Date: 20110228

Docket: A-456-09

Citation: 2011 FCA 69

CORAM: LÉTOURNEAU J.A.
NADON J.A.
MAINVILLE J.A.

BETWEEN:

SAPUTO INC. and KRAFT CANADA INC.

Appellants

and

THE ATTORNEY GENERAL OF CANADA

Respondent

and

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

Interveners

Heard at Ottawa, Ontario, on February 09, 2011.

Judgment delivered at Ottawa, Ontario, on February 28, 2011.

REASONS FOR JUDGMENT BY: MAINVILLE J.A.

CONCURRED IN BY: LÉTOURNEAU J.A.
NADON J.A.

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REASONS FOR JUDGMENT

MAINVILLE J.A.

[1] This is an appeal from the judgment of Martineau J. cited as 2009 FC 1016 ("Reasons") which dismissed the appellants' judicial review application seeking declaratory relief and challenging on various constitutional and administrative law grounds subsections and paragraphs B.08.033(1)(a)(i.1) and (i.2), B.08.033(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 *Food and Drug Regulations*, C.R.C. c. 870 as well as subsections and paragraphs 6(3)(c), 6(3)(d)(i), 6(5), 28(1)(a)(i.1) and (i.2) and 28(4) of the *Dairy Products Regulations*, SOR/79-840, (collectively referred to herein as the "impugned Regulations").

[2] These provisions were adopted pursuant to the *Regulations Amending the Food and Drug Regulations and the Dairy Products Regulations*, SOR/2007-302, published in the *Canada Gazette*, Part II, Vol. 141, No. 26 at pp. 2778 and ff. on December 26, 2007, and came into force on December 14, 2008.

[3] The impugned Regulations prescribe that cheese imported into Canada or produced in Canada and marketed in international or interprovincial trade must have:

a. a certain percentage of casein content derived from liquid milks, and not from other milk products such as whey cream or milk powder (the "Casein Ratios"); and
b. a whey protein to casein ratio that does not exceed the whey protein to casein ratio of milk (the "Whey Ratio").

[4] The appellants assert that the essential or dominant purpose of the impugned Regulations is to effect an economic transfer in favour of dairy producers to the detriment of dairy processors by requiring the use of additional liquid milk in the production of cheese, with resulting substantial impacts on milk supply costs for dairy processors. Consequently, for the appellants, the impugned Regulations have little or nothing to do with international or interprovincial trade, and were adopted by the Governor in Council for an improper economic purpose, and are consequently beyond the

constitutional and legislative authority of the federal government. The appellants add that the impugned Regulations seek to control the production of cheese, a matter of provincial authority, are *ultra vires* their enabling statutes, and do not set objective and uniform standards.

[5] The respondent, supported by the interveners, asserts that the impugned Regulations are in pith and substance in relation to interprovincial and international trade, fall within the federal authority over the regulation of trade and commerce, and were properly adopted pursuant to explicit regulation-making authority under the *Food and Drugs Act*, R.S.C. 1985, c. F-27 and the *Canada Agricultural Products Act*, R.S.C. 1985, c. 20 (4th Supp.).

[6] The applications judge properly defined the issues at paragraph 9 of his Reasons. For the purposes of this appeal, I restate these issues as follows:

a. Did the applications judge err in finding that the impugned Regulations were validly adopted under the federal trade and commerce power set out in subsection 91(2) of the *Constitution Act, 1867*?

b. If the answer to the first question is no, did the applications judge err in finding that the impugned Regulations were a valid exercise of the regulation-making authority of the Governor in Council under the *Canada Agricultural Products Act* and the *Food and Drugs Act?*

[7] For the reasons further set out below, I would answer "no" to both questions, conclude that the applications judge committed no reviewable error in his findings, and consequently dismiss this appeal.

Standard of review

[8] An application for judicial review under sections 18 and 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7 is the proper procedure for challenging the validity of a regulation made by the Governor in Council: *Novopharm Limited v. Eli Lilly Canada inc.*, 2009 FCA 138, 393 N.R. 38 at para. 10; *Canada v. Canadian Council for Refugees*, 2008 FCA 229, [2009] 3 F.C.R. 136 at paras. 55-63 (leave to appeal refused) ("*Canadian Council for Refugees*"); *Moktari v. Canada (Minister of Citizenship and Immigration)*, [2000] 2 F.C. 341 at para. 4 (F.C.A.). Accordingly, the appellants brought an application for judicial review in the Federal Court seeking declaratory relief (Notice of Application, Appeal Book, Vol. 1, pp. 69-89).

[9] Understanding what is in issue assists in determining the standard of review: *Canadian Council for Refugees* at para. 57. Like in *Canadian Council for Refugees*, this is an attack on the impugned Regulations *per se*, not the Governor in Council's "decision" to promulgate them. In substance, therefore, the Court is not dealing with judicial review of administrative action, to which the principles established in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 apply, but with appellate review of the decision of a judge of first instance deciding both a constitutional challenge to subordinate legislation as well as an administrative law challenge to the validity of

regulations brought by way of an application. In these circumstances, the principles of appellate review established in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 apply.

[10] The interpretation of the scope and extent of federal powers under the *Constitution Act, 1867* is subject to the correctness standard: *Housen v. Nikolaisen*, above at paras. 8-9; *Dunsmuir v. New Brunswick*, above at para. 58. Likewise, the determination of the validity of regulations on administrative law grounds is also subject to the correctness standard: *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, [2004] 1 S.C.R. 485 at para. 5; *Parks Canada v. Sunshine Village Corp.*, 2004 FCA 166, [2004] 3 F.C.R. 600 at para. 10; *Canada (Attorney General) v. Mercier*, 2010 FCA 167, 404 N.R. 275 at paras. 78-79.

[11] However, where it is possible to treat the constitutional analysis separately from the factual findings that underlie it, deference is owed to the initial findings of fact: *Consolidated Fastfrate Inc. v. Western Canada Council of Teamsters*, 2009 SCC 53, [2009] 3 S.C.R. 407 at para. 26; *CHC Global Operations (2008) Inc. v. Global Helicopter Pilots Association*, 2010 FCA 89, 401 N.R. 37 at para. 22.

