

Federal Court



Cour fédérale

Date: 20091007

Docket: T-1621-08

Citation: 2009 FC 1016

Ottawa, Ontario, October 7, 2009

**PRESENT:** The Honourable Mr. Justice Martineau

**BETWEEN:**

**SAPUTO INC.  
KRAFT CANADA INC.  
and PARMALAT CANADA INC.**

**Applicants**

**and**

**THE ATTORNEY GENERAL OF CANADA**

**Respondent**

**and**

**ST. ALBERT CHEESE COOPERATIVE INC. and  
INTERNATIONAL CHEESE COMPANY LTD.**

**Interveners**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] This judicial review application concerns the legality of amendments made to the *Food and Drug Regulations*, C.R.C. c. 870 (FDR) and the *Dairy Products Regulations*, SOR/79-840 (DPR) as a result of the passing of the *Regulations Amending the Food and Drugs Regulations and the Dairy Products Regulations*, SOR/2007-302 (the new Regulations).

## I. OVERVIEW

[2] After many years of consultation with a number of interest groups, the Governor in Council passed the new Regulations under the purported authority of the *Food and Drugs Act*, R.S.C. 1985, c. F-27 (FDA) and the *Canada Agricultural Products Act*, R.S.C. 1985, c. C-20 (4<sup>th</sup> Supp.) (CAPA) (collectively, the Parent legislations).

[3] The new Regulations were developed cooperatively with Agriculture and Agri-Food Canada (AAFC) and in consultation with Health Canada (HC) and the Department of Foreign Affairs and International Trade. The new Regulations were published on December 26, 2007 in the *Canada Gazette* Part II, Vol. 141 No. 26, and came into force on December 14, 2008.

[4] Essentially, the new Regulations amend the FDR and the DPR by harmonizing the definitions for milk products and revising the existing identity and compositional standards for cheese destined for inter-provincial or international trade (including cheese imported in Canada).

[5] The applicants are large dairy processors operating federally-registered facilities. They produce and distribute cheese across Canada and in export trade. They also import cheese for distribution in Canada. The cheese distributed by the applicants is made with the combination of liquid milk and milk derivatives, including powdered milk protein milk concentrate (MPC), milk protein isolate (MPI) and whey protein concentrate (WPC).

[6] By this judicial review application, the applicants challenge both the constitutionality and/or validity under the Parent legislations of paragraphs B.08.033(1)(a), (i.1) and (i.2), B.08.33(1.2), B.08.034 (1)(a)(i), (i.1) and (i.2), B.08.034(1)(c)(i), and B.08.034(1.2) of the FDR and paragraphs 6(3)(c), 6(3)(d)(i), 6(5), 28(1)(a)(i.1) and (i.2) and 28(4) of the DPR, as amended by the new Regulations (the impugned provisions).

[7] The application is opposed by the respondent. Although the interveners were granted leave to file affidavit evidence, which has been referred to by the applicants and the respondent, the latter were not allowed to make written or oral submissions to the Court.

## **II. DETERMINATION**

[8] After having assessed the legality of the impugned provisions in light of the law and the totality of the evidence submitted by the parties, read the application records and heard the oral submissions made on behalf of the applicants and the respondent respectively, and considered all relevant case law, the application must fail.

[9] The issues in this application are:

- (a) whether the new Regulations, including the impugned provisions, are a valid exercise of the federal trade and commerce power under section 91(2) of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5 (*Constitution Act, 1867*), with particular regard to the federal authority in respect of inter-provincial and international trade?

- (b) Whether the new Regulations are a valid exercise of the regulation-making authority granted to the Governor in Council by the CAPA and FDA?

[10] The answer to both of these questions is in the affirmative.

[11] In assessing whether the impugned provisions are within the federal sphere of power, the Court had to first determine the essential character of the new Regulations. In so doing, the Court has come to the conclusion that the new Regulations establish revised compositional standards for imported cheese and cheese destined for inter-provincial and international trade. Second, the Court had to ask itself whether the character of the new Regulations relates to an enumerated head of power granted to Parliament. In this regard, the Court has found that the essential character of the new Regulations – assessed in the context of the statutory scheme as a whole – fall within Parliament’s authority to regulate trade and commerce under subsection 91(2) of the *Constitution Act, 1867*.

[12] While a court may strike down a regulation for jurisdictional or other compelling reasons, it “would take an egregious case to warrant such action”: *Thorne’s Hardware Ltd. v. Canada*, [1983] 1 S.C.R. 106. The latter approach has been applied consistently by the courts in respect of regulation-making and similar legislative functions, without reference to the standards of review of decisions of administrative tribunals (*Montréal (City) v. 2952-1366 Québec Inc.*, [2005] 3 S.C.R. 141). The applicants appear to concede that new Regulations were “made in good faith.” However, they allege that the purpose of the new Regulations, including the impugned provisions, is *ultra*

*vires* the Governor in Council's regulation-making authority under the CAPA and FDA. The Court finds that there is no merit to this allegation. Even if the issues of fact and law above are somewhat related, for the sake of convenience and clarity of the present reasons, I have chosen to treat legal questions related to the interpretation and effect of the new Regulations separately from factual and evidentiary issues raised by the parties.

### **III. LEGALITY OF THE IMPUGNED PROVISIONS**

[13] Prior to the passing of the new Regulations, federal compositional standards for cheese already existed. It is not challenged that the purpose of these standards was to describe the basic requirements for cheese so that cheese available to consumers has a uniform composition and nutritional value. Of course, cheese is not the only food for which there are compositional standards. However, what makes cheese unique is that the product is subject to two different sets of federal regulations, the FDR and DPR.

[14] The impugned provisions are reproduced in the appendix. In a nutshell, they provide:

- (a) New subparagraphs B.08.033(1)(a)(i.1) of the FDR, and 6(3)(c)(i) and 28(1)(a)(i.1) of the DPR prescribe for each named variety of cheese a minimum casein content that is derived from liquid milk (i.e. milk or ultrafiltered milk, partly skimmed milk, ultrafiltered partly skimmed milk, skimmed milk, ultrafiltered skimmed milk or cream), rather than from other "milk products" (such as MPC, MPI and WPC, and other milk products covered by the new definition), that is a specified percentage of the total protein content of the cheese (the casein ratio);

- (b) New subparagraphs B.08.033(1)(a)(i.2) of the FDR, and 6(3)(c)(ii) and 28(1)(a)(i.2) of the DPR also require that the whey protein to casein ratio in the specific variety of cheese does not exceed the whey protein to casein ratio of milk (the whey ratio);
- (c) New subparagraphs B.08.033(1.2) of the FDR, and 6(5) and 28(4) of the DPR provide casein ratios for named varietal cheeses which retreat from the casein ratios prescribed in subparagraphs B.08.033(1)(a)(i.1) of the FDR, and 6(3)(c)(i) and 28(1)(a)(i.1) of the DPR, provided certain conditions are met and that the cheese has the characteristic flavour and texture of the named variety of cheese;
- (d) New subparagraphs B.08.034(1)(a)(i)(i.1) and (i.2), (1)(c)(i) and (1.2) of the FDR, and 6(3)(d)(i) of the DPR prescribe specific compositional requirements for Cheddar Cheese (including Cheddar Cheese that has been aged), which includes the requirements to be made solely from liquid milk and to have the prescribed casein ratio.

[15] As can be seen, the amendments to the FDR mirror the amendments to the DPR.

[16] First, it is important to assess the legality of the new Regulations, including the impugned provisions, in light of the FDA and CAPA legislative schemes as a whole rather than, as the applicants appear to suggest, in isolation. In this regard, the Court finds that the new Regulations are an integral part of the legislative schemes established by the CAPA and the FDA to regulate import, export, and inter-provincial trade.

[17] The purpose of the CAPA can be seen in the long title of the statute, which is: “*An Act to regulate the marketing of agricultural products in import, export and inter-provincial trade and to provide for national standards and grades of agricultural products, for the inspection and grading, for the registration of establishments and for standards governing establishments*” (emphasis added).

[18] A key provision of the CAPA engaged by the new Regulations is section 17, which clearly illustrates to the international and inter-provincial trade focus of the scheme:

**17.** No person shall, except in accordance with this Act or the regulations,

(a) market an agricultural product in import, export or interprovincial trade;

(b) possess an agricultural product for the purpose of marketing it in import, export or interprovincial trade; or

(c) possess an agricultural product that has been marketed in contravention of this Act or the regulations.

**17.** Sont interdites, relativement à un produit agricole, toute commercialisation — soit interprovinciale, soit liée à l’importation ou l’exportation — effectuée en contravention avec la présente loi ou ses règlements de même que la possession à ces fins ou la possession résultant d’une telle commercialisation.

[19] Pursuant to section 32 of CAPA, the Governor in Council has broad regulation-making powers to make regulations for carrying out the purposes and provisions of the Act, including the following:

**32.** The Governor in Council may make regulations for carrying out the purposes and provisions of this Act and prescribing anything that is to be prescribed under this Act and, without limiting the generality of the foregoing, may make regulations

...

(f) establishing grades and standards, including standards of wholesomeness, for agricultural products and establishing standards for containers;

...

(k) regulating or prohibiting the marketing of any agricultural product, other than a fresh or processed fruit or vegetable, in import, export or interprovincial trade and establishing terms and conditions governing that marketing;

...

**32.** Le gouverneur en conseil peut, par règlement, prendre toute mesure d'application de la présente loi, et notamment :

[...]

f) établir les classifications et les normes, y compris de salubrité, visant les produits agricoles et les normes des contenants;

[...]

k) régir ou interdire, relativement aux produits agricoles autres que ceux visés à l'alinéa l), la commercialisation — soit interprovinciale, soit liée à l'importation ou l'exportation —, et fixer toutes conditions et modalités liées à cette activité;

[...]

