

**AGREEMENT ON INTERNAL TRADE
DISPUTE RESOLUTION PANEL**

**IN THE MATTER OF A PRE-EXISTING DISPUTE REGARDING ONTARIO'S
MEASURES GOVERNING DAIRY ANALOGS AND DAIRY BLENDS**

SUBMISSION ON BEHALF OF THE GOVERNMENT OF SASKATCHEWAN

June 1, 2010

PROCEDURAL HISTORY

1. In a letter dated March 30, 2010, a request for a the establishment of a Summary Panel was filed by the Government of Alberta pursuant to article 1702(2) of the Agreement on Internal Trade (AIT) to determine whether or not certain measures that were subject to a Pre-existing Dispute are inconsistent with the AIT.

Submission of Alberta, Appendix B, tab 4

2. In a letter dated April 13, 2010, the Government of Saskatchewan gave notice to the Internal Trade Secretariat and all parties to the AIT of its intent to participate in the Summary Panel proceedings pursuant to article 1702(5), Annex 1702(5) and (8), and Annex 1705(1), Rule 24.

Attachment 1

3. This submission is filed pursuant to Rule 28(a) of Annex 1705(1), the Rules of Procedure. Saskatchewan continues its intervention in the Pre-existing Dispute as documented in the Report of the Article 1704 Panel Concerning the Dispute Between Alberta / British Columbia and Ontario Regarding Ontario's Measures Governing Dairy Analogs and Dairy Blends dated November 10, 2004 (the "2004 Panel"). Saskatchewan supports the position of the Government of Alberta in this Summary Panel proceeding.

ARGUMENT

4. Saskatchewan participated in the 2004 Panel by virtue of the substantial interest that was described pursuant to articles 1704(9) and (10) (as they then read) to the 2004 Panel in Saskatchewan's submissions. Saskatchewan's standing was not questioned.

2004 Panel Report, sections 2, 3.2, 6

5. Saskatchewan continues to participate on the same basis. Saskatchewan has a significant number of persons carrying on business in the Province who are affected by the measure at issue.
6. Canola is the dominant oilseed crop produced in western Canada. It is also considered the most important crop grown in all of Canada in terms of farm cash receipts, accounting for 20.8 percent of Canadian farm cash receipts from crops between 2007 and 2009 as reported by Statistics Canada.¹ Average annual farm cash receipts from canola production in Canada between 2007 and 2009 were \$4.5 billion.
7. Canola is grown in Quebec, Ontario, Manitoba, Saskatchewan, Alberta and British Columbia, although the three Prairie provinces account for over 99 percent of production. From 2007 to 2009 average annual canola cash receipts in Manitoba, Saskatchewan and Alberta were \$934 million, \$1.9 billion and \$1.6 billion respectively. In Saskatchewan, canola accounted for 21.9 percent of overall producers' farm cash receipts over this same period. Based upon the number of producers who pay levies to their provincial canola commissions, there are an estimated 9,000 canola producers in Manitoba, 26,000 in Saskatchewan and 14,233

¹Statistics Canada, Agriculture Economic Statistics, May 2010, vol. 9, no. 1
<http://www.statcan.gc.ca/pub/95-629-x/2007000/4123849-eng.htm>

in Alberta.²

8. The Canola Council of Canada (CCC) conducted a study in 2008³ which showed that the value of the direct economic benefit, value added and the multiplier effects on the Canadian economy derived from canola production averaged \$13.7 billion annually between 2004 and 2006.
9. Canola that is not exported directly is crushed at one of 12 crushing facilities located in Ontario, Manitoba, Saskatchewan and Alberta.⁴ Four of these 12 crushing facilities are located in Saskatchewan (Nipawin, Clavet and two in Yorkton). In the January 2008 CCC study, prior to the establishment of several new crushing facilities, the 10 operations then in existence were estimated to have a combined workforce of approximately 1200 persons. Six of these crushing facilities, along with five additional facilities located in various parts of the country, are engaged in edible oil refining and food oil packaging.
10. Although canola production itself is largely confined to the prairies, the industry also provides direct and indirect economic benefits to other provinces. As an example, the Canadian food processing sector employs upwards of 250,000 individuals.⁵ The bulk of this industry is located in Ontario and Quebec and it is reliant on the canola industry for a key ingredient in food product manufacturing.

