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Date: MARCH 25, 2014

Name or Organization: FASKEN MARTINEAU DUMOULIN LLP

Are you a designated representative: Yes or No

If so, please identify the person or the organization you are representing:

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Please indicate the title of the Application: CANADIAN STRAWBERRY PROMOTION AND RESEARCH AGENCY

Please check the appropriate box:

- Submission Reply to Submission
 Comment Request to appear

If you are filing a submission, please indicate whether you are in support or opposition.

- Support
 Opposition

PLEASE RETURN YOUR DOCUMENT TO THE FOLLOWING:

Mail: Farm Products Council of Canada
 Central Experimental Farm
 960 Carling Avenue, Building 59
 Ottawa, Ontario K1A 0C6

Email: hearings-audiences@agr.gc.ca **Telephone:** 613-759-1165 **Fax:** 613-7591566

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March 25, 2014
File No.: 297489.00001/10447

By Email: hearings-audiences@agr.gc.ca

Farm Products Council of Canada
Central Experimental Farm
96 Carling Avenue, Building 59
Ottawa, ON
K1A 0C6

Dear Sirs:

Re: Application for the Creation of a Canadian Strawberry Promotion and Research Council

This is to advise you that we will be representing the California Strawberry Commission (the “**Commission**”) in the above captioned public hearings. The Commission is opposed to the application and we will be filing submissions in opposition to the application.

Two officials of the Commission will be attending as observers at the Vancouver hearing schedules for April 1, 2014 and will be appearing to make oral submissions and respond to the Panel’s questions at the hearing scheduled for April 23, 2014.

The two witnesses on behalf of the Commission are as follows:

Ms Christine B. Christian, Senior Vice President; and
Mr. Mark Martinez, Vice President, Public Policy.

The undersigned will be accompanying Ms Christian and Mr. Martinez, and may seek to cross-examine witnesses supporting the application.


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The Commission requests a two-hour time slot in which to make its presentation.

Yours truly,

FASKEN MARTINEAU DuMOULIN LLP



Peter Kirby

PK/dd





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March 28, 2014

Farm Products Council of Canada
Central Experimental Farm
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Building 59
Ottawa, Ontario
K1A 0C6

Attn: Chair Laurent Pellerin

Panel Members Tim O'Connor and Mike Pickard

Re: Canadian Strawberry Promotion and Research Council application

Dear Chairman Pellerin and Panel Members O'Connor and Pickard:

Thank you for the opportunity to express our opposition to the application by the *Association des producteurs de fraises et framboises du Québec* ("APFFQ") for the creation of a Canadian Strawberry Promotion and Research Council ("CSPRC").

The California Strawberry Commission (the "**Commission**") is created by the State of California to represent all of California's more than 400 family strawberry farmers. We also represent approximately 75 shippers and processors who market California strawberries. Our membership includes companies who are importers of record of strawberries in Canada, and we understand that they will be filing their own opposition to the APFFQ proposal.

One of the most striking differences between the California Strawberry Commission and the APFFQ's proposal for the CSPRC is that our Commission only imposes levies on our members - California farmers - but our work benefits all strawberry producers worldwide. The APFFQ proposal does the opposite, imposing costs on foreign producers and concentrating the benefits on domestic producers.

Our Commission does not impose any levies on imported strawberries. Rather, our approach has been to use our members' contributions to improve strawberry farming and encourage strawberry consumption for the benefit of strawberry producers everywhere.

Since the California Strawberry Commission was started as the California Strawberry Advisory Board in 1955, we have invested more than \$100 million in research and promotion and have made the resulting information freely available to our fellow farmers around the world.

While the California model imposes costs on domestic producers and provides benefit to all - foreign and domestic producers alike - the APFFQ proposal does the opposite. It would impose the vast majority of the cost on foreign producers and direct most of the benefit to domestic producers.

You can imagine how shocked we were to learn that the APFFQ was proposing to impose 80% of the annual program cost on California strawberry farmers and deny California farmers any participation in the Council.

We are concerned by the actions of the APFFQ and its supporters and wish to register the following comments in opposition:

- California strawberry farmers already pay for significant strawberry promotion and research efforts that benefit Canadian strawberry producers, researchers, customers, and consumers.
- The proposed tax on strawberry imports into Canada represents an additional cost to Canadian consumers.
- The creation of a CSPRC could harm valuable trade relations between Canada and the U.S.
- The proposal for the CSPRC unfairly imposes a financial burden on California farmers for something from which they will gain no benefit.
- The proposal for the CSPRC violates Canadian law and Canada's international trade obligations.
- The proposal for the CSPRC amounts to taxation without representation, effectively taxing California farmers without giving them a voice in the level of taxation or how the collected taxes will be spent.
- The proposal for the CSPRC would create a Council that lacks transparency and stakeholder inclusion.
- There is no need to establish a national promotion and research council for strawberries.

