as to whether the failure was correct or reasonable. If, for example, an originating Panel refused to issue a report following a hearing, there would be no question of whether this was a reasonable or a correct ruling.

[6] Problems of such a fundamental nature would, if established, be best met with the remedy of referral back to the original Panel, one of the options contemplated in Article 1706.1(4)(a), to the extent that the problems would not allow a substitution-based remedy (particularly where necessary findings of fact were absent).

[7] With respect to questions of jurisdiction, it warrants emphasis that a question is not of a jurisdictional nature simply because an appellant so alleges or characterizes it[1]. The question, for example, of whether the consultation notice sufficed to give the Panel "jurisdiction" to hear submissions on certain aspects of Quebec's measures is not truly a question of jurisdiction. Rather, it is an interpretation and application of Article 1703(3) and related provisions, plus the interpretation of documentary evidence before the Panel, including the Request for Consultations and Request for Panel.

3. Reply to Quebec's Supplementary Submission

[8] Saskatchewan continues to rely on its August 18, 2014 submissions as well as all submissions of the intervenors, and particularly the supplementary submissions of Manitoba and Alberta.

[9] It is particularly important to dispute the allegation that an AIT appeal is a "final stage" in the arbitration process in a manner that suggests that appeals are intended to be routine rather than extraordinary. All indications of the intent of the parties on this question are, for reasons, previously submitted, to the opposite conclusion.

[10] Appellate review was added recently to the AIT and was intended as a safety valve in the context of a dispute resolution chapter that had become more enforceable, notably with the addition of Articles 1707.1 and 1707.2. The need for the possibility of review was accepted by the parties in order for them to accept this increased accountability. However, as previously demonstrated, the appeal mechanism was put in place in such a way as to ensure that unnecessary appeals would be discouraged.

[11] To characterize appeals as an ordinary stage in a single process would be to completely alter the model of AIT arbitration. It should not be accepted that the original panels, with

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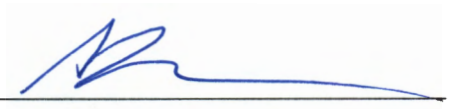
[1] ***Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association***, Tab 4 of the Alberta Book of Authorities, Alberta Submission.

required expertise in "matters covered by this Agreement" (Annex 1704(2)(3)(a)) are to be reduced to a role of mere fact-finders, with the expectation that the disappointed litigant will always have an opportunity to have a second panel consider all issues *de novo* and without deference to the original panel. The scope of review that Quebec is demanding suggests that the important role of the Panel in interpreting the AIT should have no weight once an appeal is requested.

All of which is respectfully submitted this 7th day of October, 2014.



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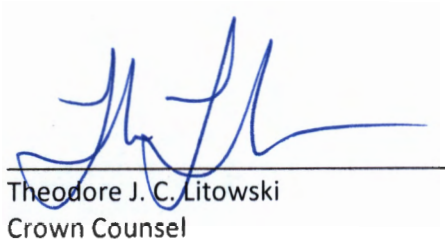

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