



Ottawa, Wednesday, January 2, 1991

**Inquiry No.: NQ-90-003**

IN THE MATTER OF an Inquiry under section 42 of the *Special Import Measures Act* respecting:

**PHOTO ALBUMS WITH SELF-ADHESIVE LEAVES, IMPORTED  
TOGETHER OR SEPARATELY, AND SELF-ADHESIVE LEAVES,  
ORIGINATING IN OR EXPORTED FROM INDONESIA,  
THAILAND AND THE PHILIPPINES**

**FINDING**

The Canadian International Trade Tribunal, under the provisions of section 42 of the *Special Import Measures Act*, has conducted an inquiry following the issue by the Deputy Minister of National Revenue for Customs and Excise of a preliminary determination of dumping dated September 4, 1990, and of a final determination of dumping dated December 3, 1990, respecting the importation into Canada of photo albums with self-adhesive leaves, imported together or separately, and self-adhesive leaves, originating in or exported from Indonesia, Thailand and the Philippines.

Pursuant to subsection 43(1) of the *Special Import Measures Act*, the Canadian International Trade Tribunal hereby finds that:

- (1) pursuant to paragraph 42(1)(a) of the *Special Import Measures Act*, the dumping in Canada of the aforementioned goods originating in or exported from Indonesia, Thailand and the Philippines has caused, is causing and is likely to cause material injury to the production in Canada of like goods; (Member Trudeau dissenting in part)
- (2) pursuant to paragraph 42(1)(b) of the *Special Import Measures Act*:
  - (a) there has occurred a considerable importation of like goods from the aforementioned countries that were dumped, which dumping has caused material injury to the production in Canada of like goods, and

- (b) material injury has been caused to the production in Canada of like goods by reason of the fact that the dumped goods from the aforementioned countries form part of a series of importations into Canada, which importations in the aggregate are massive and have occurred within a relatively short period of time; and it appears necessary to the Tribunal that, in order to prevent the recurrence of that injury, duty be assessed on the imported goods that were released during the period of ninety days preceding the day on which the Deputy Minister made a preliminary determination of dumping in respect of the goods or goods of that description. (Member Trudeau dissenting)

Robert J. Bertrand, Q.C.

Robert J. Bertrand, Q.C.  
Presiding Member

Arthur B. Trudeau

Arthur B. Trudeau  
Member

Michèle Blouin

Michèle Blouin  
Member

Robert J. Martin

Robert J. Martin  
Secretary

The Statement of Reasons will be issued within 15 days.

**Inquiry No.: NQ-90-003**

Place of Hearing: Ottawa, Ontario  
Dates of Hearing: December 3-4, 1990

Date of Finding: January 2, 1991

Tribunal Members: Robert J. Bertrand, Q.C., Presiding Member  
Arthur B. Trudeau, Member  
Michèle Blouin, Member

Director of Research: Mary Walsh  
Research Officer: Peter Rakowski  
Statistical Officer: Gilles Richard

Registration and Distribution  
Clerk: Pierrette Hébert

**Participants:**

for John D. Richard, Q.C.  
Desmarais & Frère Ltée/Ltd.

**(Complainant)**

for Peter A. Magnus  
Crown Photo Album Co. Inc.

**(Importer)**



Ottawa, Thursday, January 17, 1991

**Inquiry No.: NQ-90-003**

IN THE MATTER OF an Inquiry under section 42 of the *Special Import Measures Act* respecting:

**PHOTO ALBUMS WITH SELF-ADHESIVE LEAVES, IMPORTED  
TOGETHER OR SEPARATELY, AND SELF-ADHESIVE LEAVES,  
ORIGINATING IN OR EXPORTED FROM INDONESIA,  
THAILAND AND THE PHILIPPINES**

TRIBUNAL:       ROBERT J. BERTRAND, Q.C., Presiding Member  
                  ARTHUR B. TRUDEAU, Member  
                  MICHÈLE BLOUIN, Member

**STATEMENT OF REASONS**

**SUMMARY**

This is an inquiry to determine whether the dumping in Canada of photo albums with self-adhesive leaves, imported together or separately, and self-adhesive leaves, originating in or exported from Indonesia, Thailand and the Philippines, has caused, is causing or is likely to cause material injury to the production in Canada of like goods, and whether the dumped goods constitute a massive importation into Canada and require a finding pursuant to paragraph 42(1)(b) of the *Special Import Measures Act* (SIMA).

First, the majority of the Tribunal carefully considered the Deputy Minister's definition of the subject goods and decided to treat the albums and leaves as one product, with leaves being the principal component in their virtually finished state, which have the same use and share the same essential characteristics and, therefore, together comprise one class of goods. Since Desmarais & Frère Ltée/Ltd. (Desmarais), the complainant in this case, accounts for approximately 80 percent of the total Canadian production of this class of goods and the other significant Canadian producers import dumped albums and leaves from the subject countries and are also of marginal significance in terms of domestic production, sales and market share, the Tribunal considered that Desmarais alone constituted the Canadian industry for the purposes of this inquiry.

Desmarais claimed that once more the familiar pattern of low-priced imports from new sources was repeating itself, following the issuance of findings of material injury against other countries. This was particularly serious given the vulnerability of the industry to low-priced imports because of the price sensitive nature and marketing of the subject goods. As a direct result of dumped imports from the three subject countries, Desmarais was experiencing lost sales, price suppression, lost volume and production, lower profits, reduced utilization of capacity and employment, and increased levels of inventory - a situation that was forecast to continue throughout 1991.