California strawberry farmers already pay for significant strawberry promotion and research efforts that benefit Canadian researchers, customers, and consumers.

The California Strawberry Commission is funded by levies paid by California strawberry farmers, shippers, and processors. However, the programs funded from this purely Californian assessment benefit strawberry producers and consumers around the world.

- The Commission has funded research and development at University of California to produce new strawberry varieties, all of which are in the public domain and are used around the world. In fact, there are a number of strawberry nurseries in Canada that receive new plant varieties from the U.S., propagate those plants and then sell them back to U.S. farmers.
- The Commission has funded \$21 million in production research since 1986, all of which is in the public domain, accessible through our website, through the University of California websites, and in peer-reviewed research annual reports.
- Since 2003, the Commission has funded \$3.0 million in nutrition research in the U.S. and internationally, the results of which are published in peer-reviewed scientific journals and available worldwide and via our website.
- The Commission's funding is not limited to research undertaken in California, or even the U.S. For example, David Jenkins, MD, PhD, of the University of Toronto, received funding from the Commission for a clinical study on the role strawberries play in cholesterol regulation. (Jenkins, et al, *Am J Clin Nutr* 2006; 83:582-91)
- The Commission's promotion efforts have not been limited to California or the U.S. Since 2005, the Commission has spent \$2 million in Canada with Canadian companies, including marketing and research firms, retailers, and national and regional trade associations. That money was spent to promote the consumption of strawberries in Canada, and our efforts continue to include the engagement of Canadian consumers in our North American promotional activities.

The proposed tax on strawberry imports into Canada represents an additional cost to Canadian consumers.

We concur with the position of the members of the Retail Council of Canada that the imposition of a tax on imported strawberries will result in an additional cost to consumers, making it more difficult to access a nutritious food. We are concerned that increasing the cost of a healthy food may discourage consumption. Additionally, any costs not passed onto consumers will fall onto farmers.

The creation of a CSPRC could harm valuable trade relations between Canada and the U.S.

Canada and the U.S. historically enjoy an excellent trading relationship, with California and Canada sharing seasonal fresh fruit markets without competing with each other in the marketplace. Maintaining this relationship is beneficial to both countries.

Of the \$2.2 million cost of the CSPRC proposal, \$1.9 million would be paid annually by a new border tax on imported strawberries. That figure is based on the fact that 86% of the strawberries sold in Canada come from the U.S., of which 80% are grown by California farmers. Not only will California farmers bear a disproportionately large share of the assessment cost, but this 86% of the revenue levied against importers to pay for the Council's programs may violate Canada's international trade obligations under the WTO and NAFTA trade agreements. Whether or not this is intentional, the creation of the CSPRC constitutes a trade barrier that may become a major irritant in Canada - U.S. trade relations.

The proposal for the CSPRC unfairly imposes a financial burden on California farmers for something from which they will gain no benefit.

The APFFQ's proposal for the CSPRC makes it clear that the major goal of the Council will be to increase the production and market share for Canadian strawberries, and those efforts will be funded by an import tax on U.S. strawberries. The proposal states that the CSPRC "*will provide opportunities to increase and consolidate the market share for Canadian strawberries...*" by accessing "*industry funding, which can be used to leverage government funding,*" and by developing "*promotional tools, tailored to producers and targeting all domestic strawberry marketing channels...*"¹ Both the proposed Vision and Mission statements clearly state that the purpose of the CSPRC will be to increase market share for the Canadian fresh strawberry industry through promotion.²

If there was any doubt that the proposal intends to tax foreign producers for the benefit of Canadian producers, the proposed CS PRC 2014-2019 Development Plan carries the astounding title *A Pivotal Development Tool for the Canadian Fresh Strawberry Industry - Strengthening Competitiveness and Increasing Market Presence*. In other words, the five-year development plan is a tool for the Canadian fresh strawberry industry to strengthen its competitiveness and to increase its market presence.

While the principal goal is to benefit domestic production, the funds to do that will come from foreign producers. Notes in the Development Plan state, "*The overall budget will be comprised of 14% domestic production and 86% imports.*"³

It is apparent that the CSPRC will not "*establish an equitable contribution system,*" but instead, will use import taxes to pay for domestic marketing and promotion.

The proposed CSPRC does not outline a governance structure based on fair representation, in its Board or committee structure, as the plan shows eleven Canadian growers and five importers on the Board, with four of the five importer seats being designated for Canadian retailers, and one seat for

¹ CSPRC Application, page 7.