[20] The FDA complements the CAPA, and vice-versa, insofar as food standards are concerned.

The key provision in the FDA, being subsection 6(1) triggered by the new Regulations, again underscores the international and inter-provincial trade focus of the scheme:

**6. (1)** Where a standard for a food has been prescribed, no person shall

**6. (1)** En cas d'établissement — par règlement — d'une norme à l'égard d'un aliment et de non-



conformité à celle-ci d'un article destiné à la vente et susceptible d'être confondu avec cet aliment, sont interdites, relativement à cet article, les opérations suivantes :

- |   |  |
|---|--|
| (a) import into Canada,   | a) son importation;  |
| (b) send, convey or receive for conveyance from one province to another, or                 | b) son expédition, son transport ou son acceptation en vue de son transport interprovincial; |
| (c) have in possession for the purpose of sending or conveying from one province to another | c) sa possession en vue de son expédition ou de son transport interprovincial.               |

any article that is intended for sale and that is likely to be mistaken for that food unless the article complies with the prescribed standard.

...

[...]

- |   |  |
|---|--|
| (3) Where a standard for a food has been prescribed, no person shall label, package, sell or advertise any article that | (3) En cas d'établissement d'une norme réglementaire à l'égard d'un aliment, il est interdit d'étiqueter, d'emballer ou de vendre un aliment — ou d'en faire la publicité — de manière qu'il puisse être confondu avec l'aliment visé par la norme, à moins qu'il ne soit conforme à celle-ci, s'il entre dans l'une ou l'autre des catégories suivantes : |
|---|--|

- |   |   |
|---|---|
| (a) has been imported into Canada,                          | a) il a été importé;  |
| (b) has been sent or conveyed from one province to another, | b) il a été expédié ou transporté d'une province à une autre; |

or

(c) is intended to be sent or conveyed from one province to another

c) il est destiné à être expédié ou transporté d'une province à une autre.

in such a manner that it is likely to be mistaken for that food unless the article complies with the prescribed standard.

[21] As in the CAPA, subsection 30(1) of the FDA vests the Governor in Council with broad regulation-making powers, including the following:

**30.** (1) The Governor in Council may make regulations for carrying the purposes and provisions of this Act into effect, and, in particular, but without restricting the generality of the foregoing, may make regulations

**30.** (1) Le gouverneur en conseil peut, par règlement, prendre les mesures nécessaires à l'application de la présente loi et, notamment

...

[...]

(c) prescribing standards of composition, strength, potency, purity, quality or other property of any article of food, drug, cosmetic or device;

c) établir des normes de composition, de force, d'activité, de pureté, de qualité ou d'autres propriétés d'un aliment, d'une drogue, d'un cosmétique ou d'un instrument;

(d) respecting the importation of foods, drugs, cosmetics and devices in order to ensure compliance with this Act and the regulations;

d) régir l'importation d'aliments, de drogues, de cosmétiques et d'instruments, afin d'assurer le respect de la présente loi et de ses règlements;

...

[...]

[22] By virtue of section 6 of the FDA and section 17 of CAPA, the new Regulations apply to cheese sold or marketed inter-provincially as well as to cheese imported into Canada. It is clear that the new Regulations do not regulate cheese manufactured in a non-federally registered establishment and sold locally within a province. Indeed, the new Regulations do not prevent non-compliant products from being marketed. If a product exceeds the allowable amounts for milk derivatives and is destined for inter-provincial or international trade, then it must simply be called something other than the applicable cheese variety.

[23] While the courts have struck down federal legislation that applies indiscriminately to all trade, including intra-provincial trade, the Courts have never invalidated federal marketing legislation that is directed at extra-provincial trade. Indeed, this was a decisive factor in the Supreme Court of Canada's decision in *Labatt Brewing Co. v. Canada*, [1980] 1 S.C.R. 914 [*Labatt*]. As evidenced by the following passages, in that case the Court held that regulations enacted under the FDA could be not upheld under the federal trade and commerce power:

With respect to legislation relating to the support, control or regulation of the various levels or components in the marketing cycle of natural products [in that case], the provincial authority is *prima facie* qualified to legislate with reference to production (vide Pigeon J. in the Reference *Re Agricultural Products Marketing Act, supra*, at p. 1296), and the federal Parliament with reference to marketing in the international and interprovincial levels of trade. In between, the success or failure of the legislator depends upon whether the pith and substance or primary objective of the statute or regulation is related to the heads of power of the legislative authority in question. Incidental effect on the other legislative sphere will no longer necessarily doom the statute to failure. Several indicia of the proper tests have evolved. For example, if contractual rights within the province are the object of the proposed regulation, the province has the authority. On the other hand, if regulation of the flow in extraprovincial channels of trade is the object, then the federal statute

will be valid. Between these spectrum ends, the shadings cannot be foretold in anything approaching a constitutional formula. The majority of the illustrated cases thus far encountered are largely in the distribution, and not the production, of farm products. Here, however, we are concerned with the proper regulatory authority in connection with the production process of a single industry and, to some extent, with the sale of its products, the latter being concerned largely with the use of labels or identification. Nowhere are the impugned statutory regulations or provisions concerned with the control or regulation of the extraprovincial distribution of these products or their movement through any channels of trade. On the contrary, their main purpose is the regulation of the brewing process itself by means of a « legal recipe », as counsel for the appellant put it. Indeed, if the industry is substantially local in character, as seems to be the case from the sparse record before the court (as noted above), the regulations are, in fact, confined to the regulation of a trade within a province. (Emphasis added.)

[24] At the time that *Labatt* was decided, section 6 of the FDA provided that “where a standard had been prescribed for a food, no person shall label, package, sell or advertise any article in such a manner that it is likely to be mistaken for such food unless such article complies with the prescribed standard.” The relevant regulation-making power was tied to this charging provision. Given the statutory scheme, this provision could not be framed as being directed in pith and substance at inter-provincial and international trade. However, subsequent to *Labatt*, the FDA was amended to ensure that the regulatory scheme established by the Act, including any related regulations, fell within the well established scope of federal constitutional powers.

[25] The Court dismisses any submission made by the applicants that the new Regulations, including the impugned provisions, prescribe a “legal recipe” for cheese. Compositional standards for cheese making cannot be equated with each processor recipe for making a particular variety or

brand of cheese. To illustrate this conclusion, one only needs to read new subparagraph B.08.033 of the FDR in its entirety:

**B.08.033.** (1) [S]. (Naming the variety) Cheese, other than cheddar cheese, cream cheese, whey cheese, cream cheese with (named added ingredients), cream cheese spread, cream cheese spread with (named added ingredients), processed (named variety) cheese, processed (named variety) cheese with (named added ingredients), processed cheese food, processed cheese food with (named added ingredients), processed cheese spread, processed cheese spread with (named added ingredients), cold-pack (named variety) cheese, cold-pack (named variety) cheese with (named added ingredients), cold-pack cheese food, cold-pack cheese food with (named added ingredients), cottage cheese and creamed cottage cheese,

(a) shall

(i) be the product made by coagulating milk, milk products or a combination thereof with

**B.08.033.** (1) [N]. Le fromage (indication de la variété) autre que le fromage cheddar, le fromage à la crème, le fromage de petit-lait, le fromage à la crème (avec indication des ingrédients ajoutés), le fromage à la crème à tartiner, le fromage à la crème à tartiner (avec indication des ingrédients ajoutés), le fromage fondu (indication de la variété), le fromage fondu (indication de la variété) (avec indication des ingrédients ajoutés), une préparation de fromage fondu, une préparation de fromage fondu (avec indication des ingrédients ajoutés), le fromage fondu à tartiner, le fromage fondu à tartiner (avec indication des ingrédients ajoutés), le fromage conditionné à froid (indication de la variété), le fromage conditionné à froid (indication de la variété) (avec indication des ingrédients ajoutés), une préparation de fromage conditionné à froid, une préparation de fromage conditionné à froid (avec indication des ingrédients ajoutés), le fromage cottage et le fromage cottage en crème,

a) doit

(i) être le produit de la coagulation, à l'aide de bactéries, de lait, de produits du

the aid of bacteria to form a curd and forming the curd into a homogeneous mass after draining the whey,

(i.1) except for feta cheese, have a casein content that is derived from milk or from ultrafiltered milk, partly skimmed milk, ultrafiltered partly skimmed milk, skim milk, ultrafiltered skim milk or cream, rather than from other milk products, that is at least the following percentage of the total protein content of the cheese, namely,

(A) 63 per cent in the case of Pizza Mozzarella cheese and Part Skim Pizza Mozzarella cheese,

(B) 83 per cent, in the case of Brick cheese, Canadian Style Brick cheese, Canadian Style Munster cheese, Colby cheese, Farmer's cheese, Jack cheese, Monterey (Monterey Jack) cheese, Mozzarella (Scamorza) cheese, Part Skim Mozzarella (Part Skim Scamorza) cheese, Part Skim Pizza cheese, Pizza cheese, Skim milk cheese and any other variety of cheese not referred to in clause (A) or (C), and

(C) 95 per cent, in the case of any other variety of cheese named in the table to this section,

lait ou d'un mélange de ceux-ci, en vue de former, après égouttement du petit-lait, une masse homogène de caillé,

(i.1) sauf pour le fromage Féta, avoir une teneur en caséine dérivée du lait ou du lait ultrafiltré, du lait partiellement écrémé, du lait partiellement écrémé ultrafiltré, du lait écrémé, du lait écrémé ultrafiltré ou de la crème, plutôt que de tout autre produit du lait, au moins équivalente aux pourcentages ci-après de la teneur totale en protéines du fromage :