Crown Photo Album Co. Inc. (Crown), an importer of the subject goods, was present with counsel at the hearings and its representative was assisted by counsel in responding to questions put to him by the Tribunal's members and counsel for Desmarais, but otherwise restricted its participation to argument against the complainant's request for a finding of massive dumping.

The majority of the Tribunal was of the opinion that the evidence established the vulnerability of the industry to low-priced imports and that the domestic market for photo albums with self-adhesive leaves had been growing steadily since 1987. However, Desmarais not only failed to increase sales in an expanding market, as it could reasonably expect, but also experienced declining sales as a result of the loss of major sales to imports from the subject countries, which rose quickly to capture almost one quarter of the Canadian market in the last six months of the review period. In an attempt to maintain the necessary volume of production, Desmarais maintained or reduced its average prices, despite increased production costs, but sales and hence profits continued to decline as its gross margins were compressed, finally ending in a net loss position. Desmarais' loss of 16 points of market share from 1989 to mid-1990 and consequential dramatic decline in profitability led the majority of the Tribunal to find that the injury suffered by Desmarais was material.

The testimony of a major purchaser and retailer of photo albums respecting the rationale behind its direct import of albums from one of the subject countries as well as the purchase of low-priced finished albums and leaves from the subject countries by other Canadian producers, which were then better able to sell and compete with, and underbid, Desmarais, convinced the Tribunal that the material injury suffered by the complainant was a direct result of the importation or offering for sale of the subject goods.

Considering the substantial margins of dumping, the wide variations in the volume of the subject imports from the three subject countries and the proven ability and propensity to switch production from one country to another as well as the relative ease with which exports of separate leaves could replace present exports of dumped albums with self-adhesive leaves, the majority of the Tribunal considered the effect "*en masse*" of the single class of dumped goods and found past, present and future injury.

Turning to the issue of massive dumping, the majority of the Tribunal considered that, as the dumped goods captured 24 percent of the Canadian market in the first half of 1990 and exceeded 40 percent of the total value of Desmarais' domestic sales for the same period, this constituted a considerable importation. As these imports were also five times larger than for the corresponding period in 1989, this was a series of importations that, in the aggregate, were massive and occurred within a relatively short period of time. As a result of these massive imports, in an expanding market, Desmarais

lost a further six points of market share in the first half of 1990 and lost volume sales that increased its unit operation costs at the same time that it was suffering price suppression or degradation. These massive imports caused material injury to Desmarais. The majority of the Tribunal considers that there are good reasons to anticipate that importers will continue to switch to other low-cost sources of photo albums unless penalized to a greater degree. Consequently, the majority of the Tribunal decided that it was necessary to assess retroactive anti-dumping duties to prevent the recurrence of material injury caused by massive importations.

Member Trudeau agrees to the finding of past, present and future injury respecting photo albums with self-adhesive leaves, but dissents from the majority opinion respecting: (1) the definition of the class of goods; (2) the finding of past and present material injury in respect of self-adhesive leaves; and (3) the finding of massive importations.

### **CONDUCT OF THE INQUIRY**

The Tribunal, under the provisions of section 42 of SIMA, has conducted an inquiry following the issuance by the Deputy Minister of National Revenue for Customs and Excise (the Deputy Minister) of a preliminary determination of dumping dated September 4, 1990, and of a final determination of dumping dated December 3, 1990, respecting the importation into Canada of photo albums with self-adhesive leaves, imported together or separately, and self-adhesive leaves, originating in or exported from Indonesia, Thailand and the Philippines. The Deputy Minister's investigation into dumping covered importations of the subject goods sold for export to Canada or imported into Canada during the period of October 1, 1989, to May 31, 1990, in the case of goods exported from Indonesia and during the period of September 1, 1989, to June 30, 1990, in the case of goods exported from Thailand and the Philippines.

The notices of preliminary and final determinations of dumping were published in Part I of the September 22, 1990, and December 15, 1990, editions of the Canada Gazette, respectively. The Tribunal's Notice of Commencement of Inquiry issued on September 11, 1990, was published in Part I of the September 22, 1990, edition of the Canada Gazette.

As part of this inquiry, the Tribunal sent detailed questionnaires to six Canadian producers and forty-three importers of the subject goods, requesting production, financial, import and market information, as well as other information, covering the period of review, that is from January 1, 1987, to June 30, 1990. From the replies to the questionnaires and other sources, the Tribunal's research staff prepared public and protected pre-hearing staff reports covering that review period.

The record of this inquiry consists of all the Tribunal's exhibits, including the public and protected replies to questionnaires, all exhibits filed by the parties at the hearings, as well as the transcript of all proceedings. All public exhibits were made available to the parties and protected exhibits, to independent counsel only.

Public and *in camera* hearings were held in Ottawa on December 3 and 4, 1990, and were attended by Desmarais, the complainant, and Crown, an importer, which were represented by counsel at the hearings. Crown was originally invited by the Tribunal to appear as a witness and, in the course of agreeing to this request, decided to participate in the inquiry and be assisted by counsel who filed a notice of appearance, declaration and undertaking.

The Tribunal also invited a witness from Zellers Inc. to participate in the hearings and answer questions put to him by the Tribunal and counsel.