² Canadian Strawberry Promotion and Research Council 2014-2019 Development Plan, page 2.

³ Ditto, page 1 and 6.

a wholesaler. One seat to a wholesaler “*representative of imports market share*”⁴ does not constitute an equitable contribution system, when 86% of the strawberries sold in Canada are imported.

The proposal for the CSPRC violates Canadian law and Canada’s international trade obligations.

We are providing separate legal submissions respecting the APFFQ’s proposal for a CSPRC, and that submission makes it clear:

- That the proposal does not meet the requirements of the *Farm Products Agencies Act*;
- That the proposal, if implemented, would violate the *Farm Products Agencies Act*, and
- The proposal violates Canada’s international trade obligations under both NAFTA and the WTO.

The proposal for the CSPRC amounts to taxation without representation, effectively taxing California farmers without giving them a voice.

The CSPRC clearly anticipates that importers will pass on the burden of the proposed tax on imported strawberries to the U.S. producers of those strawberries. As a producers’ organization, we are well aware that everyone involved in the supply chain from the producer to the retailer is reluctant to absorb new costs and will inevitably seek to pass those costs back to farmers in the form of lower prices for the farmer’s output. The APFFQ’s proposal recognizes this, suggesting that the levies on imported goods may be “covered through the arrangements with foreign suppliers.” Anyone familiar with the bargaining power of Canadian retailers - and we assume that the APFFQ is - will readily admit that their most likely reaction to an import levy on imported strawberries is to pass that cost back to producers.

Thus, the proposal contemplates that the real burden of the import tax will fall on U.S. producers (to the tune of 86% of the cost of the Council) and, particularly, on California producers (to the tune of 80%). The proposal creates a tax burden on California farmers but provides no mechanism whatsoever for California farmers to have a voice either in the rate of tax or how the funds collected will be spent. This is taxation without representation in its most egregious form.

The proposal for the CSPRC would create a council that lacks transparency and stakeholder inclusion.

The effort by the proponents of the CSPRC lacks transparency and has been difficult to access. The Commission initiated contact with the organizers after learning of the effort from a third party, and since then it has been difficult to maintain communication and receive updated versions of the proposal throughout the process. We are also concerned that several documents or emails characterize one of our major importers of record, and our own organization, as being in support of the Council when in fact we have made our opposition quite clear, both verbally and in email communication.

There is no need to establish a national promotion and research council for strawberries.

The CSPRC application discusses the decline in Canadian strawberry production, with the “*ever-increasing imports to Canada, and constant growth in California*” as one justification for creating the Council.⁵ The Vision for CSPRC is to “*provide the Canadian strawberry industry with a powerful*

⁴ Ditto, page 6.

⁵ Application submitted to the Farm Products Council of Canada, December 2013, p. 9.

*development tool to increase its competitiveness and its market presence.*⁶ The Mission of CSPRC is to *“strengthen the efficiency and competitiveness of the Canadian fresh strawberry industry...”*⁷

It is obvious that the Council’s goal is to promote domestic production and sales by taxing importers to pay for the research and promotion activities. We submit there is no need to create the Council due to several factors, supported by data included in the application and supporting documents, as well as in Statistics Canada, Census of Agriculture, 2001 and 2006.

While noting Canada’s strawberry production is declining, the APFFQ’s application fails to consider that total acreage given over to fruit production in Canada climbed 5.3% between 2001 and 2006, with blueberries replacing apple and strawberries in growers’ choices. In Quebec alone, blueberry acreage increased 24.5%.⁸ This trend reflects growers choosing to increase production of one fruit crop over another, based on market demand and economics.

If, as the Retail Council of Canada notes in their submission, “demand for domestic product already outpaces supply,” the answer is for Canadian growers to dedicate more acreage to strawberries, not try to convince consumers to buy more. If demand outstrips supply, you increase supply, not demand. In fact, as the graph on page 9 of the Application shows, imports to Canada are at highest levels only when domestic production is unavailable. Imported products cause no harm to Canadian producers. They actually benefit Canadian producers by maintaining dedicated shelf-space for strawberries, and maintaining strawberry awareness in consumers year round. Shelf-space is at a premium in Canadian supermarkets and seasonal products face significant hurdles every season. Because strawberries are present year round, there is always significant and available space for domestic retailers across Canada to buy domestic product in season over imported product and merchandise that product in an already established place in the produce aisles. Typically, when domestic strawberries are in season, the volume of imported strawberries declines significantly to make way for the local product.

The APFFQ’s application contains a chart of Monthly Strawberry Exports from the U.S. to Canada that demonstrate this effect. U.S. exports peak in May, and decline dramatically when domestic strawberries became available in June and July of each year.