(A) 63 %, dans le cas du fromage Pizza mozzarella ou Pizza mozzarella partiellement écrémé,

(B) 83 %, dans le cas du fromage de lait écrémé, Brick, Brick canadien, Colby, Farmer's, Jack, Monterey (Monterey Jack), Mozzarella (Scamorza), Mozzarella partiellement écrémé (Scamorza partiellement écrémé), Munster canadien, Pizza partiellement écrémé ou Pizza et des autres variétés de fromage non mentionnées aux divisions (A) ou (C),

(C) 95 %, dans le cas des autres variétés de fromage visées au tableau du présent article,

(i.2) have a whey protein to casein ratio that does not exceed the whey protein to casein ratio of milk,

(i.2) avoir un rapport protéines de petit-lait à la caséine qui ne dépasse pas celui du lait,

(ii) possess the physical, chemical and organoleptic properties typical for the variety,

(ii) posséder les propriétés physiques, chimiques et organoleptiques typiques de la variété,

(iii) where it is a cheese of variety named in the table to this section, contain no more than the maximum percentage of moisture shown in Column II thereof for that variety,

(iii) s'il s'agit d'une variété de fromage nommée dans le tableau du présent article, ne pas contenir plus que le pourcentage maximal d'humidité indiqué pour cette variété dans la colonne II de ce tableau,

(iv) where it is a cheese of a variety named in Part I of the table to this section, contain no less than the minimum percentage of milk fat shown in Column III for that variety, and

(iv) s'il s'agit d'une variété de fromage nommée dans la partie I du tableau du présent article, contenir au moins le pourcentage minimal de matière grasse de lait indiqué pour cette variété dans la colonne III de ce tableau, et

(v) where it is cheese of a variety named in Part II of the table to this section, contain no more than the maximum percentage of milk fat shown in Column III for that variety; and

(v) s'il s'agit d'une variété de fromage nommée dans la partie II du tableau du présent article, ne pas contenir plus que le pourcentage maximal de matière grasse de lait indiqué pour cette variété dans la colonne III de ce tableau; et

(b) may contain

b) peut contenir

(i) salt, seasonings, condiments and spices,

(i) du sel, des assaisonnements, des condiments et des épices,

(ii) flavouring preparations other than cheese flavouring,

(ii) des préparations aromatisantes autres que les

	aromatisants de fromage,
(iii) micro-organisms to aid further ripening,	(iii) des micro-organismes favorisant l'affinage,
(iv) one or more of the following colouring agents:	(iv) les colorants suivants :
(A) in an amount consistent with good manufacturing practice, annatto, beta-carotene, chlorophyll, paprika, riboflavin or turmeric,	(A) en quantité conforme aux bonnes pratiques industrielles, le rocou, le $\beta$ -carotène, la chlorophylle, le paprika, la riboflavine, le curcuma,
(B) in an amount not exceeding 35 parts per million, beta-apo-8'-carotenal, ethyl beta-apo-8'-carotenoate or a combination thereof, and	(B) en quantité n'excédant pas 35 parties par million, le $\beta$ -apo-8'-caroténal, l'ester éthylique de l'acide $\beta$ -apo-8'-caroténoïque ou un mélange de ces produits, et
(C) in an amount not exceeding 0.10 parts per million, brilliant blue FCF in feta cheese only,	(C) en quantité n'excédant pas 0,10 partie par million, le bleu brillant FCF seulement dans le Feta,
(v) calcium chloride as a firming agent in an amount not exceeding 0.02 per cent of the milk and milk products used,	(v) du chlorure de calcium comme agent d'affermissement, en quantité n'excédant pas 0,02 pour cent du lait et des produits du lait utilisés,
(vi) paraffin wax as a coating in an amount consistent with good manufacturing practice,	(vi) de la cire de paraffine comme enrobage, en quantité conforme aux bonnes pratiques industrielles,
(vii) where potassium nitrate, sodium nitrate or a combination thereof are used for the purpose and in the manner described in subsection (2), residues of potassium nitrate, sodium nitrate or a combination thereof in an amount not exceeding 50	(vii) en quantité n'excédant pas 50 parties par million, des résidus de nitrate de potassium, de nitrate de sodium ou d'un mélange de ces produits utilisés aux fins et de la manière prévues au paragraphe (2),



parts per million,

(viii) wood smoke as a preservative in an amount consistent with good manufacturing practice,

(viii) de la fumée de bois comme agent de conservation, en quantité conforme aux bonnes pratiques industrielles,

(ix) the following preservatives:

(ix) les agents de conservation suivants :

(A) propionic acid, calcium propionate, sodium propionate or any combination thereof in an amount not exceeding 2,000 parts per million, calculated as propionic acid,

(A) l'acide propionique, le propionate de calcium, le propionate de sodium ou un mélange de ces produits, en quantité n'excédant pas 2 000 parties par million, calculée en acide propionique,

(B) sorbic acid, calcium sorbate, potassium sorbate, sodium sorbate, or any combination thereof in an amount not exceeding 3,000 parts per million, calculated as sorbic acid,

(B) l'acide sorbique, le sorbate de calcium, le sorbate de potassium, le sorbate de sodium, ou un mélange de ces produits, en quantité n'excédant pas 3 000 parties par million, calculée en acide sorbique,

(C) any combination of the preservatives named in clauses (A) and (B) in an amount not exceeding 3,000 parts per million, calculated as propionic acid and sorbic acid respectively, or

(C) un mélange des agents de conservation visés aux dispositions (A) et (B), en quantité n'excédant pas 3 000 parties par million, calculée respectivement en acide propionique et en acide sorbique, ou

(D) natamycin applied to the surface of the cheese in an amount that does not exceed 20 parts per million or, if the cheese is grated or shredded, 10 parts per million,

(D) la natamycine appliquée à la surface du fromage, en une quantité n'excédant pas 20 parties par million ou, si le fromage est râpé fin ou en filaments, 10 parties par million,

(x) in the case of grated or

(x) s'il est râpé fin ou en

shredded cheese, calcium silicate, microcrystalline cellulose or cellulose, or a combination of them, as an anticaking agent, the total amount not to exceed 2.0 per cent, and

(xi) carbon dioxide as a pH adjusting agent in milk for cheese production, in an amount consistent with good manufacturing practice.

(1.1) A cheese of a variety set out in column I of Part I of the table to this section may contain more than the maximum percentage of moisture set out in column II and less than the minimum percentage of milk fat set out in column III if

(a) a statement or claim set out in column 4 of any of items 12 to 14, 16, 20, 21 and 45 of the table following section B.01.513 is shown on the label of the product as part of the common name; and

(b) the cheese has the characteristic flavour and texture of the named variety of cheese.

(1.2) The reference to “83 per cent” in clause (1)(a)(i.1)(B) shall be read as “78 per cent”, and the reference to “95 per

filaments, du silicate de calcium, de la cellulose microcristalline, de la cellulose ou un mélange de ces produits, utilisé comme agent anti-agglomérant, en quantité totale n'excédant pas 2,0 pour cent,

(xi) du dioxyde de carbone comme rajusteur du pH dans le lait pour la fabrication du fromage, en quantité conforme aux bonnes pratiques industrielles.

(1.1) Le fromage d'une variété visée à la colonne I de la partie I du tableau du présent article peut contenir plus que le pourcentage maximal d'humidité indiqué dans la colonne II et moins que le pourcentage minimal de matière grasse du lait indiqué dans la colonne III, si les conditions suivantes sont réunies :

a) la mention ou l'allégation figurant à la colonne 4 de l'un des articles 12 à 14, 16, 20, 21 et 45 du tableau suivant l'article B.01.513 est indiquée sur l'étiquette du produit dans le nom usuel de celui-ci;

b) le fromage a la saveur et la texture caractéristiques de la variété de fromage visée.

(1.2) La mention « 83 % » dans la division (1)a(i.1)(B) vaut mention de « 78 % » et la mention « 95 % » dans la

<p>cent” in clause (1)(a)(i.1)(C) shall be read as “90 per cent”, with respect to the named variety of cheese if</p>	<p>division (1)a)(i.1)(C) vaut mention de « 90 % », dans le cas des variétés de fromage visées, si les conditions suivantes sont réunies :</p>
<p>(a) a statement or claim set out in column 4 of any of items 12 to 14, 16, 20, 21 and 45 of the table following section B.01.513 is shown on the label of the product as part of the common name; and</p>	<p>a) la mention ou l’allégation figurant à la colonne 4 de l’un des articles 12 à 14, 16, 20, 21 et 45 du tableau suivant l’article B.01.513 est indiquée sur l’étiquette du produit dans le nom usuel de celui-ci;</p>
<p>(b) the cheese has the characteristic flavour and texture of the named variety of cheese.</p>	<p>b) le fromage a la saveur et la texture caractéristiques de la variété de fromage visée.</p>
<p>(2) Potassium nitrate, sodium nitrate or a combination thereof may be used as a preservative in cheese providing the following requirements are met:</p>	<p>(2) Le nitrate de potassium, le nitrate de sodium ou un mélange de ces produits peuvent être utilisés comme agents de conservation dans le fromage, pourvu que</p>
<p>(a) the amount of the salt or combination of salts does not exceed 200 parts per million of the milk and milk products used to make the cheese;</p>	<p>a) la quantité de sel ou le mélange de sels ne dépasse pas 200 parties par million du lait et des produits du lait utilisés;</p>
<p>(b) the cheese in which the preservative is used is</p>	<p>b) le fromage soit</p>
<p>(i) mold ripened cheese packed in a hermetically sealed container, or</p>	<p>(i) du fromage affiné aux moisissures conservé dans un contenant hermétique, ou</p>
<p>(ii) ripened cheese</p>	<p>(ii) du fromage affiné</p>
<p>(A) that contains not more than 68 per cent moisture on a fat free basis, and</p>	<p>(A) qui contient au plus 68 pour cent d’humidité à l’état dégraissé, et</p>

(B) during the manufacture of which the lactic acid fermentation and salting was completed more than 12 hours after coagulation of the curd by enzymes; and

(c) the salting is, in the case of the cheese described in subparagraph (b)(ii), applied externally as a dry salt or in the form of a brine.

