Federal Court  Cour fédérale

**Date: 20090527**

**Dockets: T-357-07**
**T-2098-07**

**Citation: 2009 FC 547**

**Ottawa, Ontario, May 27, 2009**

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

**BETWEEN:**

**SELECT BRAND DISTRIBUTORS INC. and**
**GERBER PRODUCTS COMPANY**

**Applicants**

**and**

**ATTORNEY GENERAL OF CANADA,**
**THE MINISTER OF AGRICULTURE AND AGRI-FOOD, and**
**CANADIAN FOOD INSPECTION AGENCY**
**(DIRECTOR, FOOD OF PLAN ORIGIN DIVISION)**
**MINISTER OF PUBLIC SAFETY and**
**CANADA BORDER SERVICES AGENCY**

**Respondents**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] These two applications for judicial review have been consolidated for purposes of the Record and hearing. The Applicants (Gerber) seek relief in respect of refusals by the Canadian Food Inspection Agency (CFIA or Agency) to permit Gerber to test market in Canada a substantial quantity of baby food in sizes other than those authorized by certain Regulations as enforced by that

Agency. For the reasons that follow, I find that particular Regulations are *ultra vires* and I will direct the Agency to permit the test marketing of such baby food forthwith.

**BACKGROUND**

[2] According to the affidavit evidence of Rick Klauser, Vice-President of Channel Expansion of Gerber, Gerber has been manufacturing and selling baby food for almost a century. Until June 1990, Gerber manufactured baby food in Canada at a plant located in Niagara Falls. It closed that plant and satisfied its Canadian market with product made by it in the United States.

[3] Commencing in 1997 inquires related to charges of dumping aimed against Gerber resulted in high duties being imposed against the imported Gerber products. In 2003 those duties were eliminated. However Gerber products all but disappeared from the Canadian market leaving one domestic manufacturer, Heinz, with the virtual monopoly in the marketplace.

[4] As of 2003 and even today the *Processed Products Regulations*, SOR/82-701 (C.R.C., c.291) enacted under the *Canadian Agricultural Products Act*, R.S.C. 1985, c.20 (4th Supp.) Schedule III, Table III, Container, Section (2) permit baby food to be sold in Canada in only two sizes, 4½ fl. oz. (128 ml) and 7½ fl. oz. (213 ml). The CFIA announced in March 2003 that it was taking an initiative to re-write these Regulations to address, among other things, the permissible sizes of baby food containers. A proposed re-write was published in March 2003 but, even as of May 2009, the date of the hearing of these applications, no steps have been taken to enact these revisions or any version of them. Gerber made several submissions in support of the proposed re-write.

[5] The *Processed Products Regulations* make provision, section 9.1, for a food manufacturer or importer to request authorization from the Director of the Agency to test market a product in Canada that does not otherwise meet the requirements of those *Regulations*. Certain information including the type and size of the containers and the estimated total quantity of the product and the duration of the test, up to 24 months, and other information, is to be provided by the Applicant.

[6] Section 9.1(5) provides that the Director may authorize such test marketing provided that the Director is satisfied that the food product will not, among other things, "disrupt the normal or usual trading patterns of the industry". Section 9.1(5) says:

| | |
|---|---|
| *(5) The Director may issue a written authorization to the operator of a registered establishment or to an importer of food products to test market a food product for a period of up to 24 months where the Director is satisfied, based on information available to the Director, than the test marketing of the food product will not* | *(5) Le directeur peut accorder par écrit à l'exploitant d'un établissement agréé ou à l'importateur d'un produit alimentaire l'autorisation d'effectuer un essai de mise en marché pendant une période d'au plus 24 mois, s'il est convaincu, d'après les renseignements dont il dispose, que l'essai :* |
| *(a) disrupt the normal or usual trading patterns of the industry;*<br>*(b) confuse or mislead the public; or*<br>*(c) have an adverse affect on public health and safety or on product pricing.* | *a) ne perturbera pas la structure commerciale habituelle du secteur;*<br>*b) ne créera pas de confusion chez le public ni le l'induira en erreur;*<br>*c) n'aura pas d'effets néfastes sur le processus de fixation des prix ni sur la santé et la sécurité publiques.* |

[7] Neither the *Canadian Agricultural Products Act*, nor the *Regulations* define "normal or usual trading patterns" nor do they provide any criteria by which such patterns might be determined.