I would be pleased to provide a statement on behalf of California strawberry farmers and importers of record at the April 23 hearing in Montreal. Thank you again for the opportunity to provide input, and please do not hesitate to contact me with any questions.

Sincerely,



Christine B. Christian
Senior Vice President
California Strawberry Commission

⁶ CSPRC 2014-2019 Development Plan, p. 2.

⁷ Ditto.

⁸ Statistics Canada website, <http://www.statcan.gc.ca/ca-ra2006/articles/snapshot-portrait-eng.htm>.

FARM PRODUCTS COUNCIL OF CANADA

In the Matter of an Application
For the Establishment of a
Canadian Strawberry Promotion and Research Council

Legal Submission on Behalf of the
California Strawberry Commission

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Introduction

1. These legal submissions are filed on behalf of the California Strawberry Commission in response to the application by the Association des producteurs de framboise et fraise du Québec (“APFFQ”) to seek the establishment of a Canadian Strawberry Promotion and Research Council (“CSPRC”).
2. The California strawberry Commission respectfully submits that the APFFQ’s application be rejected on the grounds that (i) the proposal fails to address the minimum requirements for the creation of a promotion-research agency under the *Farm Products Agencies Act* (R.S.C. 1985, c. F-4) (hereinafter the “Act”); (ii) the proposal calls for an agency that would be organized in violation of the Act; (iii) the proposal would violate Canada’s obligations under the World Trade Organization Agreements; and (iv) the proposal would violate Canada’s international obligations under the *North American Free Trade Agreement*.

A. The Application fails to address the minimum requirement for the creation of a promotion-research agency under the Act

3. Section 39 of the Act, states that the Governor in Council may establish a promotion-research agency only when it is satisfied:

... that the majority of the aggregate of the producers or, where an import trade in one or more farm products is to be included, the majority of the aggregate of the producers and importers, of all those farm products, in Canada or in the region in which the proclamation relates, is in favour of the establishment of such an agency.¹ (Emphasis added)

4. It goes without saying that any application for the establishment of a promotion-research agency that has power over imports should have as its central pillar, a reasoned demonstration that the proposed agency has the majority support of producers and importers required by Section 39 of the Act.
5. The APFFQ’s application makes no attempt to demonstrate that the proposal has the required majority support.
 - (i) **The APFFQ have failed to demonstrate producer support**
6. While the APFFQ claims in its application that some Canadian strawberry producers support the application, the application itself and the documents filed in support of it demonstrate that only a minority of Canadian producers support the creation of an agency for strawberries.
7. On page 4 of its application, the APFFQ states: “*Canadian domestic strawberry production is the work of over 2,200 producers from sea to sea*”.

¹ *Farm Products Agencies Act*, R.S.C. 1985, c. F-4, section 39.

8. Thus, according to the APFFQ - which has been working on this project since October 2012, and should, therefore, know - there are 2,200 Canadian strawberry producers. Consequently, in order for the APFFQ's to demonstrate that the majority of Canadian producers support the establishment of the agency, it must demonstrate the support of 1,051 Canadian producers.
9. In fact, the APFFQ's application only claims the support of 906 Canadian producers, or 41% of all Canadian producers, well short of a majority.
10. In a chart found at page 6 of the APFFQ's application, the association sets out information respecting provincial producers' associations, the number of members of each association and the number of growers in each province.² In all provinces but Quebec, there are more growers than there are members of each provincial association.
11. In a document filed by the APFFQ entitled *Canadian Strawberry Promotion and Research Council - Project Support and Summary Position - March 17th* the APFFQ sets out the positions each of nine provincial associations has taken on the APFFQ's proposal. Only six provincial associations have indicated support for the proposal. A vote of support from the Saskatchewan association is said "to follow". The associations in New Brunswick and Nova Scotia have indicated they do not support the proposal. There is no word from any association or grower in Newfoundland.
12. Putting the APFFQ's information from the two charts together, one can calculate the extent of Canadian strawberry producers support for the proposal and it is not overwhelming. It is not even a majority. The following chart sets out the positions taken by the provincial associations, and also indicates the number of producers that were members of those associations in 2012. It then provides a total of the number of supporting producers, counting any association's support as the support of all its members, but not of its non-members:

Province	Association	Members (2012)	Growers by Province 2011	Association Position	Total Growers in Support
Saskatchewan	Saskatchewan Fruit Growers Association	10	63	Pending	0
Alberta	Alberta Fresh Farm Producers Association	120	146	Support	120
Prince Edward Island (PEI)	PEI Strawberry Group	0	38	No Support	0

² The total of grower members of the nine provincial associations that appears in the APFFQ's application is wrong. It shows a total of 950 member/growers. In fact, the numbers in the chart only add up to 948.