On January 2, 1991, the majority of the Tribunal found that the dumped goods originating in or exported from Indonesia, Thailand and the Philippines had caused, was causing and was likely to cause material injury to the production in Canada of like goods (Member Trudeau dissenting in part). The majority of the Tribunal also found that there had occurred a considerable importation of like goods from the aforementioned countries that were dumped, which dumping had caused material injury to the production in Canada of like goods, and that the dumped goods formed part of a series of importations into Canada, which importations in the aggregate were massive and had occurred within a relatively short period of time (Member Trudeau dissenting from the finding of massive importations). Further, it appeared necessary to the majority of the Tribunal that, in order to prevent the recurrence of that injury, duty be assessed on the imported goods that were released during the period of 90 days proceeding the day on which the Deputy Minister made a preliminary determination of dumping.

## **THE PRODUCT**

Under consideration in this inquiry are photo albums with self-adhesive leaves, imported together or separately, and self-adhesive leaves. The albums are composed of individual leaves that are joined together with covers mainly in the three-ring or coil-bound formats. The leaves are made up of a light cardboard coated with a special type of pressure-sensitive adhesive on each side and further covered by a transparent film that can be peeled back. The adhesive holds a photograph laid against it, but it is not a permanent adhesive and will readily release the photograph without leaving any adhesive material on it. Once a photograph is laid on the adhesive-covered cardboard, the transparent film can be laid over the photograph, thus providing it with protection.

The Canadian market for photo albums with self-adhesive leaves is broken down into two major sectors: the photographic trade, which is made up of photo retailers and camera departments of chain and department stores; and the non-photographic trade, which consists of stationery departments of chain and department stores and independent stationers. Individual self-adhesive leaves are sold either as refills, usually marketed in packages of 4, 10 or 20 leaves, or in bulk to other producers of photo albums. The latter market for leaves is by far the most important source of sales.

The chain stores (Zellers, K-Mart, Metropolitan, Woolworth's, etc.) are the major buyers of photo albums with self-adhesive leaves. The coil-bound albums are generally used as promotional items by large retailers throughout Canada. They have been surpassed in popularity by the three-ring photo album format, with a greater number of leaves, usually 50.

Generally, importers market the product using their own sales force. Sales are spread between wholesalers/distributors and retail outlets. Desmarais supplies photo retailers and independent stationers through distributors. Chain stores and camera shops are supplied directly by Desmarais, using its own sales force, with offices in Toronto, Ottawa and Longueuil.

### **THE DOMESTIC INDUSTRY**

Desmarais of Longueuil, Quebec, has been the major Canadian producer of photo albums with self-adhesive leaves since it commenced production in the early 1970s. The business was founded in 1951 and incorporated in 1957. The Groupe Québécois Inc., a Canadian holding company with substantial Canadian printing and publishing interests, acquired majority share ownership of Desmarais in 1987. Desmarais employs over 400 people in peak periods, manufacturing photo albums, transparency slide mounts, heat-sealed plastic articles and laminations, and extrusions of polymers. It is a fully integrated manufacturer of the subject goods. The company produces coil-bound, post-bound and three-ring albums, as well as individual self-adhesive leaves.

Over the years, a number of firms have produced the subject goods, in whole or in part, in Canada. These include William E. Coutts Co. Ltd., of Willowdale, Ontario; Hutchings & Patrick Inc., of Ottawa, Ontario; Crown, of Richmond Hill, Ontario; and Belt Manufacturing Co. Ltd. (Belt), of Ville d'Anjou, Quebec. The first three companies buy leaves and incorporate them into albums of their own manufacture. They have produced low volumes since 1987, with Hutchings & Patrick Inc. ceasing its production of albums in 1989. On the other hand, Belt, which had produced albums with purchased self-adhesive leaves intermittently in the past, began manufacturing leaves and producing significant quantities of albums in the three-ring format in 1987. Belt is owned by Banner Educational Products Ltd., also of Ville d'Anjou.

### **IMPORTERS AND EXPORTERS**

There are four producers/exporters from Indonesia, one from Thailand and also one from the Philippines that were investigated by Revenue Canada. The major proportion of subject goods exports to Canada has been imported by domestic photo album producers, especially in the case of goods originating from Indonesia and the Philippines. Crown was named by the Deputy Minister as an importer of the subject albums and leaves from the three subject countries and Belt was named as an importer of the subject albums from the Philippines. The second largest importer of subject albums from the named countries was a chain store. Import companies purchased small amounts of subject albums with self-adhesive leaves from the Philippines and Thailand.

### **RESULTS OF THE DEPUTY MINISTER'S INVESTIGATIONS**

In her final determination of dumping, the Deputy Minister indicated that 100 percent of the subject goods exported to Canada from the three subject countries had been dumped by weighted average margins of dumping ranging from 55.5 percent to 78.0 percent in the case of albums with self-adhesive leaves and at a margin of 35.1 percent in the case of leaves from Indonesia; the other two countries exported only albums with self-adhesive leaves to Canada and did not export separate leaves during the period of investigation. In the absence of complete and verified information required to determine normal values pursuant to section 15 or 19 of SIMA, normal values were



determined by ministerial specification, pursuant to section 29 of SIMA, using the best information available to the Department. For one of the producers/exporters from Indonesia, the specified normal value was based on its costs of production plus an amount for general selling and administrative expenses and profits.