Question # 1: Did the applications judge err in finding that the impugned Regulations were validly adopted under the federal trade and commerce power set out in subsection 91(2) of the Constitution Act, 1867?

[12] In order to answer this question, it must be determined if the impugned Regulations, "in pith and substance," fall under the federal power over the regulation of trade and commerce. This "pith and substance" analysis asks two questions: first, what is the essential character of the impugned

Regulations; second, does that character relate to an enumerated head of federal power: *Ward v. Canada (A.G.)*, 2002 SCC 17, [2002] 1 S.C.R. 569 at para. 16 ("*Ward*"); *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3 at paras. 25 to 27; *Chatterjee v. Ontario (Attorney General)*, 2009 SCC 19, [2009] 1 S.C.R. 657 at paras. 16 to 23.

The Essential Character of the Impugned Regulations

[13] In determining the essential character of the impugned Regulations, what must be determined is their true meaning or dominant feature. This is resolved by looking at their purpose and legal effect. In *Ward* at paras. 17 and 18, the Supreme Court of Canada proposed that the following considerations be taken into account:

> 17 The first task in the pith and substance analysis is to determine the pith and substance or essential character of the law. What is the true meaning or dominant feature of the impugned legislation? This is resolved by looking at the purpose and the legal effect of the regulation or law: see *Reference re Firearms Act*, [2000 SCC 31, [2000] 1 S.C.R. 783], at para. 16. The purpose refers to what the legislature wanted to accomplish. Purpose is relevant to determine whether, in this case, Parliament was regulating the fishery, or venturing into the provincial area of property and civil rights. The legal effect refers to how the law will affect rights and liabilities, and is also helpful in illuminating the core meaning of the law: see *Reference re Firearms Act*, *supra*, at paras. 17-18; *Morgentaler*, [[1993] 3 S.C.R. 463], at pp. 482-83. The effects can also reveal whether a law is "colourable", i.e. does the law in form appear to address something within the legislature's jurisdiction, but in substance deal with a matter outside that jurisdiction?: see *Morgentaler*, *supra*, at p. 496. In oral argument, Ward expressly made clear that he is not challenging the law on the basis of colourability.
>
> 18 The pith and substance analysis is not technical or formalistic: see P. W. Hogg, *Constitutional Law of Canada* (loose-leaf ed.), vol. 1, at p. 15-12. It is essentially a matter of interpretation. The court looks at the words used in the impugned legislation as well as the background and circumstances surrounding its enactment: see *Morgentaler*, *supra*, at p. 483; *Reference re Firearms Act*, *supra*, at para. 17. In conducting this analysis, the court should not be concerned with the efficacy of the law or whether it achieves the legislature's goals: see *RJR-*

> *MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 44, *per* La Forest J.; *Reference re Firearms Act*, *supra*, at para. 18.

[14] In circumstances such as here, where the subject of the challenge is discrete amendments to a comprehensive legislative and regulatory scheme, the analysis must take into account and be informed by the comprehensive scheme, since the essential character of the amendments may be otherwise lost if they are not properly understood as part of the integral scheme to which they belong: *Ward* at paras. 19 to 23; *Reference re Assisted Human Reproduction Act*, 2010 SCC 61 at paras. 16 to 18.

[15] Prior to the adoption of the impugned Regulations, cheese products marketed in import, export or interprovincial trade were already subject to detailed regulation under the *Dairy Products Regulations* and the *Food and Drug Regulations* as to their compositional standards, notably through standards concerning the maximum percentage of moisture and the minimum percentage of milk fat for various cheese products, and standards related to other ingredients which may be contained in various cheese types. These standards have not been challenged in the past, and are not now challenged by the appellants in these proceedings. The impugned Regulations now add to these compositional standards by requiring that cheese contain a minimum percentage of milk protein derived from liquid milk, the Casein Ratios, and by also requiring that the whey protein to casein ratio in cheese not exceed the ratio of whey protein to casein of milk, the Whey Ratio.

[16] The Casein Ratios vary with types of cheese. Thus, as an example, Pizza Mozzarella cheese must now have a minimum casein content of 63% derived from liquid milk products, and this minimum increases to 83% for Cheddar, Brick and other enumerated cheese varieties, to 95% for most other enumerated cheeses such as Asiago, Blue, or Camembert, and to 100% for "aged" Cheddar.

[17] The appellants argue that the sole or dominant purpose of these impugned Regulations is to favour Canadian dairy producers by ensuring an increased demand for liquid milk products to the detriment of other products such as whey cream and milk powder. The appellants' evidence on this matter rests largely on the affidavit of Kempton L. Matte, sworn October 17, 2008 (the "Matte affidavit"), a lobbyist for the Canadian dairy processing industry employed with the appellant Saputo Inc.

[18] The appellants' view, as set out in the Matte affidavit, can be briefly stated as follows:

a. a ruling of December 2002 by the World Trade Organization unfavourable to exports of liquid milk from Canada, followed by a ruling in March 2005 by the Canadian International Trade Tribunal lowering duties on certain powdered milk products, had an overall detrimental effect on Canadian dairy producers;
b. as a result of these rulings, certain federal initiatives were launched in order to address the concerns of dairy producers, notably the formation of a Dairy Industry Working Group bringing together Canadian dairy producers and processors in an effort to address the immediate concerns of dairy producers regarding the use of various ingredients, particularly milk protein concentrates, in the production of dairy products;
c. the Dairy Industry Working Group did not reach a consensus; nevertheless its moderator prepared a report for the concerned federal minister dated October 11, 2006 ("Moderator's Report") recommending regulatory modifications in order to establish a casein percentage content in cheese originating from liquid milk;

d. the recommendation in the Moderator's Report had no other purpose than to provide a unilateral economic benefit to Canadian dairy producers at the expense of dairy processors;
e. the impugned Regulations were adopted following the Moderator's Report, and largely followed the recommendations contained in that report;
f. the casein percentage content from liquid milk used in the impugned Regulations and proposed in the Moderator's Report was chosen solely for economic reasons based on what was believed by the moderator to be the highest ratios technically achievable by Canadian dairy processors;
g. the impugned Regulations are not required for consistency with any international food standards, will not allow for technical advances in cheese production, will not contribute to the organoleptic and physical properties of cheese, and will have an adverse financial impact on Canadian dairy processors.