Province	Association	Members (2012)	Growers by Province 2011	Association Position	Total Growers in Support
Manitoba	Prairie Fruit Growers Association	69	81	Support	69
New Brunswick	Really Local Harvest	8	86	No Support	0
Nova Scotia	Horticulture Nova Scotia	24	99	No Support	0
British Columbia	Fraser Valley Strawberry Growers Association	20	50	Support	20
Ontario	Ontario Berry Growers Association	150	663	Support	150
Quebec	APFFQ	547	547	Support	547
Newfoundland		Unknown	Unknown	No Support	0
TOTAL:		948	1,773		906

13. The foregoing chart, which is constructed from information provided by the APFFQ, shows the following producers support for the creation of a CSPRC:

All provinces	Total Members (2012)	Total of Producers Per APFFQ	Total Growers in Support	Percentage of Producer support
10	948	2200	906	41%

14. Even if the Saskatchewan Fruit Growers Association votes in support of the proposal, it would add only ten (10) additional producers supporting the proposal. Assuming the support of the Saskatchewan Fruit Growers Association, the revised totals would be the following:

All provinces	Total Members (2012)	Total of Producers Per APFFQ	Total Growers in Support	Percentage of Producer support
10	948	2200	916	41%

15. After more than one year spent trying to convince Canadian growers to support the creation of a promotion-research agency for strawberries, the APFFQ is only able to show the support of five (5) provincial growers' associations that collectively represent only 906 Canadian strawberry growers out of a total of 2, 200. That represents only 41% of producer support, which is far below the majority required.

(ii) The APFFQ has failed to demonstrate importer support.

16. While the APFFQ have been able to demonstrate modest, but insufficient, support for its proposal among Canadian producers, it has been unable to show any support from Canadian importers. In fact, all indications to date are that all or virtually all importers oppose the creation of a strawberry agency.

17. To make up for its inability to show any support for its proposal from Canadian importers, the APFFQ has sought to demonstrate the support of organizations and individuals whose support is irrelevant to the statutory test, and to notify the Panel of various organizations that have expressed neutrality in respect of the proposal.

18. The support of government departments and research officials is irrelevant to the legal test before the Panel. The Act requires that the majority of primary producers and importers support the creation of an agency, and no agency with powers over imported produce can be established without that support. The Act says nothing about the relevance of support from anyone other than producers and importers, and the support of any other organisation or individuals cannot change the statutory requirement that an agency be supported by a majority of importers and producers.

19. In addition, the fact that certain organizations have decided to take a neutral position on the APFFQ's proposal cannot be counted as support for that proposal; neutrality is simply that, it is neither support nor opposition. The views of those who have a neutral position are irrelevant to the issue of whether the proposal is supported by a majority of producers and importers.

B. The Proposal calls for an agency that would be organized in violation of the Act.

20. Subsection 40(3) of the Act reads, in relevant part, as follows:

(3) Where an agency is authorized by proclamation to exercise its power in relation to one or more farm products in import trade, the majority of the members of the agency shall be comprised of representatives of the following groups, namely,

a) primary producers of those farm products; and

b) importers of those farm products,

and the number of representatives of each such group within the majority shall, subject to there being at least one of each group, be in proportion to the share

of each such group in the aggregate of the total intra-provincial and import trade in all those products...³ (Emphasis added)

21. Where an agency is to be authorized to exercise power in relation to the import trade of a farm product: (i) the majority of the members of the agency shall be comprised of representatives of primary producers and importers of that farm product; and (ii) the number of representatives of each group (that is, the primary producers and importers) within that majority shall be in proportion to the share of each group in the aggregate of the total intra-provincial, inter-provincial and import trade in all of those products, providing each group has at least one member.
22. Subsection 40(3) requires two separate steps in constituting an agency with powers over the import trade. First, the total number of representatives of the producers and importers, taken together, must constitute a majority of the members of the agency. Second, within that producer/importer majority, the number of representatives of producers and the number of representatives of importers must be in accordance with the proportion of each group's share of the trade in the farm product.
23. On page 5 of its application, the APFFQ sets out the relevant proportion of domestic production and as follows:

	Vol (lbs)	Proportion
Canadian Production	45,435,062	14.3%
Imports	272,518,539	85.7%
Total	317,953,601	100%

24. Given that imports constitute 85.7% of the market and domestic producers constitute 14.3% of the market, the respective producer and importer memberships of the proposed agency would have to be constituted in such a way that together they represent a majority, and at least 86% of that majority must be representatives of importers and no more than 14% can represent primary producers.
25. The APFFQ's application wholly ignores the legal requirement of subsection 40(3) of the Act and proposes an agency dominated by domestic producers - a group that represents less than 15% of the trade in the farm product.
26. If an agency were constituted in accordance with the APFFQ's proposal, that agency would be in violation of the requirements of the Act.