### **THE COMPLAINT**

Counsel for the complainant submitted that, based on the evidence in this case, the Tribunal should: (1) make a finding of past, present and future material injury concerning each of the three subject countries; and (2) make a finding to the effect that the dumped subject goods constitute a massive importation into Canada, within the meaning of SIMA. Counsel pointed to the long history of findings respecting the subject goods and the Tribunal's own recognition, in the order it issued on September 4, 1990, in Review No. RR-89-012, which comprised four extant findings concerning photo albums with self-adhesive leaves, of the familiar pattern of low-priced imports being sourced from other countries as findings were put in place. Counsel also noted that the Tribunal recognized the vulnerability of the Canadian industry to low-priced imports because of the price sensitive nature of the subject goods and that the witness from Zellers confirmed this fact. In addition, the seasonal nature of the market, which is concentrated in the last quarter of the year, and the phenomenon of a few customers representing the major proportion of sales mean that low-price offers to one or two large retailers establish price levels to all major accounts. As evidence of the type of low offers that are being made, the complainant entered, as an exhibit, a letter from a firm called Larston Systems Trading, an export agent for a producer from Indonesia which used Korean technology and expertise to produce the subject goods. These goods were offered at f.o.b. prices that would lead to net landed prices considerably below those of Desmarais. Hence, counsel concluded that there was a propensity to dump and that Desmarais was vulnerable to such dumping, despite the fact that it was an efficient fully integrated producer, conscious of world prices and fashion trends affecting subject album sales. In short, the material injury that Desmarais has suffered, is suffering and will suffer is a direct result of dumped goods or the offer of dumped goods.

As far as an indication of material injury was concerned, counsel pointed to Desmarais' detailed evidence of lost sales, which was not challenged, and price erosion as a result of sales of dumped imports. Furthermore, as the production of photo albums is very capital-intensive and necessitates a high volume, Desmarais had to lower prices to retain sales volume. Nevertheless, and in spite of a growing market, the company lost volume and production to dumped goods with the inevitable result of lost profits and reduced utilization of capacity and employment. Increased levels of inventory arising from lost sales further exacerbated the lost profits situation by adding to the cost of doing business.

Counsel submitted that the request for a determination of future injury against all three countries was based on a real and imminent threat of injury in the near future, taking into account the past history of producers switching to other countries after a finding of injurious dumping. Information was also provided on the willingness, propensity and ability of producers in subject countries to supply the subject goods, and on the negative effect that low-price offers in late 1990 were having on sales contracts that were negotiated in the last quarter of the year, respecting sales for 1991. Desmarais' chief witness provided the Tribunal with the projection that the already declining volume of sales by Desmarais would be further reduced by 50 percent in 1991 without the

requested finding of injury. Furthermore, to exclude one country would just encourage the transfer of production from the other countries to that source, thereby eliminating the benefit of coming before the Tribunal.

Turning to the request for massive dumping, counsel argued that the importations in aggregate were indeed massive, particularly if one computed market shares for subject countries versus Desmarais' over the last year and a half, using Revenue Canada's estimated normal value for the dumped goods, rather than their dumped value. Counsel recognized with respect to Thailand, where there was only a single shipment in the last quarter of 1989, that it may be difficult to make a finding of massive importations; however, he had no hesitation in requesting it.

### **THE RESPONSE**

Counsel representing Crown assisted the representative of his client in responding to questions put to him by the Tribunal members and Desmarais' counsel, but did not otherwise participate actively in the proceedings. Counsel for Crown also argued against the complainant's request for a finding of massive dumping, pursuant to paragraph 42(1)(b) of SIMA. Counsel noted, that in responding to questions, the representative of Crown had clarified that the company had only begun to import from one of the subject countries after confirming to his satisfaction that the subject product was being offered at a fair market value, albeit significantly lower than the complainant's estimated cost of production for the same product. Again relying on the representative's testimony, counsel rejected the proposition that production facilities in the subject countries were established to avoid the consequences of previous anti-dumping findings. The new production facilities were the natural result of lower costs of production in the subject countries in comparison with certain other Pacific Rim Countries, such as Korea. There was no demonstrated trend of either rushing to get subject goods into the country quickly or stockpiling the subject goods in anticipation of an anti-dumping injury finding. Rather, Crown, the acknowledged predominant importer, imported the subject goods at relatively consistent levels throughout late 1989 and the first half of 1990, with imports by Crown beginning to decline as a ratio of total imports from subject countries in the first half of 1990. Counsel also referred to the Canadian Import Tribunal's finding respecting drywall screws originating in or exported from the Republic of Korea (Inquiry No. CIT-6-86), where the issue of massive importations and the interpretation of paragraph 42(1)(b) of SIMA were debated within the Canadian Import Tribunal. Based on that decision, counsel argued that there had to be a separate decision by the Tribunal respecting the material injury caused by the massive imports when making its finding under paragraph 42(1)(b). In counsel's view, the predominant impact of the imports from the subject countries had been on domestic sales by other producers than Desmarais. Furthermore, he submitted that, in those cases where the Tribunal's predecessors dealt with a request for a determination of massive importations, the extent of loss of share by the domestic producer and share gain from the subject countries was significantly in excess of anything to be found affecting Desmarais in this case. Finally, Crown's counsel argued that normal values, based on ministerial specifications, should not be used to reflect the subject countries growth in import shares since 1988 as the much higher value suggested would have negatively affected the volume of goods imported from the subject countries.