Section 9.1(5)(a) is the only place in the *Act* and *Regulations* where reference is made to "normal and usual trading patterns".

[8] Discussion and correspondence ensued between Gerber's representatives and the Agency. On January 29, 2007 the Agency wrote a letter to Gerber's lawyer declining to permit the test marketing request made by Gerber. The stated reason for the refusal was that the Director was "not satisfied that a test marked of infant food in different container sizes than those presently authorized in Canada would not disrupt the normal or usual treating patterns of the industry". That letter is sometimes referred to by the parties as the interim decision since it indicated that the file continued to remain active until the issue was reviewed and consideration was given to the "concerns of all interested stakeholders". The letter said:

> *This is regarding your request submitted on September 19, 2006 for an authorization to test market infant food products packed in non-standard container sizes, under the provision of Section 9.1 of the Processed Products Regulations (PPR).*
>
> *Further to your letter, we met with yourself and Mr. Kesting on December 19, 2006. At that meeting, we explained that there have been concerns raised by the US Government, importers and Canadian industry which demonstrates that there is a lack of consensus among stakeholders regarding the addition of new container sizes for infant food and its potential impact on the normal and usual trading patterns of the industry. Accordingly, it has been determined that there is a need to further review the potential impact of your proposed request prior to authorizing your Test Market Authorization (TMA).*
>
> *Therefore, based on the information available to myself, I am not satisfied that a test market of infant food in different container sizes than those presently authorized in Canada would not disrupt the normal or usual patterns of the industry. I regretfully inform you that your request is not granted at this time.*

> *In the interim, I assure you that your application for this TMA will be kept active and will remain under consideration until we review this issue and the concerns of all interested stakeholders.*

[9] Upon receipt of this letter, Gerber instituted the first of these judicial review application, T-357-07.

[10] Discussions continued between Gerber's representatives and the Agency. The result was a further refusal of the request to test market set out in a letter dated November 2, 2007 to Gerber's lawyer. The stated basis for the refusal was that the Director was "not satisfied that the issuing of a test market authorization for new container sizes of 70 million units as requested by [Gerber] will not disrupt the normal trading patterns pursuant to Section 9.1(5)(a) of the [*Regulations*]. That letter said:

> *This is further to the letter dated January 29, 2007 sent to you in response to Select Brand Distributor Inc.'s request for an authorization to test market infant food products packed in non-standard container sizes and to the June 8, 2007 letter indicating that the Director or Agrifood Division will further review the test market application and make a decision by the end of October 2007. In the June 8 letter, Select Brand Distributors Inc. was given the opportunity to provide new information.*
>
> *Since June 8, 2007, the CFIA has not received any new information from your client nor did it receive a request to meet with them.*
>
> *I have reviewed all materials currently in my possession including the consumption of baby food reports in Canada, the import figures and concerns from the Food Processors of Canada, industry and stakeholders, regarding introduction of new container sizes.*
>
> *There are two containers sizes for fruit and vegetable baby food prescribed in the Processed Products Regulations (PPR). In their application on July 31, 2006, your client requested a test market authorization for 70 million units of Gerber 1st and 2nd Foods brands baby food in two new container sizes.*

> *The total current consumption of baby food in Canada is estimated at 80 million units per year (source; excerpt from ACNeilsen Canada, Grocery Manufacturers Share Reports), of which a percentage are fruit and vegetable products, and has not significantly changed over the last couple of years. However, the imports of fruit and vegetable baby food have increased considerably, since 2002 (more than 10 times; source; Statistics Canada). Currently all companies are trading in Canada in the context of two regulated container sizes. Based on these facts, I am not satisfied that issuing a test market authorization for new container sizes of 70 million units as requested by your client will not disrupt the normal trading patterns pursuant to Section 9.1(5)(a) of the PRR.*
>
> *Therefore, Select Brand Distributors Inc.'s request for an authorization to test market 70 million units of infant food products packed in 67 ml (2.6 fl. oz.) and 95 ml (3.6 fl. oz.) sizes is refused.*
> *This decision concludes the review of Select Brand Distributors Inc.'s test market authorization request.*

[11] Upon receipt of this letter, Gerber instituted the second of these judicial review application T-2098-07.