³ *Op. cite*, footnote 1, subsection 40(3)

C. The proposal would violate Canada's obligation under the World Trade Organization Agreements

27. The World Trade Organization Agreements prohibit the imposition of any charges on imported goods that are in excess of those applied internally to like domestic products, and prohibit the imposition of taxes on imported goods that are equivalent to internal taxes when the border taxes "afford protection to domestic production". The APFFQ's proposed tax on imported strawberries would violate both of those rules.

28. Article III of the GATT reads, in relevant part, as follows:

Article III

National Treatment on Internal Taxation and Regulation

1. The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.

2. The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.

29. The APFFQ's proposal to impose a border tax on imported strawberries would violate the national treatment obligation set out in GATT Article III. It would violate GATT Article III:2 because it subjects imported strawberries to an import tax in excess of the tax imposed domestically and it would violate GATT Article III:1 because it was conceived for a protectionist purpose and would, in fact, afford protection to domestic production.

(i) **The proposed tax violates GATT Article III:2 because it subjects imports to an import tax in excess of that applied, directly or indirectly, to like domestic products.**

30. While the APFFQ might seek to characterize the proposed tax on imported strawberries as a neutral levy on domestically produced strawberries and imported strawberries alike, in reality, it represents a tax burden on imported goods in excess of any equivalent tax on domestically produced goods.

31. The APFFQ's proposal calls for the imposition of a compulsory border tax on all strawberry imports. The tax on imports is not voluntary and there is no question of importers consenting to be taxed, or consenting to pay the levy. However, domestic producers will not have to pay any levy unless their provincial governments sign cooperative agreements with the Federal government forcing provincial growers into the scheme.

32. Neither the Federal government nor any Federal agency has the authority to impose the proposed levy on Canadian strawberry growers. The APFFQ's application recognises this, and their Action Plan for the CSPRC calls for efforts to have "*Provincial officials sign an agreement with the Federal Minister of Agriculture establishing their respective provinces' participation in the CSPRC*".⁴ Thus, unless every provincial government signs an agreement with the Federal government consenting to the application of the levy to all strawberry growers within their jurisdiction, there will be always be some Canadian strawberry growers who will not have to pay the levy.
33. To the extent that any provinces' growers are not obliged to participate in the CSPRC, and do not participate in the CSPRC, the imposition of a border tax on 100% of imports will be in excess of the domestic levy on some producers.
34. Currently, it appears that strawberry growers in at least New Brunswick, Nova Scotia and Newfoundland will not participate in the CSPRC, and will not be obliged to pay any levy. That means that the border tax on imported strawberry will be in excess of the levies imposed on domestic production and will, therefore, violate GATT Article III:2.
35. In addition, while the proposed levy will be a net additional tax on imported strawberries, there will be no net additional cost to Quebec producers because those producers already pay a compulsory levy to the APFFQ.
36. Pursuant to the *Règlement sur les contributions des producteurs de fraises et de framboises à l'Association des producteurs de fraises et framboises du Québec*, every Québec strawberry grower who during at least one year in the two previous years and the current year purchased or planted more than 1000 strawberry plants must pay the APFFQ \$0.00648 for each strawberry plant purchased or planted. The levy is \$0.00260 per strawberry plant grown under a high density crop management system (at least 40,000 strawberry plants per hectare).⁵
37. In addition to the foregoing levy, a Quebec strawberry grower must pay an additional levy of \$167.66 to the a APFFQ if he or she purchased or planted 1001 to 1500 strawberry plants during at least one year in the previous two previous years and in the current year. That levy goes up to \$275.32 if the strawberry grower purchased or planted more than 1500 strawberry.⁶
38. In addition strawberry growers must pay the APFFQ a levy based on the farmers purchases of strawberry containers. The levy is 3% of purchases under \$33,333.33, and \$1000 plus 1% of purchases in excess of \$33,333.33.⁷
39. In fact, it is possible that Quebec strawberry growers will pay less under the proposed scheme that they are currently paying, once again demonstrating that the border tax on imported strawberries will be in excess of that imposed on domestic production.

⁴ 2014 *Action Plan - Canadian Strawberry Promotion and Research Council*, at pg. 5.

⁵ *Règlement sur les contributions des producteurs de fraises et de framboises à l'Association des producteurs de fraises et framboises du Québec*, RLRQ c. M-35.1, r. 182 at section 1.

⁶ *Ibid* at section 2.

⁷ *Ibid* at section 3.

