

Ottawa, Thursday, March 26, 1998

**Reference No.: GC-97-001**

IN THE MATTER OF an inquiry, pursuant to section 18 of the *Canadian International Trade Tribunal Act*, into the importation of dairy product blends outside the coverage of Canada's tariff-rate quotas;

AND IN THE MATTER OF the filing of notices of appearance by the Dairy Farmers of Canada, the Dairy Farmers of Ontario, the Fédération des producteurs de lait du Québec and the Canadian Federation of Agriculture.

**ORDER**

The Canadian International Trade Tribunal hereby orders that the Dairy Farmers of Canada, the Dairy Farmers of Ontario, the Fédération des producteurs de lait du Québec and the Canadian Federation of Agriculture be admitted as parties to the inquiry in Reference No. GC-97-001.

Arthur B. Trudeau  
Arthur B. Trudeau  
Presiding Member

Pierre Gosselin  
Pierre Gosselin  
Member

Patricia M. Close  
Patricia M. Close  
Member

Michel P. Granger  
Michel P. Granger  
Secretary

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TRIBUNAL: ARTHUR B. TRUDEAU, Presiding Member  
PIERRE GOSSELIN, Member  
PATRICIA M. CLOSE, Member

### **STATEMENT OF REASONS**

#### **INTRODUCTION**

By letters dated March 23, 1998, the Dairy Farmers of Canada, the Dairy Farmers of Ontario, the Fédération des producteurs de lait du Québec (collectively, the "Dairy Farmers") and the Canadian Federation of Agriculture (CFA) filed notices of appearance in the above-mentioned reference. The Dairy Farmers notices indicate that they are represented by Greg Somers. The CFA's notice indicates that it is represented by Donald Knoerr.

By letter dated March 23, 1998, the Canadian International Trade Tribunal (the Tribunal) advised Messrs. Somers and Knoerr, as well as existing parties to this inquiry, that it would convene a teleconference on March 24, 1998, to receive submissions on whether or not the Dairy Farmers and the CFA should be made parties to the inquiry. In its letter, the Tribunal stated that Messrs. Somers and Knoerr should be prepared to indicate the reason for their clients' lateness in filing their appearances and the nature of their participation in the proceeding. The Tribunal also stated that counsel for existing parties to the proceeding should be prepared to indicate their position with respect to this matter generally and to indicate what prejudice they might suffer in the event the Dairy Farmers and the CFA were admitted.

The teleconference was held at 2:30 p.m. on March 24, 1998. The following counsel and parties were present:

- Donald Kubesh, counsel for the International Dairy Ingredients Inc.;
- Peter Clark, counsel for the National Dairy Council of Canada;
- Michael Kelen, counsel for David Chapman's Ice Cream Limited and Good Humor-Breyers, an operating division of Unilever Canada Limited;
- Raymond Tremblay, ministère de l'Agriculture, des Pêcheries et de l'Alimentation du Québec;
- Robert Séguin, Sid Friesen and Dennis Flaming for the Ontario Ministry of Agriculture, Food and Rural Affairs;
- James D. Sutton for the Director of Investigation and Research, Competition Bureau, Industry Canada;

- Bill Denby for the Victoria County Dairy Committee;
- Greg Somers, counsel for the Dairy Farmers of Canada, the Dairy Farmers of Ontario and the Fédération des producteurs de lait du Québec; and
- Don Knoerr for the Canadian Federation of Agriculture.

### **POSITION OF DAIRY FARMERS, THE CFA AND PARTIES**

Mr. Somers submitted that the Dairy Farmers' delay in filing their appearances stemmed from the fact that the Dairy Farmers were unsure whether the terms of the Order in Council, pursuant to which the Tribunal initiated this inquiry, would allow the Tribunal to address certain issues of importance to the Dairy Farmers. The Dairy Farmers, having now obtained legal advice and certain assurances from government officials, decided that it would be in their interest to participate in the inquiry. Mr. Somers submitted that the inquiry is a "fact finding" exercise and would benefit from the participation of the Dairy Farmers. Finally, Mr. Somers noted that the Dairy Farmers were prepared to meet all the Tribunal's filing deadlines and would be prepared to participate at the hearing commencing on April 6, 1998.

Mr. Knoerr indicated that the CFA is an umbrella federation that represents a number of disparate agricultural federations. He stated that the CFA had met recently and decided, at that time, to seek to participate in this inquiry. In terms of the CFA's interest in the proceeding, Mr. Knoerr noted that the CFA represents agricultural concerns in general. He also noted that the Canadian Sugar Beet Producers Association is among the organizations which the CFA represents that could have an interest.