**THE EVIDENCE**

[12] The Applicant Gerber filed two affidavits in these proceedings both sworn by Rick Klauser, aforesaid. He was cross-examined by Respondent's Counsel.

[13] The Respondents filed no affidavit evidence. All that was filed by the Respondents were certified copies of certain of the Agency's files said to be pertinent to these proceedings. Parts of some of the documents in those files were redacted. Apparently the Respondents had filed a brief affidavit from a person at the Agency then withdrew that affidavit. Thus the Respondents put forward no witness or witnesses and provided no person for cross-examination. At best, therefore, I have copies of portions of documents said to be in the Agency files pertaining to the decision at

issue. The truth of the contents of those documents has not been proved. I have no evidence of oral discussion or other non-documentary communications that the Agency may have received or had in its mind when the decisions were made. I am disappointed that the Respondents were not more forthright.

[14] The Applicant also provided in evidence certain documents received as a result of requests made under the *Access to Information Act*, R.S.C. 1985, c.A-1. Again portions of these documents had been redacted by the government.

[15] Therefore there is no evidence to contradict what Klauser has said in his affidavits save as may appear in his cross-examination. I was not directed to any such contradiction. Further when the Agency has made statements in the letters which are the decision at issue, which statements cannot be substantiated with reference to the documents provided, I must assume that there is no substantiation for those statements. As an example the letter of January 29, 2007 states that "importers" had raised concerns; no such concerns are evident in the documents provided. None of the documents provided demonstrate any consultation with or receipt of views expressed by any "stakeholder" other than Heinz and the Food Processors of Canada, an organization of which Heinz is apparently a member. No consumer or consumer group was consulted; no other food manufacturer or importer was consulted. In appears that only Heinz was actively consulted or actively made representations including a not very subtle threat in a letter dated August 2, 2006 to the Agency that "many of [Heinz] subsequent investment decisions" may be reviewed.

[16] It must be pointed out that the documentary evidence provided shows two other relevant matters. The first is an exchange of emails between the Agency (Christina Zehaluk) and Health Canada (Chantal Martineau) of March 24, 2005 that "there is no scientific evidence from a health perspective for Health Canada to recommend that no changes be made to the regulations to allow for smaller containers sizes to be sold in Canada", which is a direct reference to the test market sizes proposed by Gerber. The second is a cryptic e-mail from Amelie Morin who appears elsewhere on the record as being Chief of Litigation, Processes Products Section of CFIA, to two persons one of whom is Trenholm, the author of the "interim decision" letter dated July 21, 2006. The e-mail simply states "voici une lettre de refus". No such letter was produced, it apparently was redacted. This e-mail was produced pursuant to a request under the *Access to Information Act*. Given that the Respondents have filed no evidence whatsoever, it is reasonable to infer that as early as six months prior to the "interim" decision, the Agency had formulated a refusal letter respecting Gerber's request. There is no evidence that a draft letter approving that request was ever prepared.

[17] It is important to note what the documents produced by the Respondents and under the *Access to Information Act* request do not show. They do not show what the "normal or usual trading patterns of the industry" were. At best they demonstrate that Heinz had a virtual monopoly. No inquiry by the Agency is apparent in any of the documents in which the Agency has sought to establish what the trading patterns were or how they may be disrupted. What is present is a letter from the Commissioner of Competition, Competition Bureau Canada, dated March 7, 2007 to the President of CFIA, expressing concerns as to the regulations of baby food jar sizes and the monopoly position enjoyed by Heinz. That letter said:

> ***Subject: Proposed New Processed Products Regulations – Infant and Junior Baby Food Jar Sizes***

> *For your information, I attach a letter I sent today to the Minister of Agriculture and Agri-Food and Minister of Coordinating Rural Affairs with respect to proposed regulations for infant and junior baby food jar sizes. I have done this in keeping with my mandate to advocate for competition in considering regulatory initiatives which impose constraints on markets.*
>
> *Specifically, the Competition Bureau has concerns that the proposed regulations as they apply to jarred fruits and vegetables, if put into effect, would prevent the entry of new baby food products to compete with the sole domestic manufacturer, Heinz Canada, and thereby reduce choice to consumers.*
>
> *If you have any questions about this matter or would like to discuss it, I would be pleased to meet with you or provide additional information.*