[19] The appellants thus submit that the activities of the Dairy Industry Working Group ("Working Group") and the Moderator's Report resulting from the activities of this Working Group are clear proof that the intended purpose of the impugned Regulations was to bring about an economic transfer in favour of dairy producers to the detriment of dairy processors.

[20] The factual findings of the applications judge seriously undermine the appellants' assertions. Indeed, the applications judge discarded the appellants' evidence, including the Matte Affidavit, as unpersuasive (Reasons paragraphs 28, 42 and 57 to 79). The applications judge rather found that the purpose of the impugned Regulations was, in pith and substance, to establish compositional standards for cheese marketed in interprovincial or international trade (Reasons paragraphs 27 and 85). He also found that the impugned Regulations were adopted in order to a) address consumer expectations and interests as to the composition of cheese (Reasons paragraph 46); b) ensure the harmonization of the federal regulations respecting cheese products (Reasons paragraphs 51 to 53); and c) provide greater consistency with international food standards (Reasons paragraphs 54 to 56). Did the applications judge err in making these findings?

The economic transfer argument

[21] The applications judge discarded the appellants' evidence as unpersuasive and adopted an alternative view as to how and why the impugned Regulations were developed and eventually adopted. The appellants argue that in rejecting their evidence showing that the dominant purpose of the impugned Regulations was to carry out an economic transfer in favour of dairy producers to the detriment of dairy processors (Reasons paragraphs 42 and 57 to 79), the applications judge committed reviewable errors by discarding what they qualify as an "uncontested evidentiary record." For the reasons which follow, I find that the applications judge made no such reviewable errors.

[22] The appellants asked the applications judge, and are now asking this Court, to confuse the pith and substance of the impugned Regulations with their incidental economic effects. The applications judge correctly distinguished between the purposes of the impugned Regulations and the incidental impacts resulting from their implementation. The impugned Regulations will result in additional use of liquid milk products in the fabrication of cheese with consequent economic impacts on certain dairy processors, particularly those processors who relied on the prior *Dairy Products Regulations* rather than on the prior *Food and Drug Regulations*. However, save exception, the economic impacts of legislation or regulations usually have little bearing on their constitutionality, since "[i]t is the 'true nature and character of the Legislation' – not its ultimate economic results – that matters": *Re: Anti-Inflation Act*, [1976] 2 S.C.R. 373 at p. 389, adopting the Privy Council's statement in *Attorney-General of Saskatchewan v. Attorney-General of Canada*, [1949] A.C. 110; see also *R. v. Morgentaler*, [1993] 3 S.C.R. 463 at pp. 485-87.

[23] Though the practical effect of a statute or regulation may be considered in determining its constitutional validity, it is only when the effects of the statute or regulation so directly impinge on another subject matter as to reflect some alternative or ulterior purpose that the effects themselves take on analytic significance: *A.-G. for Alberta v. A.-G. for Canada*, [1939] A.C. 117; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at p. 358; *R. v. Morgentaler*, [1993] 3 S.C.R. 463 at p. 487; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199 at para. 44. Here, as found by the applications judge, the evidence simply does not support the appellants' claims that the dominant purpose or *raison d'être* of the impugned Regulations is to effect an economic transfer in favour of dairy producers.

[24] Though the World Trade Organization and Canadian International Trade Tribunal rulings may have been of concern to dairy producers, the record does not show that they played any important or dominant part in the development and adoption of the impugned Regulations. As found by the applications judge, the record rather shows that other concerns were at issue.

[25] The RIAS sets the adoption of the impugned Regulations within the historical development of national standards for the production of dairy products (RIAS at pages 2791-2792) and in the context of new technological advancements in the production of cheese which have resulted in the more extensive use of powdered milk products, with a consequent impact on the traditional or typical organoleptic, chemical and physical properties of various cheeses:

> Technological advances in cheese making have enabled the inclusion of higher levels of other milk solids in the manufacture of cheese, providing flexibility in achieving higher yields and economic savings. Furthermore, the standards of the DPR [*Dairy Products*

> *Regulations*] were broad and the varietal name of the cheese was at risk of losing the organoleptic, chemical and physical properties typical for the variety. (RIAS at p. 2790)

[26] Mr. Matte himself acknowledged these technical advances in his testimony of October 17, 2008 to the House of Commons Standing Committee on Agriculture and Agri-Food and set out as Exhibit KM-3 to his affidavit (page 301 of Appeal Book): "So we've been able, through the use of technology, to reintroduce the whey protein concentrate into cheese-making to the benefit of the industry. It reduces costs, and there are more efficiencies, and so on."

[27] Beyond their economic impacts, the technological advances allowing for "new technologies" proteins to be introduced into cheese raise two fundamental questions: first, what do these new technologies do to the organoleptic, chemical and physical properties of cheese; and second, does the current federal regulatory environment allow for the introduction of these products into cheese? As regards this last matter, it is useful to note that prior to the establishment of the Working Group, the dairy producers were relying on the terms of the *Food and Drug Regulations* to assert that these "new technologies" protein products were not contemplated by the existing regulatory regime and could <u>not</u> therefore be included in cheese, while the dairy processors were relying on the terms of the *Dairy Products Regulations* to assert the exact contrary.