Mr. Kubesh stated that he had been instructed to oppose the addition of the Dairy Farmers and the CFA as parties. He noted that persons wishing to participate in this inquiry were to have filed their appearances on January 19, 1998. He also noted that responses to the Tribunal's questionnaires were due on February 23, 1998, and that the Dairy Farmers of Canada had yet to file a completed questionnaire.<sup>1</sup>

Mr. Kubesh submitted that the Dairy Farmers had had legal advice throughout the Tribunal's process and could have intervened earlier. He also submitted that his client would be prejudiced if the Dairy Farmers were allowed to become a party at this time. He submitted that, given the time that the Dairy Farmers have to prepare their case, it would likely be "superficial." He questioned how he could be expected to conduct cross-examination based on a superficial case. Mr. Kubesh also submitted that the Tribunal has a duty of fairness, which includes the right to be heard. That right includes a reasonable opportunity to present one's own case. Mr. Kubesh submitted that the Dairy Farmers late intervention in this matter would prevent his client from presenting its case to the "best benefit."

Finally, Mr. Kubesh suggested that if the Tribunal were to admit the Dairy Farmers as a party at this time, it would create a reasonable apprehension of bias. When asked by the Tribunal to expand on this point, Mr. Kubesh stated that the apprehension would be created because the Tribunal would be seen to be allowing the Dairy Farmers benefits that it would not provide to other parties.

Mr. Clark indicated that he shared some of Mr. Kubesh's concerns. However, he stated that his client did not oppose the Dairy Farmers participation in the inquiry. He suggested that it would be helpful to the process to allow the Dairy Farmers to "put their case on the table." However, Mr. Clark requested that the Tribunal consider granting an extension for filing submissions in order to permit the Dairy Farmers to file

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1. None of the other persons seeking to become parties was sent a questionnaire by the Tribunal.

their questionnaire response, which Mr. Clark's client and others could then take into consideration in preparing their cases. Finally, Mr. Clark questioned what role the CFA would play in the inquiry.

Mr. Kelen stated that his clients took no position with respect to this matter. Mr. Tremblay submitted that it was the Government of Quebec's position that all parties with an interest should be allowed to participate in the inquiry. Mr. Séguin stated that the Government of Ontario supported the Dairy Farmers participation, but suggested that an extension of time might be appropriate. He indicated that an extension of one to two months might be reasonable. He noted however that he believed that the Dairy Farmers were well prepared for the inquiry. Mr. Sutton stated that his client had no objection to the Dairy Farmers and the CFA being admitted as parties to this inquiry. Finally, Mr. Denby stated that he did not object to the Dairy Farmers' participation.

In response to Mr. Kubesh's argument, Mr. Somers submitted that the Dairy Farmers' case would not be superficial. With respect to Mr. Kubesh's argument regarding his client's right to make its case, Mr. Somers submitted that the Tribunal's inquiry is not a contest between parties, but rather is an inquiry dealing with matters of general economic concern. Finally, Mr. Somers stated that the Dairy Farmers are prepared to abide by the Tribunal's inquiry schedule and are seeking an extension.

In his response, Mr. Knoerr also indicated that the CFA was prepared to abide by the Tribunal's schedule and was not in need of an extension.

Prior to the teleconference, the Tribunal received a letter from counsel for the B.C. Milk Marketing Board (BCMMB) in which the BCMMB indicated that it did not intend to participate in the conference call. In its letter, the BCMMB expressed the view that all stakeholders should have a full opportunity to present their views in the inquiry and that it fully supported the efforts of the Dairy Farmers and the CFA to participate.

In light of the timing of this matter, at the conclusion of the teleconference, the Tribunal advised the Dairy Farmers, the CFA and parties that it had decided to admit the Dairy Farmers and the CFA as parties to this inquiry and would provide them with written reasons at a later date.

## **DECISION**

On December 17, 1997, the Tribunal received from the Governor in Council an Order in Council directing it, pursuant to section 18 of the *Canadian International Trade Tribunal Act*, to conduct an inquiry into the importation of dairy product blends outside the coverage of Canada's tariff-rate quotas. The Order in Council:

- (a) directs the Canadian International Trade Tribunal to forthwith inquire into the matter of the importation of dairy product blends outside the coverage of Canada's tariff-rate quotas, namely, by:
  - (i) examining the factors influencing the domestic market for such imports, and the implications of these imports for the Canadian dairy producing and processing industry and other segments of the Canadian food processing industry, including production and revenue levels;
  - (ii) reviewing the legal, technical, regulatory and commercial considerations relevant to the treatment of imports of these products, as well as Canada's international trade rights and obligations under the North American Free Trade Agreement and the World Trade Organization;

- (iii) identifying options for addressing any problems raised by this issue in a manner consistent with Canada's domestic and international rights and obligations; and
- (b) directs the Canadian International Trade Tribunal to hold public hearings with respect to the inquiry and to report to the Governor in Council by July 1, 1998.