(3) No person shall use an enzyme other than

(a) milk coagulating enzymes derived from *Rhizomucor miehei* (Cooney and Emerson) (previous name: *Mucor miehei* (Cooney and Emerson)), *Mucor pusillus Lindt* or *Aspergillus oryzae* RET-1 (pBoel777), aminopeptidase derived from *Lactococcus lactis*, Chymosin A derived from *Escherichia coli* K-12, GE81 (pPFZ87A), Chymosin B derived from *Aspergillus niger* var. *awamori*, GCC0349 (pGAMpR) or from *Kluyveromyces marxianus* var. *lactis*, DS1182 (pKS105), protease derived from *Micrococcus caseolyticus*, pepsin, rennet or bovine rennet, in the manufacture of any cheese to which subsection (1) applies;

(b) lipase and enzymes described in paragraph (a), in the manufacture of Asiago cheese, Blue cheese,

(B) dont la fermentation lactique et la salaison ont été faites plus de 12 heures après la coagulation du caillé par enzymes; et

c) la salaison soit, dans le cas du fromage visé au sous-alinéa b)(ii), appliquée à l'extérieur du fromage sous forme de sel ou de saumure.

(3) Il est interdit d'utiliser un enzyme qui n'est pas compris parmi les suivants :

a) les enzymes coagulant le lait qui proviennent de *Rhizomucor miehei* (Cooney et Emerson) (précédemment nommé *mucor miehei* (Cooney et Emerson)), de *Mucor pusillus Lindt* ou de *Aspergillus oryzae* RET-1 (pBoel777), l'aminopeptidase provenant de *Lactococcus lactis*, la chymosine A provenant de *Escherichia coli* K-12, GE81 (pPFZ87A), la chymosine B provenant de *Aspergillus niger* var. *awamori*, GCC0349 (pGAMpR) ou de *Kluyveromyces marxianus* var. *lactis*, DS1182 (pKS105), la protéase provenant de *Micrococcus caseolyticus*, la pepsine, la présure et la présure bovine, dans la fabrication d'un fromage visé au paragraphe (1);

b) la lipase et les enzymes mentionnés à l'alinéa a), pour la fabrication du fromage Asiago, du fromage Bleu, du fromage

Caciocavallo cheese, Feta cheese and Provolone cheese;

Caciocavallo, du fromage Feta et du fromage Provolone;

(c) a milk coagulating enzyme derived from *Endothia parasitica* and enzymes described in paragraph (a), in the manufacture of Emmentaler (Emmental, Swiss) cheese, Mozzarella (Scamorza) cheese and Part Skim Mozzarella (Part Skim Scamorza) cheese;

c) l'enzyme coagulant le lait provenant d'*Endothia parasitica* et les enzymes mentionnés à l'alinéa a) dans la fabrication du fromage Emmentaler (Emmenthal, suisse), du fromage Mozzarella (Scamorza) et du fromage Mozzarella partiellement écrémé (Scamorza partiellement écrémé);

(d) lipase, a milk coagulating enzyme derived from *Endothia parasitica* and enzymes described in paragraph (a), in the manufacture of Parmesan cheese and Romano cheese;

d) la lipase, l'enzyme coagulant le lait provenant d'*Endothia parasitica* et les enzymes mentionnés à l'alinéa a), pour la fabrication du fromage Parmesan et du fromage Romano;

(e) protease derived from *Aspergillus oryzae*, in the manufacture of Colby cheese; and

e) la protéase provenant d'*Aspergillus oryzae* pour la fabrication du fromage Colby;

(f) lysozyme derived from egg white.

f) le lysozyme provenant de blanc d'oeuf.

(3.1) No person shall use an enzyme referred to in subsection (3) at a level of use above that consistent with good manufacturing practice.

(3.1) Il est interdit d'utiliser une enzyme visée au paragraphe (3) en quantité supérieure à celle conforme aux bonnes pratiques industrielles.

(4) Where a flavouring preparation, other than a flavouring preparation that has been traditionally used in the variety, is added to a cheese as permitted in subsection (1), the words "with (naming the

(4) Lorsqu'une préparation aromatisante, autre qu'une préparation aromatisante habituellement utilisée dans la variété de fromage, est ajoutée à un fromage conformément au paragraphe (1), l'expression «

flavouring preparation)” shall be added to the common name on any label.	(avec indication de la préparation aromatisante) » doit être ajoutée au nom usuel sur l'étiquette.
(5) Only a cheese to which wood smoke has been added as permitted in subsection (1) may be described by the term “smoked” on a label.	(5) L'étiquette d'un fromage ne doit porter le terme « fumé » que si de la fumée de bois a été ajoutée au fromage conformément au paragraphe (1).
(6) Where a cheese is labelled as permitted in subsection (5), the word “smoked” shall be shown on the principal display panel.	(6) Dans les cas visés au paragraphe (5), le terme « fumé » doit paraître dans l'espace principal de l'étiquette.

[26] It is interesting to note that the applicants do not challenge the legality of section B.08.033 of the FDR, other than new subparagraphs (i.1), (i.2) and (1.2). The same observation can be made with respect to other provisions of the FDR and the DPR applicable to cheese. Dairy processors can continue to use the ingredients that they like, including fresh liquid milk or powdered milk derivatives. Processors can sell their dairy products locally, inter-provincially, and internationally. However, in those instances where the product is destined for inter-provincial or international trade, a national compositional standard must be met if the processor wishes to market the product as one of the specified varieties of “cheese”.

[27] It is apparent from a simple reading of the relevant provisions of the FDR and the DPR that the overarching purpose and object of the new Regulations, including the impugned provisions, is to establish compositional standards for cheese that is marketed inter-provincially or internationally.

That is the pith and substance of the new Regulations. The standards are an integral part of the comprehensive regulatory schemes established under the CAPA and FDA in respect of agricultural and food products destined for inter-provincial and international trade or manufactured in a federally registered establishment.

[28] The analysis of pith and substance is not technical or formalistic, it is essentially a matter of interpretation and to accomplish this task, the Court looks at the words used in the impugned legislation as well as the background and circumstances surrounding its enactment (*Ward v. Canada (Attorney General)*, 2002 SCC 17). Thus, the Court has also examined the extrinsic evidence submitted by the parties. For the reasons indicated in the next section, the Court dismisses the allegation made by the applicants that the essential or dominant purpose of the new Regulations is to transfer an economic benefit to dairy producers at the expense of dairy processors (see *infra*, IV – Factual and Evidentiary Issues).

[29] The Court also finds that the new Regulations, including the impugned provisions, constitute a proper exercise of the regulation-making authority vested to the Governor in Council.

[30] The Governor in Council's regulation-making authority is expressed in broad terms. As noted earlier, under section 32 of the CAPA, the Governor in Council is authorized to "make regulations for carrying out the purposes and provisions of the Act and prescribing anything that is to be prescribed in this Act." Paragraph 32(f) indicates that "without limiting the generality of the foregoing" this authority encompasses establishing "standards". The purpose of the CAPA, as

indicated in its long title is equally broad – i.e., “to regulate the marketing or agricultural products in import, export and inter-provincial trade and to provide for national standards and grades of agricultural products...” Similarly, the broad authority of the Governor in Council under subsection 30(1) of the FDA includes, in paragraph (c), “prescribing standards of composition, strength, potency, purity, quality or other property of any article of food...” The new Regulations fit squarely within the objectives and powers outlined in these provisions.

[31] In this regard, the Regulatory Impact Assessment Statement published in the *Canada Gazette* Part II, Vol. 141, No. 26, pages 2787 to 2801 (the RIAS), while not a part of the regulations, is a useful tool in analyzing legislative intent and purpose. As Justice Bastarache stated in *Bristol-Myers Squibb Co. v. Canada (Attorney General)*, 2005 SCC 26, at paragraph 157, “the use of the RIAS to determine both the purpose and the intended application of a regulation has been frequent in this Court and others, and this across a wide range of interpretive settings.”

[32] Based on the RIAS, it is apparent that in passing the new Regulations revising the existing identity and compositional standards for cheese destined for inter-provincial or international trade (including cheese imported in Canada), the Governor in Council was juggling a number of competing policy issues, including but not limited to (i) the need to protect the consumer interest in ensuring that cheese marketed inter-provincially and internationally has consistent composition and characteristics; (ii) the goal of regulatory harmonization; (iii) achieving greater consistency with international standards for cheese; and (iv) the need for technological innovation and long term growth in the dairy industry. These four factors are identified in the opening paragraphs of the RIAS



and are each discussed in greater detail in the remainder of the RIAS (see *infra*, IV – Factual and Evidentiary Issues).

[33] The jurisprudence establishes a high threshold that must be met before the Court will overturn the exercise of regulation-making authority for an allegedly improper purpose. The applicants have not met this high threshold.

