

**DISPUTE RESOLUTION PROCEEDINGS
UNDER CHAPTER SEVENTEEN (PART A)
OF THE
AGREEMENT ON INTERNAL TRADE**

**IN THE MATTER OF
ALBERTA'S CHALLENGE REGARDING QUEBEC MEASURES
AFFECTING THE COLOURATION OF MARGARINE**

**Government-to-Government Recourse to
Article 1704 Panel Hearing**

SUBMISSION OF THE GOVERNMENT OF MANITOBA

31 August 2004

1. INTRODUCTION

1. The Government of Quebec (“Quebec”) maintains measures in the form of legislation (i.e. statute and regulation) relating to the colouration of margarine. The measures, documented in detail in the submission to this Panel by the Government of Alberta, in effect, ban the marketing of pale yellow coloured margarine in Quebec. It is submitted that this measure imposes a barrier to interprovincial trade that causes direct and significant material injury to Manitoba’s canola growers and processors.
2. The Government of Manitoba (“Manitoba”) has intervened in these dispute proceedings, and has reviewed the submission of the Government of Alberta (“Alberta”). Manitoba supports Alberta’s contention that the Quebec measures are contrary to that Party’s obligations under the *Agreement on Internal Trade* (“AIT”). Manitoba also agrees with Alberta’s position that Quebec’s measures are not saved by the provisions in the AIT regarding measures associated with legitimate objectives.
3. In 2002, Manitoba intervened in the AIT Chapter 17 Dispute Settlement proceeding initiated by the Government of Ontario (“Ontario”) on the same Quebec measures pertaining to coloured margarine. With the Ontario action not proceeding and the measures remaining in effect, Manitoba has chosen to intervene in support of Alberta’s challenge of Quebec’s measures affecting the colouration of margarine.
4. Manitoba urges the Panel to find that Quebec’s measures on the colouration of margarine are inconsistent with Quebec’s obligations under the AIT and recommend that Quebec immediately repeal and cease enforcing the subject measures and permit the sale in Quebec of coloured margarine that has the same pale yellow hue as butter.

II. Background

5. Manitoba has a significant interest in Alberta’s challenge of Quebec’s measures affecting the colouration of margarine. Manitobans produce significant amounts of canola seed, sunflower seed and soybeans and operate three vegetable oils processing plants in Manitoba. Canadian margarine manufacturers are a market for vegetable oils produced in Manitoba. As Quebec’s margarine colouring restrictions increase costs to margarine manufacturers and reduce consumption of margarine in Quebec, the vegetable oil industry in Manitoba is negatively impacted by these higher costs and by lost sales by Canadian margarine manufacturers.

6. Bunge Canada operates two vegetable oil crushing and refining plants in Manitoba - one at Altona and the other at Harrowby. These plants mainly crush and refine canola products. The plant at Altona is also capable of processing sunflower seed and soybeans. Output from these plants includes bulk crude and refined oil, bulk vegetable oil, retail pack refined oil, hulls and screenings. In addition, a smaller soybean crushing plant (Jordan Mills) is located at Jordan Siding in Manitoba, which produces soybean oil.
7. Growth in canola production and processing is considered to be a major success story in Manitoba. Rapeseed (now referred to as canola) was introduced as an alternative crop for Manitoba farmers during World War II. The crop increased in significance in the late 1960s when research and development led to varieties that produced oil suitable for human consumption and meal for livestock.
8. The area in Manitoba seeded with canola rose from 29,300 acres in 1961 to 581,000 acres ten years later, and peaked in 1988 at 2.75 million acres. 1998 canola production of 1.8 million tonnes was also a record. In 2003, more than 7,100 Manitoba farmers seeded 2.5 million acres, producing a canola crop of 1.7 million tonnes.
9. Manitobans produce the largest amount of sunflower seed in the Prairie Provinces. Manitoba farmers have been growing this crop since the 1940s. The area in Manitoba seeded with sunflowers peaked in 1979 at 380,000 acres. Production declined throughout the 1980s due to the effects of weather, disease and insects. This production decline was reversed in the 1990s as a result of improved prices and the development of disease-resistant varieties. In 2003, more than 800 Manitoba farmers seeded 220,000 acres of sunflowers and produced a crop of 136,000 tonnes.
10. Soybeans have a long history in Manitoba, being first introduced in the early 1900s. At present, about 95 per cent of the soybeans grown in Manitoba are used for livestock feed and human food consumption. However, in recent years there has been a significant increase in the area in Manitoba seeded with soybeans. From fewer than 1,000 acres in the mid 1990s, the area seeded with soybeans increased to 220,000 acres in 2003, producing a crop of almost 150,000 tonnes. There were 875 soybean producers in Manitoba in 2003.
11. Unilever Canada Limited (Unilever), and Parmalat Canada (Parmalat) manufacture margarine in Ontario and market their products in Quebec.