On January 7, 1998, the Tribunal issued its notice of inquiry in this matter. The notice provided, among other things, that persons wishing to participate in the inquiry should file their notices of appearance with the Secretary by January 19, 1998, and should reply to the Tribunal's questionnaires by February 23, 1998. As noted by Mr. Kubesh, though the Dairy Farmers of Canada were sent a questionnaire, they have yet to file a response with the Tribunal. The hearing in this inquiry is scheduled to begin on April 6, 1998.

In deciding whether to admit the Dairy Farmers and the CFA as parties in this proceeding, the Tribunal is of the view that it must balance the interests of the Dairy Farmers and the CFA and that of existing parties. Also, in light of the fact that this inquiry is not strictly a *lis inter partes* but rather is in the nature of a broader economic inquiry, the Tribunal views it as appropriate to also consider whether the inquiry would benefit from the participation of the Dairy Farmers and the CFA.

In its letter of March 23, 1998, the Tribunal advised Messrs. Somers and Knoerr that they should be prepared to indicate the reason for their clients' lateness in filing their appearances and the nature of their intended participation in the proceeding. It also advised counsel for existing parties to the proceeding to be prepared to indicate their position with respect to this matter generally and to indicate what prejudice they might suffer if the Dairy Farmers and the CFA were admitted.

The Tribunal finds both Mr. Somers' and Mr. Knoerr's explanations for the lateness of their clients' filing of appearances to be lacking. With respect to the Dairy Farmers, the suggestion that these large and sophisticated organizations, which appear to be intimately familiar with the matters at issue in this inquiry and which are represented by experienced counsel, delayed their intervention in this matter for over two months to obtain legal advice and seek government assurances is, at least on its face, somewhat questionable. Similarly, the CFA's explanation for its delay — that it had met only recently and decided at that time to seek to participate in this inquiry — is also somewhat hard to comprehend.

Mr. Kubesh argued that his client would be prejudiced by the late addition of the Dairy Farmers and the CFA to this inquiry. He submitted that the Dairy Farmers' case would likely be "superficial" and suggested that his ability to cross-examine the Dairy Farmers would therefore be impaired. He also submitted that the Dairy Farmers late intervention would impair his client's ability to present its case. While no other parties opposed the addition of the Dairy Farmers and the CFA, some did express concern about the fact that the Dairy Farmers of Canada had not yet provided a questionnaire response and, in this connection, raised the possibility of an extension being granted.

The Tribunal is not persuaded that existing parties to this inquiry will be prejudiced by the addition of the Dairy Farmers and the CFA as parties. Their counsel have assured the Tribunal that they are prepared to abide by all of the Tribunal's deadlines and that they were not in need of an extension of time. Mr. Somers assured the Tribunal that his clients' case would not be superficial and, in the Tribunal's view, to presume otherwise is, at this point, purely speculative. Mr. Somers indicated that the Dairy Farmers of Canada were prepared to file their questionnaire response forthwith. In addition, the reports prepared by Tribunal staff and others, that were distributed to parties in this matter, contain much of the statistical and economic data and

other information relevant to this inquiry. Moreover, all parties will have an opportunity to respond to other parties' cases in reply submissions to be filed with the Secretary on April 1, 1998.

Finally, the Tribunal is of the view that the Dairy Farmers and, to a lesser extent, the CFA, have a very real interest in this inquiry. They are in no sense marginal players. In addition, the Tribunal considers it significant that, in this inquiry, it is not adjudicating upon a private dispute between two litigants, but rather is conducting an economic inquiry. The Tribunal notes that the Order in Council directs the Tribunal to identify options, not to make a decision or even provide recommendations. In light of the subject matter of the inquiry, the Tribunal considers that its process is likely to benefit from the participation of the Dairy Farmers and the CFA. They will, in all likelihood, bring a perspective to the inquiry which otherwise would have been lacking. These facts provide additional support for the view that the Dairy Farmers and the CFA should be admitted as parties.

For all of the foregoing reasons, the Tribunal has decided to admit the Dairy Farmers and the CFA as parties to the inquiry in Reference No. GC-97-001. The Tribunal does not consider that an extension for filing cases, replies, the start of the hearing or the completion of the inquiry is warranted.

Arthur B. Trudeau  
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Presiding Member

Pierre Gosselin  
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Member

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Member