[34] As an alternative argument, the applicants submit that impugned provisions are meaningless and fail to establish objective and uniform standards. Accordingly, they vest undue discretion in the Canadian Food Inspection Agency (CFIA) tasked with enforcing the DPR and the FDR (*Gallant v. New Brunswick* (1998), 200 N.B.R. (2d) 113, at paragraphs 12-14 (C.A.); *Canada (Attorney General) v. Brent*, [1956] S.C.R. 318 at 321; *Verdun (City) v. Sun Oil Co. Ltd.*, [1952] 1 S.C.R. 222 at paragraphs 229-230).

[35] Thus, it is submitted by the applicants that in applying the formula purporting to verify any given cheese's compliance with the casein ratio established by the impugned regulations, the CFIA is vested with an *ad hoc* rule making ability. This constitutes an impermissible sub-delegation of regulation-making authority and further underlies the impugned regulations' deficiencies with regards to the establishment of objective and uniform compositional standards. This alternative argument must also fail.

[36] There is no impermissible exercise of regulation-making authority by the Governor in Council in the case at bar. Although the applicants use the terminology “objective and uniform norms,” the first prong of their argument in this regard is effectively a “void for vagueness” argument, the standard for which is set out in *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, at paragraph 71, namely, whether the law “so lacks in precision as not to give sufficient guidance for legal debate.” This very high threshold is simply not met by the applicants.

[37] Even if an attack on the CFIA’s compliance records approach was properly before the Court – which it is not – this would not, in the Court’s opinion, advance the applicants position (see *Actton Transport v. Canada (Minister of Labour)*, 2004 FCA 182). Indeed, there is no foundation, in law or in fact, to the applicant’s assertion that the new Regulations somehow impermissibly sub-delegate undue discretion to the CFIA, and the cases cited by the applicants above bear no resemblance to the present case (*Re Peralta et al. and The Queen in right of Ontario* (1985), 16 D.L.R. (4<sup>th</sup>) 259 (Ont. C.A.), *affd.* [1988] 2 S.C.R. 1045).

#### **IV. FACTUAL AND EVIDENTIARY ISSUES**

[38] The applicants rely on no less than nine affidavits, including two affidavits from Dr. Hill on scientific matters, to further their argument that the policy or purpose of the new Regulations is *ultra vires* both section 91 of the *Constitutional Act, 1867* and the Parent legislations.

[39] The respondent who denies the allegations made by the applicants, relies on the RIAS, as well as on the scientific affidavit from Dr. Goulet. While not necessarily endorsing all the evidence

submitted by the interveners, the respondent has nevertheless made great use of this evidence in support of its position that the new Regulations pursue valid and constitutional purposes.

[40] As a preliminary remark on the particular evidentiary context of this application, it is not the role of the Court to act as a kind of legislative upper chamber to weigh expression of public concern and determine which ones should be respected (see *Vancouver Island Peace Society v. Canada*, [1992] 3 F.C. 42, at paragraph 6 (T.D.)). With no allegation of improper motive, the issue in this case concerns the legality of the new Regulations, and particularly the impugned provisions, which are said to be *ultra vires*. The issue is not whether, in the Court's view, the new Regulations constitute sound policy.

[41] As a key factual claim in this instance, the applicants invite the Court to conclude that the essential or dominant purpose of the new Regulations was to transfer an economic benefit to dairy producers at the expense of dairy processors. Indeed, the applicants assert that the main purpose of the impugned provisions is to provide an ongoing market for protein sourced directly from raw milk by controlling the production of cheese. This, according to the applicants, brings higher returns to producers than the alternative milk protein markets, such as animal feed.

[42] I have carefully considered the extrinsic evidence filed by the applicants in support of their claim that the essential or dominant purpose of the new Regulations is to transfer an economic benefit to dairy producers at the expense of dairy processors. I have found the material elements upon which the applicants heavily rely unpersuasive in the circumstances.

[43] The Governor in Council receives many submissions from a multitude of groups, each with its own views and interests. A deponent from a given interest group is not in a position to speak to what the Governor in Council ultimately considered. Thus, the evidence of Kempton Matte, a lobbyist for Saputo Inc., is but a thin slice of what may or may not have been considered, and is therefore of little assistance in ascertaining the intent of the Governor in Council.

[44] Evidence of proceedings of the executive are normally treated as strictly confidential and not generally placed on record in court proceedings. However, when a final draft regulation is submitted by the Privy Council Office for consideration, the RIAS is included. Approved regulations are registered and published along with the RIAS. The publication of the regulation in tandem with the RIAS, implies that the RIAS was consulted by ministers and indicates to the Court that the RIAS provides evidence of the purpose and intent of the executive arm of the federal government.

[45] The applicants do not dispute the object and purpose of the Parent legislations; neither their constitutionality nor their legality are at issue in this case. The RIAS provides conclusive evidence in this case that the new Regulations were passed by the Governor in Council to carry out the purposes of the CAPA and the FDA. Indeed, the RIAS asserts that the new Regulations will: harmonize existing federal regulations; enhance consumer interests by reflecting the tradition of cheese making; allow for technological advances in cheese productions; and provide for consistency with certain international food standards, as appropriate.

### *Consumer Interests*

[46] The RIAS explains the essential purpose of having standards, including standards in respect of cheese from the perspective of protecting consumer interests:

In Canada, cheese compositional standards exist both in the FRD and in the DPR. The main purpose of these standards is to describe the basic requirements for cheese, so that cheese available to consumers has a consistent composition and characteristics. These Regulations describe the essential characteristics of cheese. Similar to other food compositional standards, those for cheese also include essential ingredients used in its manufacture, along with permitted additives.

Food standards provide a system through which consumer interests are protected and consumer expectations of a food are met. Foods may be defined or distinguished by their essential characteristics such as ingredients, compositional and physical properties, levels of certain nutrients, or the manner in which they are produced. Food standards are beneficial because they provide assurance to consumers of product uniformity, resulting in the expectation and belief that all products bearing a particular name will possess the same essential characteristics irrespective of where they are purchased, or by whom they are manufactured or distributed. Consumers have a lack of understanding of the ingredients used in cheese making and have identified that having uniform product names, with certain defined characteristics, is important to facilitate their purchase decision making as it allows them to distinguish one cheese from another. (Emphasis added.)

[47] The RIAS identifies the concern that, under the previous cheese standards, “the varietal name of the cheese was at risk of losing the organoleptic, chemical and physical properties typical for the variety.” “Organoleptic” refers to the smell, taste and texture of a food product. The RIAS also notes that the *status quo* did not adequately “reflect modern cheese-making practices while maintaining historical varietal distinctions.”

[48] The evidence submitted by the interveners is particularly instructive in this regard and corroborates the point of view expressed in the RIAS.

[49] Mr. Wathier, a Master Cheese Maker at St. Albert with four decades of experience in the industry, including experience as a cheese Judge and as a consultant to the applicant Parmalat, gave evidence concerning the impact of using milk derivatives on cheese quality. His evidence was that even small quantities of milk derivatives (up to 5%) could affect the taste, texture, and consistency of cheese compared to cheese made with fresh milk. The process of converting fresh liquid milk into a powdered milk derivative has an immediate impact on the taste, which is one of the reasons why, for example, consumers gravitate away from skim milk powder.

[50] As Mr. Wathier indicated in his affidavit, the new Regulations reflect a compromise. They preserve the flavour, smell, texture, and feel that consumers have come to expect when they buy a given variety of cheese, while still permitting varying amounts of powdered milk derivatives to be used, depending on the variety of cheese concerned.

#### *Harmonization of Existing Federal Regulations*

[51] As aforementioned, the compositional standards for cheese are subject to two different regulations, namely the FDR and the DPR. Prior to the new Regulations, inconsistencies had developed between the two regulations, which created a number of operational and compliance issues for both the dairy industry and the CFIA.

[52] For example, the FDR required that cheese be made only with milk, skim milk, partly skimmed milk, buttermilk, whey cream or cream, or these same ingredients in their concentrated, dried, or reconstituted form. The DPR, on the other hand, made allowance for these same ingredients, as well as whey, butter, butter oil, whey butter, whey protein concentrates, and other milk solids. The inclusion of the words “other milk solids” in the DPR gave rise to legal debate and uncertainty.

[53] The new Regulations harmonized the definition of the term “milk product” so that the ingredients that can be used to produce cheese receive equal treatment under both the FDR and the DPR.

#### *Greater Consistency with International Food Standards*

[54] The RIAS also constitutes evidence that the new Regulations will provide for a greater degree of consistency with international food standards.

[55] RIAS refers to the Codex Alimentarius Commission (Codex), an international body that sets food standards under the Food and Agriculture Organisation (FAO) of the United Nations. Codex creates a General Standard of Cheese (A6 General Standard) as well as individual standards for some specialized cheeses (C Standards). The A6 General Standard for cheese requires that the whey protein to casein ratio in cheese does not exceed the same ratio in milk. This is identical to the standard found in the new Regulations.

[56] With respect to the source of protein in cheese, as the RIAS points out, there is a great deal of variation in international standards. After taking into account these different standards, it is apparent that the Governor in Council enacted standards that, while more stringent than those in certain countries, provide greater flexibility for the use of milk derivatives in cheese than the standards in, for example, France or the United States.

*Allow for Technological Advances in Cheese Production*

[57] The RIAS considered the impact that the compositional standards in the new Regulations would have on technological advances.

[58] I accept the respondent's submission that the new Regulations allow technological advances in cheese production. In turn, there will be greater certainty to the technology that can be utilized by dairy processors. With the amendments introduced by the new Regulations, the FDR now allows for the use of more ingredients than in the past, which in turn allows for greater flexibility and innovation on the part of dairy processors.