[28] The Working Group was established by the concerned federal minister in order to encourage the industry to reach a consensus. The terms of reference for the Working Group were very broad and went beyond simply dealing with pricing and profitability issues. As noted in the news release issued by minister Strahl's office on April 15, 2005 announcing the formation of the Working group

(Record Book page 318), the mandate of the Working Group included not only the development of a strategy for growth in the industry, but also the development of "common positions on compositional standards for milk utilization and ingredients" in the dairy industry, in order notably to resolve the regulatory inconsistencies.

[29] The Moderator's Report also acknowledged that the Working Group's mandate was "comprehensive, ranging from resolving the immediate challenge of ingredient usage in dairy products to establishing collaboratively a long-term strategy for the industry that would be of benefit to dairy farmers, dairy processors and their customers" (Appeal Book at p. 321).

[30] Moreover, the Moderator's Report indicated that the main stumbling block to reaching a consensus at the Working Group was the divergent views as to the current and likely future usages of ingredients in cheese making, an issue closely related to technical advances: "[t]he main stumbling block on cheese was the great divergence between what producers thought was the current and likely usage of ingredients in cheese making and what processors claimed was the current and likely future usage." (Appeal Book at p. 322).

[31] In light of the failure to reach an industry consensus on compositional standards for cheese within the Working Group, the moderator made a recommendation to "[l]aunch the regulatory process to harmonize the regulations of the [Canada Agricultural Products] Act and Food and Drug[s] Act" (Appeal Book p. 322). He proposed that the regulatory harmonization between the conflicting regulations be achieved through allowing the casein content in cheese to be derived <u>both</u>

from liquid milk and from other derivative milk products through a percentage system based on the casein content from liquid milk. The recommended system determined by the moderator was meant to reflect the actual usage in the industry of liquid milk and of derivative milk products.

[32] Consequently, it is abundantly clear from the record that the evidence submitted by the appellants, including the Matte affidavit, did not properly describe either the history leading to the promulgation of the impugned Regulations or their true purposes. Rather, the Matte affidavit reflects the particular views and beliefs of an industry lobbyist. The applications judge made no reviewable error in finding this evidence to be unconvincing.

Consumer expectations and interests

[33] The RIAS specifically refers to consumer expectations and interests as factors for the adoption of the new harmonized federal cheese composition standards. As explained in the RIAS, cheese standards describe the basic requirements for cheese, so that cheese available to consumers has a consistent composition and characteristics so as to provide a system through which consumer interests are protected and consumer expectations are met: RIAS at pp. 2787-2788, Reasons para. 46. As already noted, the RIAS goes on to state that with the technological advances in cheese making, allowing for the inclusion of higher levels of other milk solids in the manufacture of cheese, and the broad standards under the *Dairy Products Regulations*, the varietal name of the cheese was at risk of losing the organoleptic, chemical and physical properties typical for the variety: RIAS at p. 2790, Reasons at para. 47.

[34] The appellants' dispute that consumer expectations and interests are at issue by asserting that the inclusion within cheese of proteins derived from new technologies does not in fact affect the organoleptic qualities of cheese products. Again, the evidence accepted by the applications judge does not support the appellants' assertions.

[35] Indeed, after considering the expert evidence submitted to him, the applications judge found that cheese smell, taste and texture may be affected by the use of substitutes to liquid milk products, even in small quantities. He accepted the abundant evidence submitted by the interveners concerning this matter, and notably the evidence of Mr. Wathier, an experienced Master Cheese Maker and cheese Judge (Reasons at paragraph 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 Parlamat, 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.

[36] The applications judge made no reviewable error in so finding.

<u>Harmonization of the federal regulatory environment respecting cheese products</u>

[37] The RIAS refers to the elimination of inconsistencies between the *Food and Drug Regulations* and the *Dairy Products Regulations* as one of the principal purposes for the adoption of the impugned Regulations. The applications judge agreed that this was indeed one of the principal purposes of these regulations (Reasons paras. 51 to 53). The appellants dispute this finding by

asserting that the impugned Regulations "harmonize nothing" as the Casein Ratios and Whey Ratio they set out are new (appellants' Memorandum at para. 44). Again, I cannot accept the appellants' contentions, which run counter to the evidence submitted to and accepted by the applications judge and to the terms of the *Food and Drug Regulations* and the *Dairy Products Regulations* as they read prior to the adoption of the impugned Regulations.

[38] For example, prior to the coming into force of the impugned Regulations, the *Dairy Products Regulations* allowed the use of "other milk solids" as an ingredient of cheese, while the *Food and Drug Regulations* required that cheese be made only with milk, skim milk, partly skimmed milk, buttermilk, whey cream, or these same ingredients in their concentrated, dried or reconstituted form, without reference to "milk solids." As already noted above, the dairy processors favoured the definition used in the *Dairy Products Regulations* which they interpreted as allowing them to use all milk solids, including those resulting from new technological advances, while the dairy producers favoured the definition in the *Food and Drug Regulations* which set out a more restrictive list of permitted ingredients.

[39] These regulatory inconsistencies were recognized in the dairy industry, were identified in Parliamentary research documents (*Compositional Standards for Cheese in Canada* - 26 December 2007 - Parliamentary Information and Research Service, pages 680 and ff. of the Appeal Book), were one of the principal reasons leading to the creation of the Working Group, which had a specific mandate to address these inconsistencies, and were recognized by the Governor in Council (RIAS at p. 2789).

[40] The *Regulations Amending the Food and Drug Regulations and the Dairy Products Regulations* not only introduced the impugned Regulations, but also provided for new definitions. Section 1 of the amending regulations replaced the definition of "milk product" in section B.08.001.1 of the *Food and Drug Regulations*, while section 5 thereof replaced the definitions of "milk product" and "milk solids" in section 2 of the *Dairy Products Regulations*. These amendments eliminated the prior inconsistencies between the two regulations by allowing cheese to be composed of any constituent of milk – other than water – singly or in combination with other constituents of milk.

[41] Consequently, the appellants' submissions that the new regulations did not seek to harmonize federal regulations concerning the composition of cheese are simply untenable, and the applications judge made no reviewable error in rejecting these submissions.