² Manitoba Canola Growers' Association, Saskatchewan Canola Development Commission and Alberta Canola Producers' Commission.

³ Canola Council of Canada, Canola Socio-Economic Value Report, January 2008 http://www.canolacouncil.org/uploads/Canola_in_Canada_Socio_Economic_Value_Report_January_08.pdf

⁴ Canadian Oilseed Processors Association, *A Profile of the Canadian Oilseed Processing Industry*, April 2010 <http://dds.exg.ca/app2/DDS/Default.aspx>

⁵Supra, note 3.

11. The canola industry, in turn, relies on various sectors of the economy for its own inputs. As an example, the industry relies on innovations by large and small life science companies whose employees live in both rural and urban communities. These companies tend to have higher salary payrolls and they are located in centres such as Guelph, Winnipeg, Regina, Saskatoon, Calgary, Edmonton and Lethbridge.
12. The Government of Saskatchewan in its intervention in the 2004 panel process, along with the Complainants, identified the injury caused by Ontario's dairy analogs and dairy blends measures in terms of both the limiting effect on sale and purchase of vegetable oils and in terms of limiting the potential development and growth of the edible oils based dairy analogs and dairy blends sector. The Government of Saskatchewan relies on the panel's conclusions.

2004 Panel Report, section 6.

13. The Government of Saskatchewan participates in support of the position of the Government of Alberta and wishes to particularly emphasize, with the above data, that the unresolved dispute remains critically significant to Saskatchewan's economy. Just as the 2004 panel found Saskatchewan to have suffered injury on the basis of similarly relevant data at that time, it is submitted that the ongoing restrictions, inconsistent with Ontario's obligations under the AIT, continue to cause injury to Saskatchewan and Saskatchewan's oil-seed producers and industry.
14. Saskatchewan wishes to underline secondly that there is a crucial principle at stake involving the integrity of the AIT. The Summary Panel proceeding is a vehicle created to facilitate the transition of existing disputes to the new disciplines of the reformed enforcement articles of Chapter 17 which were agreed to by all parties in an effort to encourage better compliance with each Party's obligations under the Agreement.
15. The 2004 Panel found not only that the measures then being challenged were inconsistent with the AIT (a point fairly conceded by the Government of Ontario)

but also stressed that it had jurisdiction to find and did find that any measure of Ontario that might follow the repeal of the inconsistent measures (found in the *Edible Oil Products Act*) must respect the findings of the Panel respecting dairy analogs and dairy blends.

16. The Government of Saskatchewan commends to this panel comments and findings made by the dispute resolution panel in the Cost of Credit dispute in its report issued June 4, 2004 in section 6.2 wherein the panel underscored the importance of preventing injury not only to the particular affected sector, but also to interprovincial relations within the context of the AIT. It is submitted that the risk of injury to internal trade relations and to the integrity of the AIT is particularly significant in the context of a summary panel hearing or a compliance hearing.

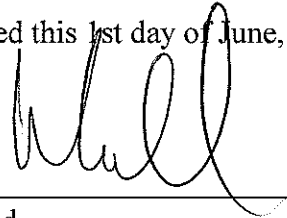
*Report of the Panel concerning a dispute by Alberta,
Quebec and British Columbia with Canada, Sections
6.2, 7.2, 8 - Attachment 2*

17. The Government of Saskatchewan agrees with and supports the analysis of Alberta and does not propose to repeat the arguments. It is the submission of the Government of Saskatchewan that the Summary Panel, in accordance with Annex 1702 of the AIT, is tasked in these circumstances with ensuring that the new measures involving regulation of dairy analogs and blends in Ontario are recognized as the very type of illegitimate replacement that the 2004 Panel presciently warned against and in a manner that again has breached the transparency obligations of the AIT.

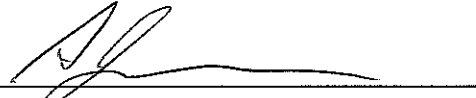
RELIEF REQUESTED

18. Saskatchewan requests that relief be accorded as requested by Alberta.

All of which is respectfully submitted this 1st day of June, 2010.