[18] Given the evidence that has been addressed, I draw the following conclusions:

1. Gerber's test marketing proposals do not raise any health concerns;
2. The Agency has no material before it upon which it could draw any conclusions as to what constituted the "normal or usual patterns of the [baby food] industry". For instance, without enumerating all of varying factors, over what period of time is the pattern to be considered, what is the definition of the specific industry, are monopolistic practices to be considered as part of the normal or usual pattern?
3. To the extent that the industry constituted essentially a monopoly enjoyed by Heinz, the Competition Bureau has serious concerns. That monopoly cannot be said to form a "normal or usual pattern".
4. The Agency made no effort to seek input from "stakeholders" such as other manufacturing retailers or consumers, and had to hand no information except that from Heinz which company had made a not very subtle threat to reconsider what it called its investment options.

5. At least six months before the "interim" decision was made the Agency had to hand a draft refusal letter. There is no evidence of a draft acceptance letter.

**MATTERS NOT AT ISSUE**

[19] At the hearing Counsel for the Applicants withdrew any issue raised in their Memorandum of Argument as to whether the Director was empowered to make the decisions at issue. Second, Counsel for both the applicants and Respondents agreed that no issues or distinctions would be argued in respect of the "interim" decision of January 29, 2007 and the "final" decision of November 2, 2007. It was agreed that the Court should approach the matter on the basis that the Agency had refused to permit Gerber to test market as it had requested.

**ISSUES FOR DETERMINATION**

[20] As a result of submissions made by Counsel for each of the Applicants and Respondents the issues for determination have resolved themselves into the following:

1. Is section 9.1(5)(a) of the *Processed Products Regulations* SOR/82-701 (C.R.C., c.291)as amended SOR/94-465 *ultra vires* as being beyond the scope of the enabling legislation, the *Canada Agricultural Products Act* R.S.C. 1985, c.20 (4th Supp.)?
2. Should the refusal decisions of January 29, 2007 and November 2, 2007 be set aside?
3. Should Gerber's test marketing request be reconsidered on the basis of directions from this Court and, if so, what should those directions be?

**Issue #1: Is section 9.1(5)(a) of the *Processed Products Regulations* SOR/82-701 as amended SOR/94-465 (C.R.C., c.291) *ultra vires* as being beyond the scope of the enabling legislation, the *Canada Agricultural Products Act* R.S.C. 1985, c.20 (4th Supp.)?**

[21] Section 9.1(5)(a) of the *Regulations* says the following:

| | |
|---|---|
| *(5) The Director may issue a written authorization to the operator of a registered establishment or to an importer of food products to test market a food product for a period of up to 24 months where the Director is satisfied, based on information available to the Director, that the test marketing of the food product will not* | *(5) Le directeur peut accorder par écrit à l'exploitant d'un établissement agréé ou à l'importateur d'un produit alimentaire l'autorisation d'effectuer un essai de mise en marché pendant une période d'au plus 24 mois, s'il est convaincu, d'après les renseignements dont il dispose, que l'essai :* |
| *(a) disrupt the normal or usual trading patterns of the industry;* | *a) ne perturbera pas la structure commerciale habituelle du secteur;* |

[22] On occasion the Courts have found the Regulatory Impact Analysis Statement (RIAS) which accompanies the publication of Regulations to be of assistance. The RIAS in this case as published in the Canada Gazette, Part II, Vol. 128, No. 14, 13/7/94 says that the amendments are to facilitate the development and marketing of new products and ideas. It says in part:

| | |
|---|---|
| *Description* | *Description* |
| *These amendments to the Processed Products Regulations introduce terms and conditions for Canadian manufacturers and importers to test market processed food products which do not meet packaging, labelling and compositional requirements of the regulations.* | *La présente modification du Règlement sur les produits transformés a pour effet d'établir des modalités et conditions à l'intention des fabricants et importateurs canadiens qui souhaitent procéder à des marchés-tests de produits alimentaires qui ne respectent pas les exigences du* |

*The Processed Products Regulations are made under the authority of the Canada Agricultural Products Act to regulate the marketing of processed foods and product in import, export and interprovincial trade.*