## **ECONOMIC INDICATORS**

The Canadian market for photo albums with self-adhesive leaves, by value, rose by 30 percent during the 1987 to 1989 period. A rising trend also occurred in the first six months of 1990 when the market rose by more than 9 percent from the same period in 1989. The market share of the domestic producers fell by 5 percentage points in 1989 and fell a further 17 points in the first six months of 1990. Desmarais' share of the domestic market was at its peak in 1987, but fell 11 points in 1988, 10 points in 1989 and 6 points in the first six months of 1990.

Imports from all countries captured an increasing share of the market, rising by 18 percent over the three and a half years ending in June 1990. Imports from subject countries, which were non-existent in 1987 and negligible in 1988, captured 7 percent of the market in 1989 and 24 percent in the first six months of 1990. Thus, the substantial loss of market share which Desmarais experienced over the last year and a half was captured primarily by imports from subject countries and, to a lesser extent, by other Canadian producers, many of whom were themselves importers of the subject goods. The first six months of 1990, alone, saw Desmarais lose a significant portion of its market share to dumped imports.

Financially, Desmarais' gross margin for subject goods was at its highest in 1988. However, gross margins declined in both 1989 and the first six months of 1990. In terms of net profits, Desmarais showed a pre-tax profit for the subject goods in both 1987 and 1988. This reversed to a loss in 1989 and an even greater pre-tax loss occurred in the first half of 1990.

## **PRELIMINARY ISSUES**

In the present inquiry, under section 42 of SIMA, the Tribunal is obliged to determine whether the dumping found by the Deputy Minister respecting photo albums with self-adhesive leaves, imported together or separately, and self-adhesive leaves, originating in or exported from Indonesia, Thailand and the Philippines, has caused, is causing or is likely to cause material injury to the production in Canada of like goods and to rule on the complainant's request for a finding of massive dumping in accordance with the provisions of paragraph 42(1)(b) of SIMA.

### **Definition of the Class of Goods**

The first issue that the Tribunal must resolve pertains to the definition of the class of goods to which the preliminary determination applies. The Deputy Minister has the exclusive authority to define that class of goods and her definition will in turn set the scope of the injury inquiry and thus delineate the jurisdiction of this Tribunal. The precise wording used by the Deputy Minister then needs to be examined closely in order to assess whether the preliminary determination applies to only one or to more than one class of goods and, consequently, whether the Tribunal has to conduct multiple inquiries and issue multiple decisions or findings of injury in accordance with the Federal Court of Appeal's decision in the *Noury Chemical Corp.*<sup>1</sup> case.

---

1. *Noury Chemical Corp. vs Pennwalt of Canada Ltd.*, [1982] 2 F.C. 283.

In the present case, the Deputy Minister has defined the subject goods of the preliminary determination as "photo albums with self-adhesive leaves, imported together or separately, and self-adhesive leaves, originating in or exported from Indonesia, Thailand and the Philippines." Acting on the assumption that each word or group of words that the Deputy Minister has used contribute to the definition of the subject goods, the majority of the Tribunal considers that the words "imported together or separately" were used to prevent the circumvention of a finding of injury by clarifying that album covers and self-adhesive leaves, whether imported together or separately, for later assembly in Canada, are included in the definition of the subject goods. What is intended to be included is not only the complete photo album with self-adhesive leaves set between the covers, but also the unassembled album consisting of the cover and its dedicated set of self-adhesive leaves that can be imported separately or as part of a single shipment for subsequent assembly into complete albums in Canada. The subsequent expression "and self-adhesive leaves" clarifies that self-adhesive leaves imported on their own, that is to say without any album covers at any time whatsoever, were properly the subject of investigation.

The Deputy Minister's intentions as expressed in her choice of wording can easily be ascertained. There remains, however, to determine whether the scope of the investigation and the definition embrace one or more than one class of goods. Photo albums enter Canada under a commodity code for customs tariff purposes that is different from that by which subject leaves enter Canada. However, both goods are subject to an identical tariff rate. A witness from Desmarais testified that self-adhesive leaves were the major component of, and represent the major portion of the manufacturing cost (well over 50 percent) of a finished album. In the case of the 20-page album, leaves represent approximately 70 percent of the cost of manufacturing that album. It was also established that, where leaves were imported from the subject countries, they were used to produce photo albums with self-adhesive leaves as there is now practically no market for leaves sold separately as refills. Such imported leaves undergo virtually no further transformation before being assembled with the album cover. Imports of subject leaves would, therefore, affect the production cost of photo albums in Canada of the Canadian producer that bought them and this would, in turn, affect the integrated domestic producer's sales of albums as well as its sales of leaves to other producers. It is the self-adhesive leaves that are the essential element of the photo album with self-adhesive leaves, not the album cover. Consumers could choose to buy only self-adhesive leaves and use them to store and display their photos by: (1) adding the leaves to a photo album they already have; (2) inserting the leaves in a binder of their own choice; or (3) maintaining the leaves in a binder free form. In this sense, self-adhesive leaves have the same use and share the same essential characteristics as photo albums with self-adhesive leaves.

The *Noury Chemical Corp.* decision is distinguishable from the present case, in that, in *Noury Chemical Corp.*, the Federal Court of Appeal held that once the Tribunal had found that there were four distinct product classes that were not generally substitutable for each other, it was bound to make four inquiries and issue four findings with respect to material injury. The case before us concerns one product and its principal component in its virtually finished state. The majority of the Tribunal considers that, although the Deputy Minister computed separately the margins of dumping for self-adhesive leaves for albums from Indonesia, this fact alone is not conclusive on the issue of whether there is one or more than one class of goods when the goods investigated are the finished product and its major component, which subsequently receives virtually no

transformation in the process of being incorporated into the finished product and is not to be marketed separately. The majority of the Tribunal will therefore conduct one injury inquiry respecting the single class of goods, photo albums with self-adhesive leaves, imported together or separately, and self-adhesive leaves.