Greater consistency with certain international food standards

[42] The applications judge also found that one of the important purposes of the impugned Regulations was to ensure greater consistency with certain international food standards as stated in the RIAS. The appellants dispute this finding. Again, I find that the applications judge committed no reviewable error in so finding.

[43] The appellants are challenging two new standards for cheese composition set out in the impugned Regulations: i) the requirement for a certain percentage of casein content derived from liquid milks, and not from other milk protein sources such as whey cream and milk powder (the

Casein Ratios); and ii) a whey protein to casein ratio that does not exceed the ratio of whey protein to casein ratio of milk (the Whey Ratio).

[44] The *Codex Alimentarius Commission* was established in 1962 by the United Nations Food and Agricultural Organization and the World Health Organization to prepare international food standards, recommendations and guidelines with a view to protecting consumer health, ensuring fair trade practices and facilitating international trade: Raymond O'Rourke, *European Food Law*, 3rd ed. (London: Sweet and Maxwell, 2005) at 14-019. This Commission has notably developed a *Codex General Standard for Cheese* (Codex Stan A-6-1978, Rev.1-1999, Amended 2006, reproduced at pp. 372 and ff. of the Appeal Book). This international standard provides for the following regarding a whey ratio in cheese:

> 2.1 Cheese is the ripened or unripened soft, semi-hard, hard, or extra-hard product, which may be coated and <u>in which the whey protein/casein ratio does not exceed that of milk</u>, … [emphasis added]

[45] This is precisely the new Whey Ratio referred to in the impugned Regulations and which the appellants challenge. Indeed, subsections 3(1), 6(1) and 11(1) of the *Regulations Amending the Food and Drug Regulations and the Dairy Products Regulations* introduce a new subparagraph B.08.033(1)(a)(i.2) in the *Food and Drug Regulations* and new subparagraphs 6(3)(c)(ii) and 28(1)(a)(i.2) into the *Dairy Products Regulations* which provide that cheese must "have a whey protein to casein ratio that does not exceed the whey protein to casein ratio of milk."

[46] It is thus abundantly clear that the impugned Regulations do indeed seek to achieve greater consistency with certain international food standards, and the applications judge consequently made no reviewable error in so finding.

[47] Moreover, as noted by the applications judge, with regard to the Casein Ratios, there is a great deal of variation in various jurisdictions, and though the Casein Ratios adopted under the impugned Regulations may be more stringent than those of certain countries, they allow more flexibility for the use of milk derivatives than many other jurisdictions (Decision para. 56; RIAS at p. 2788 and at p. 2790 *in fine*).

Conclusion on pith and substance

[48] I therefore conclude that, in light of new technological advances allowing for an increase in protein products from milk derivatives in cheese content, the impugned Regulations are concerned with ensuring a balance between these “new technologies” proteins and traditional liquid milk protein in the contents of cheese marketed in import, export or interprovincial trade, and that they were adopted with a view to a) harmonizing existing federal regulations concerning the use of such protein products, b) enhancing consumer interests by protecting the traditional organoleptic, chemical and physical properties of cheese, c) allowing for technological advances in cheese production through compositional requirements which permit to a limited extent new technologies proteins in cheese content, and d) providing consistency with certain international food standards.

Do the pith and substance of the impugned Regulations fall within the federal power to regulate trade and commerce?

[49] Having determined the pith and substance of the impugned Regulations, it must now be asked whether they fit within the federal power to regulate trade and commerce. The appellants contend that they do not since, in their view, they concern the regulation of cheese production, a matter falling under provincial authority. It should be noted here that only the first branch (the international and interprovincial branch as opposed to the second or "general" branch) of the federal trade and commerce power is at issue in this appeal.

[50] One of the fundamental purposes of the Canadian federation was, and still is, to facilitate trade and commerce among the various provinces and territories, and to ensure continued and improved access to international markets for Canadian businesses. This fundamental purpose is reflected in section 121 of the *Constitution Act, 1867* which effectively provides for the free trade of all articles of growth, produce or manufacture among all the provinces. Moreover, this fundamental purpose is also reflected in subsection 91(2) of the *Constitution Act, 1867*, which entrusts Parliament with the important responsibility of regulating international and interprovincial trade and commerce.

[51] Consequently, section 121 and subsection 91(2) of the *Constitution Act, 1867* are two interrelated facets of Canada's Constitution, and they both seek to facilitate Canada's economic union and prosperity through an effective and efficient Canada-wide free and common market for all products of growth, production or manufacture: *Black v. Law Society of Alberta*, [1989] 1 S.C.R. 591 at pp. 608-09.

[52] A Canadian common market requires that interprovincial and international trade regulations that support it be adopted at the federal level. I hold no doubt that this includes the ability to regulate standards for products, including compositional characteristics for food products, marketed for international or interprovincial trade.

[53] Indeed, great economic benefits can be achieved by regulating the compositional characteristics of the products of trade, allowing producers, manufacturers and consumers to rely on a uniform quality standard for such products, thus increasing consumer confidence and ensuring fair and efficient market competition between industrial players, while increasing available markets. Thus, a consumer in Vancouver may buy a food product processed in Quebec with the confidence that the product meets the same compositional characteristics and standards as a competing product processed in Ontario. Likewise, processors in Alberta can produce a similar food product meeting standardized characteristics in order to enter into competition on a level playing field with rivals in other provinces. Moreover, composition and quality regulations can boost Canadian exports by assuring foreign purchasers that they are being supplied with products purchased anywhere in Canada that meet minimum quality and consistency standards. These are but some of the important economic benefits resulting from composition and quality standards set at a central economic and political regulatory level.