- The maintenance by Unilver of two separate production, inventory, and distribution lines, one to comply with the colour restrictions of Quebec and one for the rest of Canada, gives rise to increased costs estimated at over \$1 million per year.
12. Quebec's measures also increase the costs of food retailers that operate in and outside Quebec. They must similarly maintain dual inventory, distribution and marketing processes, all bearing cost implications.
 13. In addition to higher costs, there are also lost sales opportunities as a result of Quebec's regulations for coloured margarine. The Canadian Oilseed Processors Association (COPA) has previously noted that the consumption of margarine in Quebec is approximately 58 per cent of the combined market for butter and margarine in Quebec. By comparison, the consumption of margarine in Canada is approximately 67 per cent of the combined market for butter and margarine in Canada.
 14. COPA estimates that the total annual cost to the margarine and related industries is approximately \$17 million in lost sales in Quebec.
 15. These additional costs and lost sales opportunities are not borne solely by margarine manufacturers and distributors, but also affect farmers and processors across Canada. As Manitoba is a significant producer of canola, sunflower seed and soybeans, some of these higher costs and lost sales opportunities are ultimately reflected in the prices obtained by Manitobans involved in the production and processing of vegetable oils for their crops and products.

III. Analysis: Agreement on Internal Trade Obligations

16. Margarine colouring has been recognized as a matter of concern to internal trade, both before and after the inception of the AIT. Manitoba agrees with Alberta's submission that Quebec's measures affecting the colouration of margarine fall within the scope and coverage of Chapter Nine (Agriculture and Food Goods) of the AIT.
17. Manitoba supports Alberta's position that the Quebec measure at issue is inconsistent with the general spirit of the AIT expressed in the objective and operating principles set out in Article 100 (Objective) and Article 101 (Mutually Agreed Principles), and that it contravenes Articles 401 (Reciprocal Non-Discrimination), 402 (Right of Entry Exit) and 403 (No Obstacles). Manitoba further supports Alberta's position that the measure

is not saved by Article 404 (Legitimate Objectives) and that Article 405 (Reconciliation) is applicable.

18. Manitoba will not reiterate in this submission all of Alberta's arguments on all of these points. Manitoba will limit its submission to support of Alberta's arguments that: the Quebec measure falls within the scope of the obligations in Chapter Nine (Agricultural and Food Goods), that the measure is inconsistent with Articles 401 (Reciprocal Non-Discrimination) 402 (Right of Entry and Exit) and that the measure is not saved by Article 404 (Legitimate Objectives).
19. Manitoba supports Alberta's contention that Quebec's coloured margarine regulations fall within the scope of Chapter Nine (Agriculture and Food Goods) and that therefore, the measure is properly subject to other AIT Chapters including Chapter 4 (General Rules) and Chapter 17 (Dispute Resolution Procedures).
20. Chapter Nine of the AIT operates by way of a "positive listing". This means that the scope and coverage of the Chapter extends only to those measures that are expressly identified as being covered. This stems from the operation of Articles 902.2 and 902.3.
21. Article 902.2 provides that the only agricultural and food goods measures that are covered under the Chapter and the AIT are those that are expressly identified as "technical barriers to trade" by the Federal Provincial Agri-Food Inspection Committee (FPAFIC). Article 902.2 expressly provides that the measures can be identified as technical barriers to trade either before or after the AIT came into force.
22. Manitoba submits that Alberta has correctly identified that notice for the purposes of Article 902.2 was given in June of 1993 when the Federal Provincial Agri-Food Inspection Committee identified coloured margarine as one of eight barriers to interprovincial trade. Even though that date is prior to the AIT being in force, it is clear that these eight barriers are those contemplated by Article 902.2.
23. Article 902.3 essentially builds on Article 902.2 by requiring another body - the Federal-Provincial Trade Policy Committee --to give written notice of the technical barriers to trade that give rise to "policy implications". Written notice to this effect was given by that body in a letter dated October 1, 1997 -- which identifies five measures including "margarine colouring restrictions and other margarine standards".
24. Accordingly, Manitoba submits -- together with Alberta -- that Quebec's measures respecting margarine colouring restrictions fall within the scope and coverage of Chapter Nine of the AIT.