### **Definition of the Domestic Industry**

The Tribunal must next define the domestic industry for the purpose of this inquiry as this definition will affect the Tribunal's examination of causality and injury. Under SIMA, the Tribunal must determine whether the dumping has caused injury to the production in Canada of goods that are like those found by the Deputy Minister to have been dumped. The oral evidence and the physical exhibits presented on behalf of Desmarais establish unequivocally that there is production in Canada of goods that are virtually identical to the goods found to have been dumped. The Tribunal, however, may in certain circumstances exclude some producers in assessing the injury to the domestic production or industry. Subsection 42(3) of SIMA directs the Tribunal to take fully into account the provisions of paragraph 1 of Article 4 of the Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade (GATT), which states that "In determining injury the term domestic industry shall be interpreted as referring to the domestic producers as a whole ... except that (i) when producers ... are themselves importers of the allegedly dumped product, the industry may be interpreted as referring to the rest of the producers." In the present case, it has been established that one producer of photo albums is an importer of dumped albums and self-adhesive leaves from the subject countries; its production of the subject goods being limited to production of covers and assembly of albums with imported leaves in a finished stage. Recently, a second producer of photo albums not only began manufacturing leaves and producing albums, but also imported dumped albums. Taking into account the GATT provisions and considering that: (1) the other significant producers import directly dumped albums and leaves; and (2) these producers are of marginal significance in terms of production, sales and market share whereas Desmarais accounts for a major proportion of the Canadian production of the subject goods (approximately 80 percent), the Tribunal considers that Desmarais alone constitutes the Canadian industry for the purpose of this inquiry.

### **CONSIDERATION OF MATERIAL INJURY**

The evidence provided by Desmarais in its questionnaire response, its written submission and the oral testimony of its representatives, as well as the oral testimony of one of the largest purchasers and retailers of the subject goods, clearly established the vulnerability of the industry to low-priced imports. This is a consequence of the nature of the subject goods, the fact that the majority of the sales occur during a four-month period, and the structure of the market. The subject goods are offered in sealed plastic envelopes or packages to consumers who consequently have difficulty in assessing their quality. Price, therefore, becomes the major determinant of the purchasing decision for both retailers and consumers. As the majority of the market is accounted for by relatively few large purchasers, offerings of dumped goods to one large retailer negatively affect the Canadian producer not only respecting that account, but also other accounts since low-price offerings are inevitably and quickly used by other retailers to obtain price concessions from the Canadian producer. According to Desmarais, its 10 largest customers account for, on average, close to 60 percent of its total sales of subject goods.

This situation is further compounded by the volume driven, capital-intensive nature of the production process that forces the domestic industry to lower its selling prices in order to maintain production volumes sufficient to cover fixed expenses and achieve a profit if possible.

Testimony from industry and market experts confirmed that the domestic market, by value, for photo albums with self-adhesive leaves has been growing steadily since 1987. However, this evidence also showed that, despite a growing market for photo albums, Desmarais' share of this market declined by 27 points over the review period of 1987 to mid-1990. Other Canadian producers, many of whom also imported subject goods either in the form of albums or, to a lesser extent, leaves used to make photo albums, initially gained market share, peaking at 27 percent in the first six months of 1989, before falling to 16 percent in the first six months of 1990. On the other hand, in the period from January 1989 to June 1990, subject countries increased their share of the Canadian market for photo albums with self-adhesive leaves by 24 percentage points, with Indonesia alone capturing 22 points of this market share. It appears from these statistics that the other domestic producers initially used imports of subject goods to displace Desmarais before themselves losing sales to subject goods imported directly by large Canadian retailers.

This loss of photo album market share by Desmarais was caused by its loss of part of, or all of, many major sales accounts. Indeed, the sales that were lost were so significant that Desmarais not only failed to increase sales in an expanding market, as it could reasonably expect, but also experienced declining sales. The Tribunal accepts Desmarais' testimony, which was corroborated in the case of one major account, that in an attempt to maintain the necessary volume of production in 1989 and 1990, the company had no choice but to maintain low prices or reduce them to avoid the greater risk of losing further sales to dumped imports. Therefore, Desmarais' average prices for the last year and a half of the review period, either rose very little or declined for the most frequently sold models of self-adhesive photo albums in an effort to reduce inventory to acceptable levels. This was particularly the case in the first half of 1990. In other words, the company suffered price suppression or erosion. Further, evidence indicated that since June 30, 1990, the situation has worsened and the presence and availability of dumped goods from the subject countries have continued to negatively affect Desmarais' ability to pass its increased costs on to its customers.

The ultimate result for Desmarais was a dramatic decline in profitability as its gross margins were compressed, finally ending in a net loss position. Loss of sales is generally accompanied by a decline in employment and in capacity utilization within the affected industry and this is exactly what Desmarais experienced throughout 1990.