[54] Though the jurisprudence concerning the authority to regulate trade and commerce in Canada has developed somewhat haphazardly, it now appears incontestable that federal legislation may validly regulate the compositional characteristics of food products destined for international or

interprovincial trade: *Attorney-General for Manitoba v. Manitoba Egg and Poultry Association et al.*, [1971] S.C.R. 689; *Dominion Stores Ltd. v. R.*, [1980] 1 S.C.R. 844 at pp. 865-66 (upholding the validity of the interprovincial and international trade program aspects of a grading system while striking down its purely intra-provincial aspects). As early as in *The King v. Eastern Terminal Elevator Co.*, [1925] S.C.R. 434, Duff J. recognized the overriding federal authority to regulate food product standards to protect external trade, at pp. 446:

> It is undeniable that one principal object of this Act is to protect the external trade in grain, and especially in wheat, by ensuring the integrity of certificates issued by the Grain Commission in respect of the quality of grain, and especially of wheat; and the beneficent effect of the legislation as a whole is not in dispute by anybody. I do not think it is fairly disputable, either, that the Dominion possesses legislative powers, in respect of transport (…); in respect of weight and measures; in respect of trade and commerce, interpreted as that phrase has been interpreted; which would enable it effectively, by properly framed legislation, to regulate this branch of external trade for the purpose of protecting it, by ensuring correctness in grading and freedom from adulteration, as well as providing for effective and reliable public guaranties as to quality.

[55] Canadian courts have had to struggle with the difficult interrelation between the federal authority under subsection 91(2) of the *Constitution Act, 1867* concerning the regulation of trade and commerce and the provincial authorities over property and civil rights and matters of a merely local or private nature in a province under subsections 92(13) and 92(16). The solution, which has stood the test of time, has been to recognize that the federal authority under the first branch of the trade and commerce power is restricted to international and interprovincial trade and commerce: *Citizens' Insurance Co. v. Parsons* (1881), 7 App. Cas. 96; *The King v. Eastern Terminal Elevator Co.*; *Carnation Company Limited v. Quebec Agricultural Marketing Board et al.*, [1968] S.C.R. 238; *Caloil Inc. v. Attorney General of Canada*, [1971] S.C.R. 543; *Labatt Breweries of Canada Ltd. v. Attorney General of Canada*, [1980] 1 S.C.R. 914 at pp. 942-43 (*Labatt Breweries*). This

solution has fostered federal-provincial cooperation in the field of trade and commerce, while recognizing the lead role played by the federal government in regulating both a common Canadian market (interprovincial trade and commerce) and the flow of Canadian products into foreign markets and of foreign products into Canada (international trade and commerce).

[56] This federal-provincial cooperation has been particularly strong in the field of food products standards, notably as concerns dairy products. A National Dairy Code has been developed by federal, provincial and territorial governments to provide national standards for the production of milk and processing of dairy products. This federal-provincial cooperation is also clearly evidenced by numerous provincial regulatory schemes which refer to the *Food and Drug Regulations* or the *Dairy Products Regulations* as the primary standards for dairy products, notably in Quebec, Manitoba, Saskatchewan and Alberta: *Regulation respecting food*, R.R.Q. 1981, c. P-29, r.1, s. 11.8.6; *Dairy Regulation*, Man. Reg. 203/87 R, ss. 58-62; *Dairy Manufacturing Plant Regulations*, Sask. Reg. 53 79, ss. 22-27; *Dairy Industry Regulation*, Alta. Reg. 139/1999, ss. 43, 63.

[57] The appellants correctly state that the regulation of production, including where primary agricultural products are transformed into other food products, is *prima facie* a local matter of provincial jurisdiction: *Reference re Agricultural Products Marketing*, [1978] 2 S.C.R. 1198 at 1293-94 (*Egg Reference*). This position in the *Egg Reference* was however qualified by Pigeon J., writing for the majority in that case, by noting that the control of interprovincial trade fell under federal authority, and that federal-provincial cooperation was often important in ensuring proper trade regulations (at p. 1296):

> This does not mean that such power is unlimited, a province cannot control extraprovincial trade, as was held in *Manitoba Egg Reference* [[1971] S.C.R. 689] and in the *Burns Food* case [[1975] 1 S.C.R. 494]. However, "Marketing" does not include production and therefore, provincial control of production is *prima facie* valid. In the instant case, the provincial regulation is not aimed at controlling the extraprovincial trade, it is only complementary to the regulations established under federal authority. In my view this is perfectly legitimate, otherwise it would mean that our Constitution makes it impossible by federal-provincial cooperative action to arrive at any practical scheme for the orderly and efficient production and marketing of a commodity which all governments concerned agree requires regulation in both intraprovincial and extraprovincial trade.

[58] The constitutional validity of a trade statute or regulation depends on 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. In determining this matter, Estey J. in *Labatt Breweries* at pp. 942-43 stated that incidental effects on the powers of the other level of government will not necessarily lead to the conclusion that the statute or regulation is unconstitutional:

> With respect to legislation relating to the support, control or regulation of the various levels or components in the marketing cycle of natural products, 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.

[59] In *Fédération des producteurs de volailles du Québec v. Pelland*, 2005 SCC 20, [2005] 1 S.C.R. 292 at para. 31, Abella J., writing for a unanimous Supreme Court, reiterated this approach

by concluding that a reviewing court is required to focus on the core character of the impugned legislation, particularly where laws enacted under the jurisdiction of one level of government overflow or have an incidental impact on the jurisdiction of the other level of government.

[60] If the essential character of the impugned legislation falls within federal legislative authority, merely incidental effects on provincial jurisdiction will not invalidate the legislation: *Canadian Western Bank v. Alberta*, *supra* at paras. 28 to 30; *Chatterjee v. Ontario (Attorney General)*, above at paras. 2, 29-30; *Caloil Inc. v. Attorney General of Canada*, [1971] S.C.R. 543 at pp. 549-50.

[61] The essential character of the impugned Regulations is to set compositional standards for cheese marketed in import, export or interprovincial trade, and they do not *prima facie* seek to control the production or the manufacturing of dairy products such as cheese. The impugned regulations were adopted under the *Canada Agricultural Products Act* and the *Food and Drugs Act* pursuant to legislative provisions which are clearly limited in scope to interprovincial and international trade.