40. In addition, the manner in which the proposed border tax will be assessed, collected and spent clearly renders it an import charge that is in excess of that which is applied, directly or indirectly, to domestic strawberries. If one compares the net cost of the levy to importers with the net cost to participating domestic growers, it is clear that the tax on imports will be in excess of the tax on domestic production.
41. The net cost imposed on imported goods is 100% of the proposed levy.
42. The net cost to domestic producers, assessed in the context of the proposed organization and goals of the CSPRC, is significantly less.
43. The proposed CSPRC will be controlled and directed by representatives of the domestic producers of strawberries. The APFFQ's proposal calls for a Board of Directors that will be dominated (69%) by domestic producers, with most spending occurring provincially.
44. While the vast majority (87%) of the funds collected will come from the border tax on imported strawberries, domestic producers, through their domination of the CSPRC, will receive all of the funds collected, will control those funds and will use those funds to pursue their own interests.
45. While importers face nothing but a cost, domestic producers enjoy a significant benefit. Importers will pay 86% of the CSPRC's budget and domestic producers only 14%, but domestic producers will control 100% of the budget. For every \$1 in levies paid by domestic producers, those same producers will gain control over \$7 in taxes collected. It hardly accurate in such circumstances to talk of any 'net cost' of the levy to domestic producers, instead, the proposal promises a very significant net benefit to domestic producers by transferring \$6 from importers to domestic producers for every \$1 paid by domestic producers.
46. That is not a tax on domestic production but an investment opportunity for domestic producers that returns \$7 to domestic producers for every \$1 spent. It is a mechanism to subsidise domestic producers with a tax on imported goods.
47. Under the circumstances, the border tax is clearly imposed in excess of the internal, domestic charge in a manner that violates GATT Article III:2
- (ii) **The proposed tax violates GATT Article III:1 because it was conceived with protectionist intent and will "afford protection to domestic production".**
48. Even if it could be said that the imposition of the proposed levy on imported strawberries was not in excess of domestic charges, which is specifically denied, the proposal would still violate GATT Article III because "it affords protection to domestic production". That is evident because of its protectionist intent and its protectionist impact.
49. A brief review of the APFFQ application and supporting documentation leaves no doubt about the protectionist intent of the proposal. The APFFQ has made it perfectly clear that the CSPRC's object and purpose will be to increase domestic production of strawberries. The following are some of the more telling quotes from the APFFQ documentation:

- The CSPRC will be “*A Pivotal Development Tool for the Canadian Fresh Strawberry Industry - Strengthening Competitiveness and Increasing Market Presence*”;⁸
 - The APFFQ seeks the establishment of a CSPRC because: “*Strawberry production in Canada has been in decline over the past 10 years... All producers feel a need to regain lost market share and to consolidate production in each province*”;⁹
 - “*The Council will provide opportunities to increase and consolidate the market share for Canadian strawberries*”;¹⁰
 - The Council will provide for “*The development of promotional tools tailored to producers and targeting all domestic strawberry marketing channels ...*”¹¹
 - The Council will invest to “*Increase the consumption of strawberries, privileging local products when available*”.¹²
 - The CSPRC would be dominated and controlled by domestic producers.¹³
50. While the protectionist intent of the APFFQ proposal is clear, its design and architecture also demonstrates that the proposal will afford protection to domestic strawberry producers in a way that violates GATT Article III:1.
51. GATT Article III:1 specifically prohibits the imposition of taxes or other charges that are “*applied to imported or domestic products so as to afford protection to domestic production*”. It is not necessary to demonstrate a protectionist intent for a measure to violate GATT Article III, it suffices that the measure be applied “*in a way that affords protection*”.
52. In *Japan - Taxes on Alcoholic Beverages*, WTO Doc., DS8/AB/R of 4 October 1996, the Appellate Board considered the meaning of the expression “*in a way that affords protection*” and stated:

This is not an issue of intent. It is not necessary for a panel to sort through the many reasons legislators and regulators often have for what they do and weigh their relevant significance of those reasons to establish legislative or regulatory intent. If the measures apply to imported or domestic products so as to afford protection to domestic products, then it does not matter that there may not have been any desire to engage in protectionism in the minds of the legislators or the regulators who impose the measure. It is irrelevant that

⁸ Subtitle, *Canadian Strawberry Promotion and Research Council 2014 - 2019 Development Plan*.

⁹ *Application Submitted to the Farm Products Council of Canada by the Association des Producteurs de fraises et framboises du Québec*, (“APFFQ Application”), at pg. 6.

¹⁰ *Ibid*, at pg. 7.

¹¹ *Ibid*, at pg. 7

¹² *Ibid*, at pg. 11.