The Tribunal carefully reviewed the situation respecting self-adhesive leaves in order to understand the working of the market forces at play and the role of leaves in that market. In this context, the Tribunal notes that during the review period purchases of bulk leaves were made from only the United States and Taiwan and, in lesser amounts, from Indonesia during the first half of 1990. All imports of subject leaves from Indonesia in 1990 were made by one domestic producer of subject albums. The domestic market for separate self-adhesive leaves (for later incorporation into albums or for sale as refills) during the review period was very small in relation to the market for photo albums. Since leaves represent the major proportion of the manufacturing cost of a finished album, the purchase of low-priced leaves allowed an other domestic

manufacturer to undercut Desmarais on a price basis on the sale of finished albums. Thus, it appears that the importation of dumped leaves, in even small quantities, by one producer and the continuing offer of leaves at dumped prices have had and will have an effect on not only the domestic market for leaves, but also, and more importantly, the domestic market for albums and the price at which both leaves and albums are sold. In addition, the import of photo albums from the subject countries by Canadian producers other than Desmarais not only negatively affected sales by Desmarais of bulk leaves to certain Canadian producers with no leaf making capability, but also allowed those same producers to compete more successfully against Desmarais in the sale of low-priced photo albums.

The majority of the Tribunal has found that from January 1989 to June 1990 Desmarais lost 16 points of market share in an expanding market and that it did this despite significant efforts to maintain volume sales by lowering or maintaining its prices, in the face of increased production costs, to meet the competition arising from dumped imports and other Canadian producers. During this same period, importers of dumped goods increased their share of the market from zero in 1988 to 24 percent in the first six months of 1990. Over the same one and a half years, other Canadian producers lost 6 points of market share. Desmarais' significant loss of market share, dramatic decline in profitability ending in a net loss position, and reduction in employment and capacity utilization were of such magnitude that the majority of the Tribunal has no hesitation in finding the injury it suffered to be material.

The testimony of witnesses knowledgeable about the marketplace for the subject goods confirmed that the presence of dumped goods in the Canadian market in late 1990 will have a large impact on sales throughout 1991. The fall of each year is the traditional time to conclude sales and purchase agreements between producers and retailers for the supply of photo albums for the next calendar year and, in 1990, these discussions have taken place in a climate of intense price competition because of the presence of dumped goods in the market earlier in the year. Sales agreements concluded at low prices due to these dumped goods will have to be honoured by domestic suppliers for a full year to come.

Turning to the issue of causality, the witness from Zellers confirmed that Desmarais produces a high-quality product that found general consumer acceptance and that there is no problem respecting Desmarais delivery or service. The Zellers' witness related the discovery of low-priced imported albums in a competitor's store and explained that because of Zellers' corporate pricing policy of offering "feature values," it was important to find a source of photo albums with self-adhesive leaves of reasonable quality at an equally low price. As a result, in 1990, Zellers began to import photo albums directly from Indonesia, essentially because of price considerations. The price at which the dumped goods could be landed in Canada was much lower than the price at which Desmarais had agreed to sell. That low price was made possible by the dumping of the subject goods. Furthermore, the ability of other Canadian producers to purchase low-cost finished albums at dumped prices from the subject countries and import subject self-adhesive leaves at dumped prices to produce albums to sell in competition with, and underprice, Desmarais, convinced the majority of the Tribunal that the material injury suffered by Desmarais was a direct result of the importation, or offering for sale, of dumped photo albums with self-adhesive leaves, and self-adhesive leaves, from the three subject countries taken as a single class.

The majority of the Tribunal is cognizant of the fact that there are wide variations in the volume of the subject imports originating from the three subject countries. However, taking into account the substantial margins of dumping determined by the Deputy Minister against all three countries respecting photo albums with self-adhesive leaves and the margin of dumping for leaves from Indonesia, the majority of the Tribunal considered the effect "*en masse*" of this single class of dumped goods. The majority of the Tribunal is further convinced from the history of past cases respecting the subject goods and the complainant's testimony respecting the capacity and willingness of producers in at least two of the subject countries to increase exports of subject goods at low prices, that Desmarais is likely to suffer injury if dumping were to continue. The majority of the Tribunal is also convinced from the testimony it heard that annual purchases and supply decisions recently made by suppliers and chain stores respecting 1991 sales of photo albums with self-adhesive leaves have been influenced, at least with respect to price, by the known availability of low-priced photo albums from the subject countries. Furthermore, there is no reason to believe that the volume of imports of photo albums with self-adhesive leaves from the three subject countries would decline in the absence of anti-dumping duties. The past shifting of source countries for photo albums with self-adhesive leaves in the wake of injury findings convinces the majority of the Tribunal of the genuineness of the complainant's fear that to exclude even one country, such as Thailand, from this finding would result in the rapid increase in exports of subject goods from that country. Furthermore, the majority of the Tribunal is mindful of the relative ease with which exports of separate leaves could replace present exports of dumped albums with self-adhesive leaves, given the fact that all three named countries are now dumping albums.

For these reasons, the majority of the Tribunal finds that the dumping of photo albums with self-adhesive leaves, imported together or separately, and self-adhesive leaves, originating in or exported from Indonesia, Thailand and the Philippines, has caused, is causing and is likely to cause material injury to the production in Canada of like goods.