*Alternatives*
*Amendments to the regulations were required to provide the industry with flexibility, which did not previously exists, to test market new food products. Since the amendments facilitate the development and marketing of new products and ideas, and result in positive costs-benefits, no acceptable alternatives were identified.*

*Benefits and Costs*

***Benefits***
*- the opportunity to test market food products and packaging which do not meet some requirement of the regulations will facilitate the introduction of new products, ideas and technologies to the Canadian market and could reduce the costs of new product development;*
*- test marketing may also allow industry members to take immediate advantage of newly identified opportunities unencumbered by a lengthy regulatory process;*
*- as a result of test marketing, Canadian consumers may have access to a variety of products currently available only in*

*règlement en matière d'emballage , d'étiquetage ou de composition.*

*Le Règlement sur les produits transformés, pris sous le régime de la Loi sur les produits agricoles au Canada, régit la commercialisation des produits alimentaires transformés qui sont importés, exportés ou écoulés sur le marché interprovincial.*

*Solution de rechange*
*Ces modifications étaient nécessaires pour offrir à l'industrie la possibilité, qui n'existait pas antérieurement, de soumettre les nouveaux produits alimentaires à des marchés-tests. Comme elles facilitent la mise au point et la commercialisation de nouveaux produits ou de nouvelles idées et se traduisent par des avantages supérieurs aux coûts, aucune solution de rechange acceptable n'a été trouvée.*

*Avantages et coûts*

***Avantages***
*- La possibilité de soumettre à des marchés-tests des produits alimentaires et des emballages qui ne respectent pas certaines des exigences du règlement facilitera le lancement de nouveaux produits et de nouvelles idées ou technologie sur le marché canadien, et elle pourrait réduire les coûts que cela suppose.*
*- Les marchés-tests permettraient aux membres de*

| | |
|---|---|
| *foreign markets.* | *l'industrie de saisir immédiatement les nouveaux débouchés qui se présentent sans avoir à passer par un lourd processus réglementaire. - Grâce aux marchés-tests, les consommateurs canadiens pourront avoir accès à toute une gamme de produits qui ne sont actuellement offerts qui sur les marchés étrangers.* |

[23] In considering such a *Regulation* regard must be had to whether it is consistent with the enabling statute, here the *Canada Agricultural Products Act*, *supra*. as stated by LaForest J. in *British Columbia (Milk Board) v. Grinsnich*, [1995] 2 S.C.R. 895 at paragraph 19:

> *Traditionally, the primary question in reviewing the validity of subordinate legislation has been whether the delegate has authority under the empowering statute to make the impugned enactment. Any regulation, rule or order must be consistent with the purposes of the empowering statute, and cannot be designed to achieve some collateral purpose, extraneous to the statute's objectives.*

[24] The *Canada Agricultural Products Act* states, in the preamble, that it is intended to regulate the marketing of agricultural products and to provide for national standards and grades. It says:

> *An Act to regulate the marketing of agricultural products in import, export and interprovincial trade and to provide for national standards and grades of agricultural products, for their inspection and grading, for the registration of establishments and for standards governing establishments*

[25] "Marketing" is a term defined in section 2 of the *Act*:

> *"marketing" means the preparation and advertisement of agricultural products and includes the conveyance, purchase and sale of agricultural products and any other act necessary to make agricultural products available for consumption or use;*

[26] Section 32 provides for *Regulations* the parties have drawn particular attention to subsections l), n) and o):

> ***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*
>
> *[…]*
>
> *(*l*) regulating or prohibiting the marketing of any fresh or processed fruit or vegetable in import, export or interprovincial trade, including regulations*
>
> > *(i) establishing the terms and conditions governing that marketing,*
> >
> > *(ii) defining fresh or processed fruits or vegetables,*
> >
> > *(iii) controlling the consignment selling of fresh fruits and vegetables,*
> >
> > *(iv) permitting the Minister or a delegate of the Minister to exempt the marketing of any fresh or processed fruit or vegetable in import or interprovincial trade from any of the requirements of this Act or the regulations where the Minister or delegate considers that it is necessary to do so in order to alleviate a shortage in Canada of the fruit or vegetable or an equivalent fruit or vegetable, and*
> >
> > *(v) permitting the Minister or a delegate of the Minister to exempt the marketing of any fresh or processed fruit or vegetable in export trade from any of the requirements of this Act or the regulations;*
>
> *[…]*
>
> *(*n*) for exempting any person, establishment, agricultural product, class of agricultural products, container or other thing from the application of any or all of the provisions of this Act or the regulations;*

> *(o) providing for the collection of market information and statistics, the publication of studies dealing with the marketing of agricultural products and the conduct of surveys on any matter related to this Act or the regulations; and*

[27] Counsel for the Respondents placed particular reliance on sub-section (o) which I find to be directed to collecting data and statistics; it has nothing to do with maintaining the usual patterns of an industry.