*Long Term Growth of the Dairy Sector*

[59] The long term growth of the dairy sector was one of the policy issues the Governor in Council had to deal with in enacting the new Regulations. This proved to be a contentious subject, as the RIAS explained and as appears from the other extrinsic evidence filed by the parties in this proceeding.



[60] Extensive consultations have been taking place since the early 1990's between stakeholders and the AAFC and the CFIA with the goal of updating national standards for the dairy industry. In 1993, the Canadian Food Inspection System (CFIS), a collaborative initiative of all levels of government, was launched to develop an integrated Canadian food inspection system which would be responsive to, among others, consumers. Eight working committees, including the National Dairy Code Committee (NDCC), were formed and tasked with developing model regulations and codes with the aim of achieving national harmonization.

[61] As a result, in 1997, the National Dairy Code (NDC) was developed and approved, by all dairy stakeholders and government partners, to provide a national standard for the production of milk and the processing of dairy products in Canada.

[62] In 2003, HC and the CFIA reviewed and proposed amendments to the dairy product compositional standards in order to incorporate the concepts contained in the NDC. Public consultations were held with the CFIA and HC. Some stakeholders felt that individual standards specifying compositional and processing requirements should be established for each dairy product in order to have a meaningful standard with particular ingredients. Other stakeholders recognized the need for standards to be adaptable and supported the use of a number of different ingredients to produce safe and quality products for Canadians. In the end, the CFIA proposed a number of compromises to the compositional standards for cheese, but agreement between some stakeholders, namely the large dairy processors and the dairy producers, could be not reached.

[63] In 2005, the Minister of Agriculture and Agri-Food (the Minister) recognized that solutions to the many issues facing Canada's dairy industry, which included compositional standards for cheese, could only be developed by dairy producers and dairy processors working closely together. Consequently, in 2005, the Minister created the Dairy Industry Working Group (DIWG), an industry-led initiative, to work towards reaching common grounds on various dairy issues. The applicants were active participants in Dairy Processors Association of Canada (DPAC), one of the two groups forming part of DIWG. The Minister appointed a respected industry expert, Ted Bilyea, as moderator (the Moderator).

[64] The stated Guiding Principles developed within the DWIG were:

- Consumer focus/benefits
- Supports supply management
- Enables Growth
- Fact based analysis
- WTO/NAFTA compliant
- Encourages innovation
- Enable competitiveness
- Foster partnership

[65] While milk producers and dairy processors reached a consensus on the need for additional compositional standards for cheese, there were divergent views regarding permitted ingredients. Neither side wanted to be seen as making concessions before its membership and accordingly the assistance of the federal government was required to resolve the issue. This point was made by the Moderator:

Both sides want to break this cheese deadlock so that they can get on to other matters. But they need government, not themselves, to be seen to be setting the compositional standards.

[66] The Moderator's report advised the Minister that the main stumbling block in achieving consensus on the cheese standards was as follows:

The main stumbling block on cheese was the great divergence between what producers thought was the current and likely future usage of ingredients in cheese making and what processors claimed was the current and likely future usage. As the actual and potential usage affects the income of producers and processors, this divergence in understanding hampered a realistic assessment of the economic impact on the compositional standards each side put on the table.

... It is also clear that processor estimates of usage include estimates of what they would expect to be using in the future but are not today...

[67] Following another round of DIWG meetings, and in the absence of consensus, a series of recommendations were made by the Moderator to the Minister. The Moderator recommended minimum percentages of casein derived from fresh liquid milk to produce various cheeses allowing the balance to be filled in with powdered milk derivatives. The ratios were based on what the Moderator believed to be current usage for powdered milk derivatives, based on various sources of information, including information received from AAFC.

[68] The Moderator suggested that, by signaling the intention to use these ratios, the government would invite dairy processors to provide information on the actual and intended usage of powdered milk derivatives, so that adjustments could be made, if required:

By articulating your intention to use these ratios in the clarification of dairy regulations on compositional standards, you would be inviting processors to confidentially reveal to government officials their actual ingredient usage, their intended usage, and the financial hit, if any, that would result from the implementation of these standards. Should any of the above suggestions be substantially offside with normal industry usage as of the commencement of the DIWG, which may come to light through private processor submissions, then some amendment to the ratios may be necessary.

[69] The ratios proposed by the Moderator were presented as a compromise between what was sought by the dairy processors and by the dairy producers:

These ratios may have an economic impact on producer income; but these ratios will not have as great an impact as the ratios proposed by processors.

These ratios may have an economic impact on processor profitability, upon their ability to attract new investment, and upon their flexibility to use technological advancements; but not as great as would be the case if producer proposed ratios were used in the compositional standards.

[70] The use of ratios as a means of imposing compositional standards was not novel to the industry and had been proposed by DPAC in 2000. This was ultimately rejected by the milk producers in 2001, but revived in some form by DIWG in 2007.

[71] Based on the evidence on record, the Court finds that the ratios proposed by the DIWG were meant to reflect usage. Those ratios were not based on what the Moderator believed to be the “highest ratios technically achievable by Canadian dairy processors.” What the Moderator actually said was that “I believe the ratios recommended more closely reflect actual current usage which both sides accepted as the ground rules.”

[72] The ratios as adopted in the new Regulations are summarized in the following chart:

Variety of cheese	Minimum percentage of casein content that is derived from milk, ultrafiltered milk, partly skimmed milk, ultrafiltered partly skimmed milk, skim milk, ultrafiltered skim milk or cream (as a percentage of the total protein content of cheese)
Pizza Mozzarella, Part Skim Pizza Mozzarella	63%
Asiago, Baby Edam, Baby Gouda, Butterkase, Bra, BrieCaciovallo, Camembert, Dando, Edam, Elbo, Emmental, Esrom, Feta, Fontina, Fynbo, Gouda, Gournay, Gruyère, Havarti, Kasserer, Limburger, Maribo, Montasio, Muenster, Neufchâtel, Parmesan, Provolone, Romano, St-Jorge, Saint-Paulin, Samsöe, Tilsiter, Tybo	95%
Cheddar, Brick, Canadian Style Brick, Colby, Farmer's, Jack, Monterey (Monterey Jack), Mozzarella (Scamorza), Part Skim Mozzarella (Part Skim Scamorza), Part Skim Pizza and any other variety of cheese not referred to	83%
Aged Cheddar Cheese	100%

[73] As indicated in the RIAS, the ratios proposed by the Moderator were used as the basis for the amendments to the compositional standards for different types of cheese. It should be noted, however, that the ratios contained in the new Regulations were not the same as those the Moderator had proposed, as adjustments were made that provided somewhat greater flexibility to processors.

#### *Benefits and Costs*

[74] As a standard part of the regulation-making process, the RIAS contained a section on benefits and costs associated with the new Regulations, notably, in respect of the financial impacts

on dairy processors and producers. Using assumed ratios of 60% for Mozzarella, 60% for Cheddar and Cheddar-types, and 80% for other varietal cheeses (i.e. assuming considerably higher use of milk derivatives than estimated by the DWIG Moderator), the economic model suggested an increase in cheese ingredient cost of \$71,463,471.00 and an increase in dairy producer revenue of \$185,673,610.00.

[75] The RIAS also observed that, in respect of dairy producers, the new Regulations “will stabilize the proportion of protein in cheese sourced directly from raw milk” and that “this brings higher returns to producers than alternative markets for milk protein (e.g. animal feed).”

[76] In respect of dairy processors, the RIAS observed that the impact on cheese processors would vary depending on the extent of their use of milk derivatives. It was also noted that there could be additional one-time costs to modify labels, as well as costs related to infrastructure adjustments, reformulation, innovation, and competitiveness.

[77] The additional flexibility provided for lower fat cheeses, as well as the clarification on the use of ultrafiltered milk, as it was suggested, will help to allay the increased costs for some processors. The one-year transition clause included in the amendments will also serve to mitigate some of the costs. In addition, the point was made that some of these costs might be recovered by passing them along the food value chain. The RIAS also referred to an estimate, provided by DPAC, of the impact of the new Regulations on direct sales of cheese to retail, food service, and industrial customers.

[78] At this point, the Court notes that the applicants have made reference to the World Trade Organization's (WTO) final ruling in December 2002, which prevented dairy producers from disposing of excess milk through export (the WTO ruling), and the Canadian International Trade Tribunal's decision in March 2005, which had the effect of allowing certain milk products to be imported at a lower rate of duty (the CITT decision). While these decisions may have been in the minds of the dairy processors and the dairy producers alike, these decisions were not mentioned in the RIAS. This undermines the applicants' contention that the dominant purpose or intent of the new Regulations, including the impugned provisions, is to address these decisions.

[79] A clear distinction must be drawn between the direct effects of legislation and its "consequential or incidental effects." Unless the effect is immediate, deliberate, and direct, it does not speak to the intended purpose of the legislation. It is only when the effect of the legislation so directly impinges on some other subject matter as to reflect some alternative or ulterior purpose that the effects themselves acquire analytical significance (*Le Dain*, "Sir Lyman Duff and the Constitution" (1974) 12 Osgoode Hall L.J., at pages 298-301; *RJR MacDonald Inc. v. Canada*, [1995] 3 S.C.R. 199, at paragraph 44).

[80] On a fair reading of the regulatory scheme as a whole, as amended by the new Regulations, it cannot be said in the Court's opinion that the essential or dominant purpose of the impugned provisions is to effect an economic transfer from dairy processors to dairy producers. The RIAS does acknowledge that there are benefits and costs associated with the new Regulations – it is after all an impact analysis statement. However, to equate the economic analysis of costs and benefits in

the RIAS with the dominant purpose of the new Regulations is to grossly distort the evidence and the legal character of the overall scheme of compositional standards for cheese.