¹³ *Ibid*, at pg. 15.

protectionism was not an intended objective if the particular tax measure in question is, nevertheless, to echo Article III:1, "applied to imported or domestic products so as to afford protection to domestic production". This is an issue of how the measure in question is applied

...

Although it is true that the aim of a measure may not be easily ascertained, nevertheless, its protective application can most often be discerned from the design, the architecture, and the revealing structure of a measure. The very magnitude of the dissimilar taxation in a particular case may be evidence of such protective application ... Most often, there will be other factors to be considered as well.¹⁴

53. In the present case, the APFFQ proposal will clearly afford protection to domestic production, and domestic producers will receive significant benefits funded overwhelmingly by a tax on imported goods.
54. Over 85% of the funds collected will be collected from imported strawberries, and those funds will then be directed to an agency that will be dominated and controlled by domestic producers. That is not a neutral application of an internal tax on a particular commodity but a transfer of cash from importers to domestic producers.
55. The proposal would deliver 100% of the taxes collected on imported strawberries into the hands of an agency dominated and controlled by domestic producers, and dedicated to improving domestic production. The proposal is, therefore, a tax on imports that would afford protection to domestic production in violation of GATT Article III:1

D. The proposal would violate Canada's obligations under *North America Free Trade Agreement*

56. The *North America Free Trade Agreement* ("NAFTA") between Canada, the United States and Mexico was signed on December 17, 1992 and entered into force on January 1, 1994.
57. The provisions of NAFTA which are relevant to the APFFQ's proposal are found in Chapter Three of the NAFTA which addresses the issues of "National Treatment and Market Access for Goods".
58. NAFTA Article 302, provides *inter alia* that, in so far as originating goods are concerned, and except as otherwise provided in the NAFTA, no Party may increase any existing customs duty, or adopt any customs duty. It reads as follows:

Article 302: Tariff Elimination

1. Except as otherwise provided in this Agreement, no Party may increase any existing customs duty, or adopt any customs duty, on an originating good.

¹⁴ *Japan - Taxes on Alcoholic Beverages*, WTO Doc. DS8/AB/R of 4 October 1996, at pgs. 27-30.

59. Article 302 prohibits increasing any existing customs duty or adopting any new customs duty, “except as otherwise provided in the Agreement”.
60. First, the proposed levy on strawberries is a ‘customs duty’ within the meaning of NAFTA Article 302 and is, therefore, subject to its prohibition.
61. Article 318 of NAFTA defines “customs duty”, in relevant part, as follows:
- “Customs duty” includes any customs or import duty and a charge of any kind imposed in connection with the importation of a good, including any form of surtax or surcharge in connection with such importation, but does not include any:*
- a) *charge equivalent to an internal tax imposed consistently with Article III:2 of the GATT, or any equivalent provision of a successor agreement to which all Parties are party, in respect of like, directly competitive or substitutable goods of the Party, or in respect of goods from which the imported good has been manufactured or produced in whole or in part;*
- b) ...
62. The proposed levy is clearly a charge that is “imposed in connection with its importation of a good”. In addition, the proposed levy is not saved by any of the exceptions to definition of customs duty found in paragraph (a) to (e) of the definition.
63. In particular, as we have demonstrated in Section C of this submission, the proposed levy is not a “charge equivalent to an internal tax imposed consistently with Article III.2 of the GATT”.
64. Finally, there is nothing “otherwise provided” in the NAFTA that would permit Canada to impose a compulsory levy on the importation of strawberries.
65. Consequently, the proposed levy is a customs duty within the meaning of NAFTA Article 318 and its adoption would violate the prohibition set out in NAFTA Article 302.

Conclusion

66. In light of the deficiencies in the application itself, and the structure of the agency it proposes, the Farm Products Council of Canada should decline to recommend the creation of a promotion-research agency for Canadian strawberries:
- The APFFQ’s application for the creation of such an agency is deficient in that it fails to demonstrate even the minimal requirement for support by a majority of Canadian producers of strawberries;
 - The APFFQ’s proposal makes no attempt to demonstrate support by a majority of importers and all importer submissions to date have been in opposition to the proposal;
 - The APFFQ’s proposal calls for the creation of an agency that would be in violation of a core requirement of Canadian law that requires importers to dominate the

producer/importer majority of members of the agency when the import trade in the farm product dominates the trade in the farm product; and

- The APFFQ's proposal calls for the adoption of a border tax that would violate Canada's international obligations under both the World Trade Organization Agreements and the NAFTA.

The whole of which is respectfully submitted this 28th day of March, 2014.

FASKEN, MARTINEAU DuMOULIN, s.r.l.

Per:


Peter Kirby