[62] Section 17 of the *Canada Agricultural Products Act* is strictly limited to import, export and interprovincial trade:

> **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

> **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

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. [Emphasis added]	présente loi ou ses règlements de même que la possession à ces fins ou la possession résultant d'une telle commercialisation

[63] The Governor in Council adopted the *Dairy Products Regulations* under the *Canada Agricultural Products Act* in order to regulate dairy products, including cheese, strictly for purposes of international and interprovincial trade. Sections 2.1 and 2.2 of these regulations are instructive:

2.1 Where a grade or standard is established under these Regulations for a dairy product, no person shall market any product in import, export or interprovincial trade in such a manner that the product is likely to be mistaken for the dairy product.	**2.1** Dans le cas où une catégorie ou une norme est établie par le présent règlement pour un produit laitier, est interdite la commercialisation — soit interprovinciale, soit liée à l'importation ou l'exportation — d'un produit de telle manière qu'il puisse être confondu avec le produit laitier.
2.2 (1) Subject to subsections (2) and (3), no person shall market a dairy product in import, export or interprovincial trade as food unless the dairy product (*a*) [Repealed, SOR/2004-80, s. 6] (*b*) is not contaminated; (*c*) is edible; (*d*) is prepared in a sanitary manner; and (*e*) meets all other requirements of the *Food and Drugs Act* and the *Food and Drug Regulations* with respect to the dairy product.	**2.2** (1) Sous réserve des paragraphes (2) et (3), est interdite la commercialisation — soit interprovinciale, soit liée à l'importation ou l'exportation — d'un produit laitier en tant qu'aliment, sauf s'il : *a*) [Abrogé, DORS/2004-80, art. 6] *b*) n'est pas contaminé; *c*) est comestible; *d*) est conditionné hygiéniquement; *e*) satisfait aux autres exigences de la *Loi sur les aliments et drogues* et du *Règlement sur les aliments et drogues* applicables à ce produit.
[Emphasis added]	[Soulignement ajouté]

[64] Subsections 6(1) and (3) of the *Food and Drugs Act* use similar language by restricting the scope of a standard adopted for food to imports and interprovincial trade:

6. (1) Where a standard for a food has been prescribed, no person shall (*a*) import into Canada, (*b*) send, convey or receive for conveyance from one province to another, or (*c*) have in possession for the purpose of sending or conveying from one province to another 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.	**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*) son importation; *b*) son expédition, son transport ou son acceptation en vue de son transport interprovincial; *c*) sa possession en vue de son expédition ou de son transport interprovincial.
(3) Where a standard for a food has been prescribed, no person shall label, package, sell or advertise any article that (*a*) has been imported into Canada, (*b*) has been sent or conveyed from one province to another, or (*c*) is intended to be sent or conveyed from one province to another in such a manner that it is likely to be mistaken for that food unless the article complies with the prescribed standard.	(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*) il a été importé; *b*) il a été expédié ou transporté d'une province à une autre; *c*) il est destiné à être expédié ou transporté d'une province à une autre.
[Emphasis added]	[Soulignement ajouté]

[65] It is noteworthy that section 6 was amended by Parliament to ensure that the regulatory scheme for compositional standards for food established under the *Food and Drugs Act* and its

regulations applied only to food products which fall within the limited scope of federal constitutional powers as found by the Supreme Court of Canada in the *Labatt Breweries* case: *An Act to amend the Food and Drug Act*, R.S. 1985, c. 27 (3rd Supp.), s.1; Patrick J. Monahan, *Constitutional Law*, 2nd ed. (Toronto: Irwin Law, 2002) at p. 283.

[66] Consequently, the effects of the impugned regulations are strictly limited to cheese products marketed for export, import or interprovincial trade. The impugned Regulations may incidentally affect production, but not more than any other compositional standard. Product standards almost always invariably incidentally affect how the concerned product will be produced, yet this does not mean that the standard is directed to production rather than to trade and commerce. To decide otherwise would result in the absurd proposition that no federal compositional standards could be adopted for food products marketed for import, export or interprovincial trade since almost all such standards incidentally affect the production of food products. Consequently, federal legislative authority to establish standards for food products marketed in export, import or interprovincial trade and which has an incidental effect on local production does not, on that account alone, become invalid.

Question # 2: Did the applications judge err in finding that the impugned Regulations were a valid exercise of the regulation-making authority of the Governor in Council under the* Canada Agricultural Products Act *and the* Food and Drugs Act*?

[67] Though this is clearly not the thrust of their appeal, in addition to their constitutional arguments the appellants also challenge the impugned Regulations on various administrative law grounds. First, they assert that the regulations are beyond the legislative purview of their parent

statutes. Second, they assert that the regulations are meaningless in that they do not set out objective and uniform standards.

[68] The appellants' challenge concerning the legislative purview of the parent statutes raises issues similar to those raised in their constitutional challenge: since, in the appellants' view, the "pith and substance" of the impugned Regulations is to effect an economic benefit to Canadian dairy producers at the expense of Canadian dairy processors, and since there is nothing in the *Food and Drugs Act* or in the *Canadian Agricultural Products Act* which purports to regulate profits or to transfer economic benefits from one sector of an industry to another, the impugned Regulations cannot fit within the regulation-making authority provided to the Governor in Council under those acts: appellants' memorandum paras. 120 to 122.