[81] Another important aspect of the extrinsic evidence submitted by the applicants concerns the compliance approach and related formula developed by the CFIA, which would demonstrate that the impugned provisions are meaningless or impermissibly sub-delegate undue discretion to the CFIA.

[82] The efficacy of the impugned provisions is not a valid consideration in the pith and substance analysis the Court is called upon to make in assessing whether the new Regulations, including the impugned provisions, are laws in relation to inter-provincial and international trade (*Ward*, above, at paragraphs 16 and 18). But more importantly, the CFIA's proposed compliance approach does not form part of the new Regulations. Today, no proposed action or decision taken by the CFIA is legally before this Court or part of the present judicial review application.

[83] Finally, considering both the law and the evidence on record, the Court dismisses all constitutional and administrative grounds of attack alternately raised by the applicants or subsidiary to the arguments already addressed by the Court.

## **V. CONCLUSION**

[84] For the reasons mentioned above, the present judicial review application must fail.



[85] In summary, the Court has found that the main purpose of the revised compositional standards introduced by the new Regulations, including the impugned provisions, is to describe the basic requirements for cheese destined for inter-provincial or international trade, so that cheese available to consumers has a consistent composition and characteristics. Indeed, sections B.08.033 and B.08.034 of the FDR, and sections 6 and 28 of the DPR, respectively, describe the essential characteristics of cheese and Cheddar Cheese (including aged Cheddar Cheese), as the case may be. Similar to other food compositional standards, those for cheese and Cheddar Cheese also include essential ingredients used in its manufacture, along with permitted additives.

[86] Further, the Court has found that the new Regulations, including the impugned provisions, when assessed in their statutory context, are in pith and substance laws related to inter-provincial and international trade, and as such, fall within the federal legislative authority over trade and commerce pursuant to section 91(2) of the *Constitution Act, 1867*.

[87] Finally, the Court has also found that the new Regulations, including the impugned provisions, which prescribe cheese compositional standards, fall squarely under the clear and explicit regulation-making authority bestowed on the Governor in Council by the Parent legislations, namely section 32 of the CAPA and section 30 of the FDA.

[88] In conclusion, the compositional standards for cheese and Cheddar Cheese (and aged Cheddar Cheese), as the case may be, including the casein and whey ratios prescribed by the

impugned provisions, are in all respects constitutionally and legally valid inasmuch as they apply to cheese destined for inter-provincial or international trade (including cheese imported in Canada).

[89] Accordingly, the present application shall be dismissed with costs in favour of the respondent.

**JUDGMENT**

**THIS COURT ORDERS AND ADJUDGES that** the application for judicial review made by the applicants be dismissed with costs in favour of the respondent.

“Luc Martineau”

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Judge

*Food and Drug Regulations, SOR/78-840*

**B.08.033. (1) [S]. (Naming the variety)**  
**Cheese**, other than cheddar cheese, cream cheese, whey cheese, cream cheese with (named added ingredients), cream cheese spread, cream cheese spread with (named added ingredients), processed (named variety) cheese, processed (named variety) cheese with (named added ingredients), processed cheese food, processed cheese food with (named added ingredients), processed cheese spread, processed cheese spread with (named added ingredients), cold-pack (named variety) cheese, cold-pack (named variety) cheese with (named added ingredients), cold-pack cheese food, cold-pack cheese food with (named added ingredients), cottage cheese and creamed cottage cheese,

(a) shall

...

(i.1) except for feta cheese, have a casein content that is derived from milk or from ultrafiltered milk, partly skimmed milk, ultrafiltered partly skimmed milk, skim milk, ultrafiltered skim milk or cream, rather than from other milk products, that is at least the following percentage of the total protein content of the cheese, namely,

(A) 63 per cent in the case of Pizza Mozzarella cheese and Part Skim Pizza

**B.08.033. (1) [N]. Le fromage (indication de la variété)** autre que le fromage cheddar, le fromage à la crème, le fromage de petit-lait, le fromage à la crème (avec indication des ingrédients ajoutés), le fromage à la crème à tartiner, le fromage à la crème à tartiner (avec indication des ingrédients ajoutés), le fromage fondu (indication de la variété), le fromage fondu (indication de la variété) (avec indication des ingrédients ajoutés), une préparation de fromage fondu, une préparation de fromage fondu (avec indication des ingrédients ajoutés), le fromage fondu à tartiner, le fromage fondu à tartiner (avec indication des ingrédients ajoutés), le fromage conditionné à froid (indication de la variété), le fromage conditionné à froid (indication de la variété) (avec indication des ingrédients ajoutés), une préparation de fromage conditionné à froid, une préparation de fromage conditionné à froid (avec indication des ingrédients ajoutés), le fromage cottage et le fromage cottage en crème,

a) doit

[...]

(i.1) sauf pour le fromage Féta, avoir une teneur en caséine dérivée du lait ou du lait ultrafiltré, du lait partiellement écrémé, du lait partiellement écrémé ultrafiltré, du lait écrémé, du lait écrémé ultrafiltré ou de la crème, plutôt que de tout autre produit du lait, au moins équivalente aux pourcentages ci-après de la teneur totale en protéines du fromage :

Mozzarella cheese,

(B) 83 per cent, in the case of Brick cheese, Canadian Style Brick cheese, Canadian Style Munster cheese, Colby cheese, Farmer's cheese, Jack cheese, Monterey (Monterey Jack) cheese, Mozzarella (Scamorza) cheese, Part Skim Mozzarella (Part Skim Scamorza) cheese, Part Skim Pizza cheese, Pizza cheese, Skim milk cheese and any other variety of cheese not referred to in clause (A) or (C), and

(C) 95 per cent, in the case of any other variety of cheese named in the table to this section,

(i.2) have a whey protein to casein ratio that does not exceed the whey protein to casein ratio of milk,

...

(1.2) The reference to "83 per cent" in clause (1)(a)(i.1)(B) shall be read as "78 per cent", and the reference to "95 per cent" in clause (1)(a)(i.1)(C) shall be read as "90 per cent", with respect to the named variety of cheese if

(a) a statement or claim set out in column 4 of any of items 12 to 14, 16, 20, 21 and 45 of the table following section B.01.513 is shown on the label of the product as part of the common name; and

(b) the cheese has the characteristic flavour and texture of the named variety of cheese.

...

**B.08.034.** (1) [S]. Cheddar Cheese

(A) 63 %, dans le cas du fromage Pizza mozzarella ou Pizza mozzarella partiellement écrémé,

(B) 83 %, dans le cas du fromage de lait écrémé, Brick, Brick canadien, Colby, Farmer's, Jack, Monterey (Monterey Jack), Mozzarella (Scamorza), Mozzarella partiellement écrémé (Scamorza partiellement écrémé), Munster canadien, Pizza partiellement écrémé ou Pizza et des autres variétés de fromage non mentionnées aux divisions (A) ou (C),

(C) 95 %, dans le cas des autres variétés de fromage visées au tableau du présent article,

(i.2) avoir un rapport protéines de petit-lait à la caséine qui ne dépasse pas celui du lait,

[...]

(1.2) La mention « 83 % » dans la division (1)a(i.1)(B) vaut mention de « 78 % » et la mention « 95 % » dans la division (1)a(i.1)(C) vaut mention de « 90 % », dans le cas des variétés de fromage visées, si les conditions suivantes sont réunies :

a) la mention ou l'allégation figurant à la colonne 4 de l'un des articles 12 à 14, 16, 20, 21 et 45 du tableau suivant l'article B.01.513 est indiquée sur l'étiquette du produit dans le nom usuel de celui-ci;

b) le fromage a la saveur et la texture caractéristiques de la variété de fromage visée.

[...]

(a) shall

(i) be the product that is made by coagulating milk, milk products or a combination of those things with the aid of bacteria to form a curd and subjecting the curd to the cheddar process or any process other than the cheddar process that produces a cheese having the same physical, chemical and organoleptic properties as those of cheese produced by the cheddar process,

(i.1) have a casein content that is derived from milk or from ultrafiltered milk, partly skimmed milk, ultrafiltered partly skimmed milk, skim milk, ultrafiltered skim milk or cream, rather than from other milk products, that is at least 83 per cent of the total protein content of the cheese,

(i.2) have a whey protein to casein ratio that does not exceed the whey protein to casein ratio of milk, and

...

(c) shall not be labelled or advertised as cheddar cheese that has been aged unless

(i) it is made solely with milk, ultrafiltered milk, partly skimmed milk, ultrafiltered partly skimmed milk, skim milk, ultrafiltered skim milk or cream or a combination of those things, and

...

(1.2) The reference to “83 per cent” in subparagraph (1)(a)(i.1) shall be read as “78 per cent” if

**B.08.034. (1) [N]. Le fromage cheddar**

a) doit

(i) être le produit de la coagulation — à l’aide de bactéries — du lait, de produits du lait ou d’un mélange de ceux-ci, en vue de former un caillé soumis par la suite soit au procédé cheddar, soit à tout autre procédé qui donne du fromage possédant les mêmes propriétés physiques, chimiques et organoleptiques que le fromage produit par le procédé cheddar,

(i.1) avoir une teneur en caséine dérivée du lait ou du lait ultrafiltré, du lait partiellement écrémé, du lait partiellement écrémé ultrafiltré, du lait écrémé, du lait écrémé ultrafiltré ou de la crème, plutôt que de tout autre produit du lait, d’au moins 83 % de la teneur totale en protéines du fromage,

(i.2) avoir un rapport protéines de petit-lait à la caséine qui ne dépasse pas celui du lait,

[...]

c) ne peut être étiqueté et annoncé comme étant un fromage cheddar qui a été vieilli que s’il remplit les conditions suivantes :

(i) il est fait uniquement de lait, de lait ultrafiltré, de lait partiellement écrémé, de lait partiellement écrémé ultrafiltré, de lait écrémé, de lait écrémé ultrafiltré, de crème ou d’un mélange de ceux-ci,

[...]