25. In fact, this issue of identifying the document that constitutes the written notice contemplated in Article 902.3 has been raised previously, in another dispute that was considered under Chapter Seventeen. In the dispute that resulted in the *Report of the Article 1704 Panel Concerning a dispute Between Nova Scotia and Prince Edward Island Regarding Amendments to The Dairy Industry Act Regulations* (January 18, 2000), this issue of the effect of the October 1, 1997 letter was raised but not contested -- the parties to that dispute readily acknowledged that it is that letter which is contemplated by Article 902.3.
26. The issue that was contested in that dispute was, instead, whether there is an unspecified transition period after September 1, 1997 (the date specified in Article 902.3) given to the Parties to comply with the obligations in Chapter Nine and in the AIT. The Panel effectively found that the only transition period was the one that ended on September 1, 1997, and that after that date all measures must be made to conform to the obligations. It is submitted that this Panel has no reason to come to any different conclusion for the purposes of this dispute.
27. As Manitoba submits that Quebec's coloured margarine measure is covered by Chapter Nine, then it is also subject to the provisions of Chapter Four (General Rules) as per Article 900 (Application of General Rules).
28. Manitoba supports Alberta's submission that Quebec's regulations on coloured margarine contravene Article 401 (Reciprocal Non-Discrimination). Article 401 says that "each Party shall accord to goods of any other Party treatment no less favourable than the best treatment it accords to its own like, directly competitive or substitutable goods". Quebec's provision for coloured margarine does not allow margarine to have the same colouring as butter. Manitoba agrees with Alberta's submission that Quebec fails to offer reciprocal non-discriminatory treatment to margarine and therefore, contravenes Article 401.
29. Manitoba agrees with Alberta's submission that Quebec's coloured margarine regulation contravenes Article 402 (Right of Entry Exit). As Quebec's measure does not allow the sale of coloured margarine in Quebec, it has the effect of preventing the movement of this product (which is produced in other Canadian provinces) across provincial borders into Quebec – contravening the intent of Article 402.
30. If a measure is covered under a Chapter, and if that measure is inconsistent with the obligations in the AIT, Article 404 of the AIT

nevertheless permits the measure to be maintained by a Party -- provided it can be demonstrated that the purpose of the measure is to achieve a legitimate objective.

31. A "legitimate objective" is defined for the purposes of the AIT in Article 200 means any of the following objectives pursued within the territory of a party:

- public security and safety;
- public order;
- protection of human, animal or plant health;
- protection of the environment;
- consumer protection;
- protection of the health, safety and well-being of workers; or
- affirmative action programs for disadvantaged groups;

considering, among other things, where appropriate, fundamental climactic or other geographical factors, technological or infrastructural factors, or scientific justification.

32. The effect of Quebec's measure is to ban the sale of margarine that is coloured with a yellow hue resembling butter. Manitoba is aware of no grounds which have been raised by Quebec -- or anyone else, for that matter -- which would fit within any one of the objectives, listed in the definition of the term "legitimate objectives". Furthermore, Manitoba agrees with the suggestion in the Alberta submission that Quebec's measures are intended to protect Quebec dairy products from competition and thus clearly not included within the scope of the meaning of "legitimate objective". To this end, Manitoba is unaware of any evidence that might be made by Quebec to meet the onus that rests on it to demonstrate that the measure might be justified as being for a legitimate objective.

33. From the list of permissible legitimate objectives that might be raised, it is perhaps paragraphs regarding protection of human health, or consumer protection that are most likely to be argued. However, there are no known health concerns about the colouring of margarine, and it is difficult to fathom how any argument could be persuasively be advanced that these measures are in place in Quebec for consumer protection reasons.

34. Accordingly, Manitoba submits that the measure in question would fail to meet the meaning of a "legitimate objective" if Quebec were to argue that the measure is permissible for that reason. The fact that Quebec has permitted the sale of pale yellow-coloured margarine in the past, and the additional fact that Quebec recently seemed to be prepared to again permit its sale (by publishing a draft regulation to that effect), only

underscore the point that this measure has no legitimate objective under the AIT.

IV. RELIEF REQUESTED

35. Manitoba urges the Panel to find that Quebec's measures on the colouration of margarine are inconsistent with Quebec's obligations under the AIT, for all of the same reasons identified in Alberta's submission.
36. Manitoba accordingly also urges the Panel to recommend that Quebec immediately repeal and cease enforcing the subject measures and permit the sale in Quebec of coloured margarine that has the same pale yellow hue as butter.
37. All of which is respectfully submitted this 31st day of August 2004.

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