Robert Donald
Internal Trade Representative
Government of Saskatchewan



Alan Jacobson
Crown Counsel
Government of Saskatchewan

ATTACHMENT 1



Executive
Council

April 13, 2010

2010-73

Ms. Anna Maria Magnifico
Executive Director
Internal Trade Secretariat
Suite 850, 444 St. Mary Avenue
WINNIPEG MB R3C 3T1

Dear Ms. Magnifico:

Please be advised that Saskatchewan intends to continue its participation in its capacity as a party with a substantial interest regarding the dispute between Alberta and British Columbia versus Ontario regarding Ontario's measures governing Dairy Analogs and Dairy Milk Blends.

Our notice follows the Government of Alberta's March 30, 2010 letter requesting a Summary Panel pursuant to Article 1702 of the Agreement on Internal Trade for the above referenced dispute.

Future correspondence regarding this dispute should be addressed to my attention:

Mr. Bob Donald, Executive Director
Trade Policy Branch
Intergovernmental Affairs – Executive Council
Suite 800, 1919 Saskatchewan Drive
REGINA SK S4P 4H2
Phone: (306) 787-8910
Email: robert.donald@gov.sk.ca

Sincerely,

Bob Donald

cc: Harley Olsen, Associate Deputy Minister of Intergovernmental Affairs,
Saskatchewan Executive Council
Nithi Govindasamy, Associate Deputy Minister, Saskatchewan Agriculture
Internal Trade Representatives

ATTACHMENT 2

The Panel is deeply concerned that the negative effect of Canada's unilateral decision to vary from a federal-provincial agreement reached after lengthy negotiation and compromise goes beyond the area of consumer protection. Canada's actions have undermined the processes of consultation and negotiation set forth in the AIT. By breaching the trust-ties that are essential for cooperative federal-provincial-territorial action on issues of concern to Canadians, Canada may have damaged the provincial-territorial support essential to the ongoing success, operation and improvement of the AIT. This situation could lead to the perpetuation of unnecessary trade barriers within Canada.

7. DETERMINATION OF IMPAIRMENT TO TRADE AND INJURY

Article 1707.2(c) requires that the Panel's report contain a determination, with reasons, as to whether the measures under review have or would impair internal trade and have or would cause injury.

7.1 Impairment to Trade

The Panel has found that the CBR created an obstacle to internal trade under Article 405.

7.2 Injury

The Panel considers that the CBR have or would cause injury with respect to:

- the AIT and federal-provincial relations in general;
- provincially regulated financial institutions; and
- consumers.

In terms of injury to the AIT and federal-provincial relations generally, the Panel has elaborated on its views in Section 6.

On the question of injury to provincially regulated financial institutions, an October 20, 2003 letter from the Credit Union Central of Canada to Hon. Allan Rock, Minister of Industry Trade and Commerce, stated:

"Of particular concern to credit unions is the fact that some aspects of disharmonization actually seem to place them at a competitive disadvantage relative to their most important competitors - the chartered banks of Canada. This clearly was not the intent of the Drafting Template, but we are concerned that further efforts to implement the template could actually worsen the competitive position of credit unions in this area."¹¹⁹

¹¹⁹ Canada's Submission, Tab 28.

Alberta, Québec and British Columbia make similar observations in their submissions to the Panel.

In paragraph 180 of its submission to the Panel, Canada argues that no evidence has been presented to support the allegation that the CBR place provincially regulated financial institutions at a competitive disadvantage. In its view, such evidence would have to show a shift in market share and establish causation.

In the hearing on the question of evidence, Mr. Ternes from Alberta stated:

"When we asked the Alberta Treasury Branches to give us some empirical evidence so that we could disclose it to the Panel to make it nice and easy, their response was: "One of the problems is that these are walk-aways. How do we give you empirical evidence with walk-aways?"

So it is a difficult issue to address to provide an empirical study to you because these are walk-aways. The same difficulty with the waiver issue, they are walk-aways. You cannot get the money in the time that you want, you pop over to the Bank of Montreal or to the CIBC, for example."¹²⁰

For its part, British Columbia noted the decision of the *Farmers Dairy/NB Panel* with respect to proof of injury:

"With respect to injury, Complainant alleges that the denial of a fluid milk distribution license in New Brunswick has caused significant injury to Complainant's prospects for growth and eroded its capability to respond to competition in the future. Complainant admits that it is difficult to quantify the extent of injury and submitted no documentation in that regard. The Panel notes that a complainant is not required under the Agreement to prove a demonstrable dollar amount to establish injury, nor is a panel required to rule on the extent of injury. It is the view of the Panel that the denial of the opportunity to be considered for a fluid milk distribution license in a manner that is fair and consistent with the Agreement is injury in itself, as is the denial of the opportunity to participate on an equal footing in the New Brunswick market."¹²¹

While the circumstances of the dispute are not identical, the Panel accepts the principle that a complainant is not required to demonstrate a dollar amount in order to establish injury and that the Panel is not required to rule on the extent of injury. Further, this Panel accepts the common sense approach to establishing injury that the *Farmers Dairy/ NB Panel* appears to have used in making its determination.

The Panel considers that consumers are likely to be influenced in their credit decisions as a result of the challenge of comparing information provided by financial institutions that are regulated differently.

On the question of injury to consumers, the issue is not so much one of minimizing the differences between federal and provincial cost of credit legislation but of ensuring

¹²⁰ Hearing Transcript, p. 60.

¹²¹ *Farmers Dairy/NB Panel Report*, p. 27

comparability, clarity and simplicity. It is evident that the two different methods of calculating interest (APR and AIR) do not provide "comparable information about the cost of credit," as required by paragraph 7 of Annex 807.1 and that this situation is not in the best interest of consumers.

Accordingly, the Panel finds that the CBR cause injury to the AIT and to federal-provincial relations generally, to provincially regulated financial institutions, and to consumers.

8. SUMMARY OF ISSUES AND FINDINGS

The Panel was asked to address the following issues:

- Are the CBR inconsistent with the express terms of the HA and in breach of Article 807 and Annex 807.1?
- Was the process by which the CBR were put into force contrary to Article 406, the "transparency" provision of the AIT?
- Has the disharmony between the CBR and Alberta's HA-compliant legislation created an obstacle to trade contrary to Article 403?
- Can the CBR's inconsistencies with the HA be justified under Article 803's Legitimate Objectives exclusion clause?
- Have or would the CBR cause injury?

With respect to these issues, the Panel has found:

Canada acted inconsistently with its implementation rights and obligations under the HA as interpreted in light of the objectives set out in Annex 807.1.

The obstacle to trade in this case arises from the interaction of measures of different Parties and is therefore more appropriately addressed under Article 405 than Article 403.

Had Alberta framed its complaint as a failure to cooperate under Article 405.2, the Panel would have found such a breach.

Since Article 405 is not subject to the Article 803 justification process, it is unnecessary to interpret this Article.

Contrary to AIT Article 406.2, Canada failed to properly notify other Parties with an interest in a measure that would materially affect the operation of the AIT.

The CBR cause injury to the AIT and to federal-provincial relations generally, to provincially regulated financial institutions, and to consumers.

9. PANEL RECOMMENDATIONS

In summary, this is a regrettable failure of process. Ironically, the AIT was intended to improve the Canadian common market through, among other things, negotiation and consultation. From both the written and oral submissions to the Panel it would appear that the Parties' original timetable for harmonizing cost of credit legislation may have been overly ambitious, but a seven year delay appears excessive, particularly in light of the progress outlined in the October 1998 report to the MRCA. From its written and oral submissions, it appears that Canada, on reflection, has concluded that its efforts were wanting.

The mandate of the Panel is to determine if the measure complained against is inconsistent with the AIT. The Panel has done that. It is not the mandate of the Panel to determine how the concerns regarding specific aspects of the HA raised by Canada and some other Parties should be addressed. That is the role of the Parties. All Parties should resolve to return to the table and revisit the HA implementation process. The expense and time incurred in arbitrating this dispute would be well worth it if all Parties to the AIT returned to the CMC and resuscitated this important endeavour that has gone awry. It would be most regrettable if, after much time, effort, and expense to the taxpayer, the cost of credit disclosure negotiations ended in disarray with only two Parties implementing the HA on different bases.

The Panel therefore recommends that:

- **The MRCA direct the CMC to meet at the earliest opportunity to resolve concerns raised by the Parties with respect to the implementation of the HA, specifically by developing:**
 - **clear guidelines on how APR is to be calculated and what, if any, additional waivers to the 2-day cooling off period are acceptable, such guidelines to be followed by all jurisdictions in drafting their cost of credit legislation;**