[69] This argument can be dismissed for the same reasons that have led to the rejection of the constitutional arguments of the appellants. The impugned Regulations seek in pith and substance to set compositional standards for cheese products marketed in import, export and interprovincial trade. Moreover, they have been validly adopted under clear regulation-making authority conferred notably by paragraphs 32(f) and (k) of the *Canadian Agricultural Products Act* (which empower the Governor in Council to make regulations establishing grades and standards for agricultural products and regulating the marketing of agricultural products in import, export and interprovincial trade), and by paragraphs 30(1)(b), (c) and (d) of the *Food and Drugs Act* which provide for similar regulation-making authority in regard to articles of food. For purposes of convenience, these legislative provisions are reproduced as follows:

Canada Agricultural Products Act

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;

Loi sur les produits agricoles au Canada

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;

Food and Drugs Act

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
[…]

(*b*) respecting
[…]

Loi sur les aliments et drogues

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

b) régir, afin d'empêcher que l'acheteur ou le consommateur d'un article ne soit trompé sur sa conception, sa fabrication, son efficacité, l'usage auquel il est destiné, son nombre, sa nature, sa valeur, sa composition, ses avantages ou sa

sûreté ou de prévenir des risques pour la santé de ces personnes, les questions suivantes :
[…]

(iv) the use of any substance as an ingredient in any food, drug, cosmetic or device, to prevent the purchaser or consumer thereof from being deceived or misled in respect of the design, construction, performance, intended use, quantity, character, value, composition, merit or safety thereof, or to prevent injury to the health of the purchaser or consumer;	(iv) l'emploi de toute substance comme ingrédient entrant dans la fabrication d'un aliment, d'une drogue, d'un cosmétique ou d'un instrument;
(*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;

[70] In oral argument before us, the appellants added to their memorandum by arguing that since the impugned Regulations do not address any health or public safety concerns, their provisions would be beyond the legislative scope set out under the *Food and Drugs Act*. I first note that even if this argument were correct, which it is not, it would be of little assistance to the appellants who would still need to contend with the terms of the *Dairy Products Regulations*, as amended by the impugned Regulations, and which were adopted pursuant to the *Canada Agricultural Products Act*.

[71] In any event, I acknowledge that the *Food and Drugs Act* is principally concerned with the protection of public heath and public safety in relation to food and drug products, and that its constitutional validity rests principally on the federal criminal law authority under subsection 91(27) of the *Constitution Act, 1867*: *Standard Sausage Co. v. Lee*, [1934] 1 W.W.R. 81 (BCCA); *R. v. Wetmore*, [1983] 2 S.C.R. 284; *C.E. Jamieson & Co. (Dominion) v. Canada (Attorney General)* (1987), 12 F.T.R. 167, 46 D.L.R. (4th) 582; *Apotex v. Canada (Health)*, 2010 FCA 334.

[72] Nevertheless, though the main thrust of the *Food and Drugs Act* is related to public health and safety, it also has important incidental trade and commerce aspects. As noted by Laskin C. J. in *R. v. Wetmore*, above, at p. 288, there are three categories of provisions in the act, and one of these, namely the marketing standards set out under that act, invite the application of the trade and commerce power:

> An examination of the various provisions of the *Food and Drugs Act* shows that it goes beyond mere prohibition to bring it solely within s. 91(27) but that it also involves a prescription of standards, including labelling and packaging as well as control of manufacture. The ramifications of the legislation, encompassing food, drugs, cosmetics and devices and the emphasis on marketing standards seem to me to subjoin a trade and commerce aspect beyond mere criminal law alone. There appear to be three categories of provisions in the *Food and Drugs Act*. Those that are in s. 8 are aimed at protecting the physical health and safety of the public. Those that are in s. 9 are aimed at marketing and those dealing with controlled drugs in Part III of the Act are aimed at protecting the moral health of the public. One may properly characterize the first and third categories as falling under the criminal law power but the second category certainly invites the application of the trade and commerce power.

[73] Subsections 6(1) and 6(3) and paragraphs 30(1)(b), (c) and (d) of the *Food and Drugs Act* notably provide that prescribed standards for food, including compositional requirements, may be adopted by the Governor in Council. In this case, no one asserts that the impugned Regulations seek to address a public health or public safety issue. Rather, the amendments brought to the *Food and Drug Regulations* by the impugned Regulations seek primarily to ensure their coherence with the amendments brought to the *Dairy Products Regulations*. Consequently, the constitutional authority for the impugned Regulations must be found elsewhere than in the criminal law power. The constitutional validity of the impugned Regulations rather rests on the federal power to regulate trade and commerce. The terms of paragraphs 30(1)(b), (c) and (d) of the *Food and Drugs Act* empower the Governor in Council to adopt the impugned Regulations on the basis of concerns related to the regulation of international and interprovincial trade, irrespective of any health or public safety concerns.

[74] Finally, I reject the appellants' alternative argument set out in paragraphs 124 to 127 of their memorandum and by which they assert that the impugned Regulations are meaningless, vest undue discretion in the Canadian Food Inspection Agency, and constitute an impermissible sub-delegation of regulation-making authority since they do not set out objective and uniform standards. I reject these arguments for the same reasons they were rejected by the applications judge at paragraphs 34 to 37 of his Reasons: the standards set out under the impugned Regulations are clear and unambiguous, and there is no foundation, in fact or in law, to the appellants' assertions concerning impermissible sub-delegation.

[75] Insofar as the appellants' alternative argument is related to the enforceability and policing of the impugned Regulations, I agree with the applications judge that such an attack was not properly before the Federal Court (Reasons para. 37) nor is it properly before us in this appeal. Nevertheless, insofar as it is useful to answer this argument, I find that the Casein Ratios and the Whey Ratio can be objectively enforced, the expert report of Dr. Goulet clearly concluding that there were a number of objective ways to ensure compliance (Appeal Book at pages 202 and ff.).

Conclusion

[76] For all of the above reasons, I would dismiss this appeal, with costs in favour of the respondent.

"Robert M. Mainville"
J.A.

"I agree
Gilles Létourneau J.A."

"I agree
M. Nadon J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-456-09
STYLE OF CAUSE:	**SAPUTO INC. and KRAFT CANADA INC. v. THE ATTORNEY GENERAL OF CANADA and ST-ALBERT CHEESE COOPERATIVE INC. and INTERNATIONAL CHEESE COMPANY LTD. (Interveners)**
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	February 9, 2011
REASONS FOR JUDGMENT BY:	MAINVILLE J.A.
CONCURRED IN BY:	LÉTOURNEAU J.A. NADON J.A
DATED:	February 28, 2011

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