(1.2) la mention « 83 % » au sous-alinéa (1)a(i.1) vaut mention de « 78 % », si les conditions suivantes sont réunies :

(a) a statement or claim set out in column 4 of any of items 12 to 14, 16, 20, 21 and 45 of the table following section B.01.513 is shown on the label of the product as part of the common name; and

(b) the cheese has the characteristic flavour and texture of cheddar cheese.

...

a) la mention ou l'allégation figurant à la colonne 4 de l'un des articles 12 à 14, 16, 20, 21 et 45 du tableau suivant l'article B.01.513 est indiquée sur l'étiquette du produit dans le nom usuel de celui-ci;

b) le fromage a la saveur et la texture caractéristiques du fromage cheddar.

[...]

*Dairy Products Regulations, SOR/2007-302*

**6(3)** Cheddar cheese shall be the product made by coagulating milk, milk products or a combination thereof with the aid of bacteria to form a curd and subjecting the curd to the cheddar process or any process other than the cheddar process that produces a cheese having the same physical, chemical and organoleptic properties as those of cheese produced by the cheddar process, and

...

(c) shall have

(i) a casein content that is derived from milk or from ultrafiltered milk, partly skimmed milk, ultrafiltered partly skimmed milk, skim milk, ultrafiltered skim milk or cream, rather than from other milk products, that is at least 83 per cent of the total protein content of the cheese, and

(ii) a whey protein to casein ratio that does not exceed the whey protein to casein ratio of milk; and

(d) shall not be designated as cheddar cheese that has been aged unless

(i) it is made solely with milk, ultrafiltered milk, partly skimmed milk, ultrafiltered partly skimmed milk, skim milk, ultrafiltered skim milk or cream or a combination of those things, and

...

**6 (3)** Le fromage cheddar est le produit de la coagulation, à l'aide de bactéries, du lait, de produits du lait ou d'un mélange de ceux-ci, en vue de former un caillé qui est ensuite soumis au procédé cheddar ou à un autre procédé qui donne un fromage possédant les mêmes propriétés physiques, chimiques et organoleptiques que le fromage produit par le procédé cheddar, et :

[...]

c) doit avoir :

(i) une teneur en caséine dérivée du lait ou du lait ultrafiltré, du lait partiellement écrémé, du lait partiellement écrémé ultrafiltré, du lait écrémé, du lait écrémé ultrafiltré ou de la crème, plutôt que de tout autre produit du lait, d'au moins 83 % de la teneur totale en protéines du fromage,

(ii) un rapport protéines de lactosérum à la caséine qui ne dépasse pas celui du lait;

d) ne peut être désigné comme étant un fromage cheddar qui a été vieilli que s'il remplit les conditions suivantes :

(i) il est fait uniquement de lait, de lait ultrafiltré, de lait partiellement écrémé, de lait partiellement écrémé ultrafiltré, de lait écrémé, de lait écrémé ultrafiltré, de crème ou d'un mélange de ceux-ci,

[...]



(5) The reference to “83 per cent” in subparagraph (3)(c)(i) shall be read as “78 per cent” if

(a) a statement or claim set out in column 4 of any of items 12 to 14, 16, 20, 21 and 45 of the table following section B.01.513 of the *Food and Drug Regulations* is shown on the label of the product as part of the common name; and

(b) the cheese has the characteristic flavour and texture of cheddar cheese.

...

**28(1)** (Naming the variety) Cheese, other than cheddar cheese, cream cheese, whey cheese, cream cheese with (named added ingredients), cream cheese spread, cream cheese spread with (named added ingredients), processed (named variety) cheese, processed (named variety) cheese with (named added ingredients), processed cheese food, processed cheese food with (named added ingredients), processed cheese spread, processed cheese spread with (named added ingredients), cold-pack (named variety) cheese, cold-pack (named variety) cheese with (named added ingredients), cold-pack cheese food, cold-pack cheese food with (named added ingredients), cottage cheese and creamed cottage cheese,

(a) shall

5) la mention « 83 % » au sous-alinéa (3)(c)(i) vaut mention de « 78 % », si les conditions suivantes sont réunies :

a) la mention ou l’allégation figurant à la colonne 4 de l’un des articles 12 à 14, 16, 20, 21 et 45 du tableau suivant l’article B.01.513 du *Règlement sur les aliments et drogues* est indiquée sur l’étiquette du produit dans le nom usuel de celui-ci;

b) le fromage a la saveur et la texture caractéristiques du fromage cheddar.

[...]

**28 (1)** Le fromage (indication de la variété) autre que le fromage cheddar, le fromage à la crème, le fromage de lactosérum, le fromage à la crème (avec indication des ingrédients ajoutés) le fromage à la crème à tartiner, le fromage à la crème à tartiner (avec indication des ingrédients ajoutés), le fromage fondu (indication de la variété), le fromage fondu (indication de la variété) (avec indication des ingrédients ajoutés), une préparation de fromage fondu, une préparation de fromage fondu (avec indication des ingrédients ajoutés), le fromage fondu à tartiner, le fromage fondu à tartiner (avec indication des ingrédients ajoutés), le fromage conditionné à froid (indication de la variété), le fromage conditionné à froid (indication de la variété) (avec indication des ingrédients ajoutés), une préparation de fromage conditionné à froid, une préparation de fromage conditionné à froid (avec indication des ingrédients ajoutés), le fromage cottage et le fromage cottage en crème,

a) doivent

...

(i.1) except for feta cheese, have a casein content that is derived from milk or from ultrafiltered milk, partly skimmed milk, ultrafiltered partly skimmed milk, skim milk, ultrafiltered skim milk or cream, rather than from other milk products, that is at least the following percentage of the total protein content of the cheese, namely,

(A) 63 per cent, in the case of Pizza Mozzarella cheese and Part Skim Pizza Mozzarella cheese,

(B) 83 per cent, in the case of Brick cheese, Canadian Style Brick cheese, Canadian Style Munster cheese, Colby cheese, Farmer's cheese, Jack cheese, Monterey (Monterey Jack) cheese, Mozzarella (Scamorza) cheese, Part Skim Mozzarella (Part Skim Scamorza) cheese, Part Skim Pizza cheese, Pizza cheese, Skim Milk cheese and any other variety of cheese not referred to in clause (A) or (C), and

(C) 95 per cent, in the case of any other variety of cheese named in the table to this section,

(i.2) have a whey protein to casein ratio that does not exceed the whey protein to casein ratio of milk,

...

(4) The reference to "83 per cent" in clause (1)(a)(i.1)(B) shall be read as "78 per cent", and the reference to "95 per cent" in clause (1)(a)(i.1)(C) shall be read as "90 per cent", with respect to the named variety of cheese if

[...]

(i.1) sauf pour le fromage Feta, avoir une teneur en caséine dérivée du lait ou du lait ultrafiltré, du lait partiellement écrémé, du lait partiellement écrémé ultrafiltré, du lait écrémé, du lait écrémé ultrafiltré ou de la crème, plutôt que de tout autre produit du lait, au moins équivalente aux pourcentages ci-après de la teneur totale en protéines du fromage :

(A) 63 %, dans le cas du fromage Pizza mozzarella ou Pizza mozzarella partiellement écrémé,

(B) 83 %, dans le cas du fromage de lait écrémé, Brick, Brick canadien, Colby, Farmer's, Jack, Monterey (Monterey Jack), Mozzarella (Scamorza), Mozzarella partiellement écrémé (Scamorza partiellement écrémé), Munster canadien, Pizza partiellement écrémé ou Pizza et des autres variétés de fromage non mentionnées aux divisions (A) ou (C),

(C) 95 %, dans le cas des autres variétés de fromage visées au tableau du présent article,

(i.2) avoir un rapport protéines de lactosérum à la caséine qui ne dépasse pas celui du lait,

[...]

(4) La mention « 83 % » dans la division (1)a(i.1)(B) vaut mention de « 78 % » et la mention « 95 % » dans la division (1)a(i.1)(C) vaut mention de « 90 % », dans le cas des variétés de fromage visées, si les

(a) a statement or claim set out in column 4 of any of items 12 to 14, 16, 20, 21 and 45 of the table following section B.01.513 of the *Food and Drug Regulations* is shown on the label of the product as part of the common name; and

(b) the cheese has the characteristic flavour and texture of the named variety of cheese.

...

conditions suivantes sont réunies :

a) la mention ou l'allégation figurant à la colonne 4 de l'un des articles 12 à 14, 16, 20, 21 et 45 du tableau suivant l'article B.01.513 du Règlement sur les aliments et drogues est indiquée sur l'étiquette du produit dans le nom usuel de celui-ci;

b) le fromage a la saveur et la texture caractéristiques de la variété de fromage visée.

[...]

**FEDERAL COURT**

**NAME OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** T-1621-08

**STYLE OF CAUSE:** **SAPUTO INC. and KRAFT CANADA INC. and  
PARMALAT CANADA INC. v. THE ATTORNEY  
GENERAL OF CANADA and ST. ALBERT CHEESE  
COOPERATIVE INC. and INTERNATIONAL  
CHEESE COMPANY LTD.**

**PLACE OF HEARING:** Ottawa, Ontario

**DATE OF HEARING:** March 31, 2009

**REASONS FOR JUDGMENT  
AND JUDGMENT:** Martineau J.

**DATED:** October 7, 2009

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