[28] The *Act* is directed to the provision of food to the Canadian marketplace for its consumption and use. It does not purport to regulate the "patterns" of the marketplace. Such regulation can be found elsewhere such as in the *Competition Act*, R.S.C. 1985, c.C-34. The CFIA has no mandate to regulate "normal and usual" patters in the food industry.

[29] Section 9.1(5)(a) of the *Regulations* has provided no definition as to what is a "normal or usual" trading pattern nor does any part of those *Regulation* or *Act* provide any guidance as to how such patterns are to be determined. This provision is simply outside the scope of the *Act*.

[30] I find section 9.1(5)(a) of the *Regulations* to be *ultra vires* as outside the scope of the enabling statute.

**Issue #2: Should the refusal decision of January 29, 2007 and November 2, 2007 be set aside?**

[31] The only basis for the "interim" and "final" refusals by the Agency in respect of Gerber's test marketing request was in respect of section 9.1(5)(a) of the *Processed Products Regulations* which I have found to be *ultra vires*.

[32] Even if I had not found that provision to be *ultra vires* I would set aside the decision(s) in any event as they were not reasonable. The basis for this is that, on the evidence, the Agency had not established what the "normal and usual" patterns of the industry were. There was nothing with which to compare Gerber's request. Given the evidence that I have, the inquiries made by the Agency were scant and flawed and, in the decision(s) letter, misstated. The Agency seems to have prepared a refusal letter, but not an acceptance letter, several months is advance of the first refusal decision. The Supreme Court of Canada in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 particularly at paragraph 47 instructed that a decision must be reasonable, justified, intelligible and transparent:

> ***47*** *Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.*

[33] I find that the decision(s) at issue here to be flawed, lacking transparency and, unreasonable. They must be set aside.

**Issue #3: Should Gerber's test marketing request be reconsidered on the basis of declarations from this Court and, if so, what should those directions be?**

[34] Section 18.1(3)(b) of the *Federal Courts Act*, R.S.C. 1985, c.F-7 empowers this Court not only to set aside a decision but also to provide appropriate directions.

[35] I am concerned here with the failure of the Agency to be forthcoming with evidence, to have taken an unreasonably long time in dealing with the matter, and to have based its decision on flawed considerations. The Agency is directed to reconsider the application forthwith and, given that there are no health concerns, allow the application for up to 24 months.

**COSTS**

[36] I find that the Agency has not only lost these applications but, in failing to provide evidence, has acted inappropriately. I award costs to the Applicants to be taxed at the middle of Column V.

**JUDGMENT**

**FOR THE REASONS PROVIDED:**

**THIS COURT ADJUDGES that:**

1. The applications are allowed;
2. Section 9.1(5)(a) of the *Processed Products Regulations*, SOR/82-701 as amended SOR/94-465 is *ultra vires*;
3. The decisions of January 29, 2007 and November 2, 2007 are set aside;
4. The Canadian Food Inspection Agency is directed to allow the Applicants to test market baby food as requested for a period of up to 24 months;
5. The Applicants are awarded their costs to be taxed at the middle of Column V.

"Roger T. Hughes"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKETS:** | T-357-07 & T-2098-07 |
| **STYLE OF CAUSE:** | **SELECT BRAND DISTRIBUTORS et al. v. ATTORNEY GENERAL OF CANADA et al.** |
| **PLACE OF HEARING:** | Ottawa, Ontario |
| **DATE OF HEARING:** | May 21, 2009 |
| **REASONS FOR JUDGMENT AND JUDGMENT:** | Hughes, J. |
| **DATED:** | May 27, 2009 |

**APPEARANCES:**

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| Mr. Lorne Ptack | FOR THE RESPONDENT<br>ATTORNEY GENERAL OF CANADA |

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