### **MASSIVE DUMPING**

Counsel for the complainant has also requested a finding of massive dumping in accordance with the provisions of paragraph 42(1)(b) of SIMA. The application of paragraph 42(1)(b) of SIMA can only be invoked if the Tribunal is satisfied that, either:

- (a) there has occurred a considerable importation of like goods,
- (b) that were dumped,
- (c) which dumping has caused material injury (or would have caused material injury except for the application of anti-dumping measures),
- (d) material injury has been caused by reason of the fact that the dumped goods
  - (i) constitute a massive importation into Canada, or
  - (ii) form part of a series of importations into Canada, which in the aggregate are massive and have occurred within a relatively short period of time, and



(e) it appears necessary to the Tribunal that duty be assessed on the imported goods in order to prevent the recurrence of that material injury;

or

(f) the importer of the dumped goods was or should have been aware that the exporter was practising dumping and

(g) that the dumping would cause material injury, and

(h) material injury has been caused by reason of the fact that the dumped goods

(i) constitute a massive importation into Canada, or

(ii) form part of a series of importations into Canada that in the aggregate are massive and have occurred within a relatively short period of time, and

it appears necessary to the Tribunal that duty be assessed on the imported goods in order to prevent the recurrence of that material injury.

In the opinion of the majority of the Tribunal, the imposition of retroactive duties pursuant to paragraph 42(1)(b) of SIMA is justified in this case since the conditions set out in that paragraph have been satisfied.

During the first half of 1990, imports from the subject countries, which account for 91 percent of total imports of the subject goods, captured 24 percent of the total Canadian market in value terms and exceeded 40 percent of the total value of Desmarais' domestic sales for that same period. The majority of the Tribunal is of the opinion that such a volume of imports constitutes a "considerable importation." The Deputy Minister found that those importations were dumped at considerable margins of dumping. The majority of the Tribunal has found, above, that the dumping of the subject goods has caused material injury to the production in Canada of like goods. Imports from the subject countries that were negligible in 1988 experienced an exponential growth in the following three six-month periods. In the first half of 1990, such imports were nearly twice as large as for the full year 1989 and five times larger than for the corresponding period in 1989. The rapid market penetration is demonstrated by the market shares captured by these imports over the three six-month periods examined. From a low of 6 percent of the domestic market in the first half of 1989, the dumped imports captured 7 percent in the second half of 1989 and 24 percent in the first half of 1990.

Against this background, the majority of the Tribunal considers that the importation of the dumped goods in the first half of 1990 was massive or, as the goods were imported at different times during that period, that they form part of a series of importations that in the aggregate are massive and have occurred within a relatively short period of time. Desmarais lost a further 6 points of market share in the first half of 1990 as compared to 1989, despite an expanding market. The loss of sales volume also increased Desmarais' unit operation costs at a time it was suffering price suppression or degradation. Accordingly, the majority of the Tribunal is convinced that this material injury is attributable to the fact that this series of importations of the dumped goods was massive.

The majority of the Tribunal considers that it is necessary to assess duty on the imported goods to prevent the recurrence of the material injury caused by the massive importation of dumped goods. The majority of the Tribunal is of the view that this provision of SIMA contemplates circumstances where there is a likelihood of a recurrence of material injury. What SIMA intends to deter is not only the importation of dumped goods from the subject countries, but also, the switching "*en masse*" of those importations to other dumped sources. By the imposition of retroactive anti-dumping duties on importers, this provision of SIMA imposes a penalty to discourage the importers from switching sources to defeat the purpose of SIMA.

In the present case, the majority of the Tribunal is persuaded that there is a clear prospect of recurrence of that material injury. This vulnerable industry with its history of recurrences of dumping as importers switch from one country to another, following an anti-dumping determination, clearly warrants a finding of massive dumping. Importers have already demonstrated their eagerness in switching to other sources, subsequently determined to be dumped sources, after anti-dumping measures were applied against their previous sources. Accordingly, there are good reasons to anticipate that importers will continue to switch to other low-cost sources of photo albums unless penalized to a greater degree than in the usual anti-dumping case. Consequently, the majority of the Tribunal concludes that this measure is necessary to prevent the recurrence of material injury caused by massive importations.

Robert J. Bertrand, Q.C.  
Robert J. Bertrand, Q.C.  
Presiding Member

Michèle Blouin  
Michèle Blouin  
Member

### **MEMBER TRUDEAU'S SEPARATE REASONS**

While I agree with some of the conclusions of my colleagues, there are three aspects of their conclusions with which I do not agree: (1) the definition of the class of goods; (2) the finding of past and present material injury in respect of self-adhesive leaves; and (3) the finding of massive importations.

I agree with my colleagues' finding that the complainant alone constitutes the domestic industry for purposes of this inquiry.

I do not agree with my colleagues, however, that it is open to the Tribunal to determine material injury to domestic production of like goods by aggregating dumped imports without distinguishing between the separate products within the "class of goods" described in the preliminary and final determinations of dumping.

This case involves two products or more precisely a finished product and its major component part. The Deputy Minister, in framing the description of the goods for the investigation into dumping, identified the class of goods as: "photo albums with self-adhesive leaves, imported together or separately, and self-adhesive leaves, originating in or exported from Indonesia, Thailand and the Philippines." Accordingly, the Deputy Minister has inquired into the importation of subject albums and self-adhesive leaves, separately. Dumping of subject albums was found from all three named countries, and dumping of leaves was found with respect to Indonesia alone. There were no imports of leaves from Thailand and the Philippines during the period of investigation by the Deputy Minister or inquiry by the Tribunal. Margins of dumping were calculated for subject albums and leaves separately for each country, where applicable. The Tribunal, in conducting this inquiry, has also looked at the two products distinctly. Separate information was requested from the manufacturers and importers for subject photo albums and self-adhesive leaves, and statistics were developed for both categories where available. Furthermore, separate commodity codes are used to classify imports of photo albums with self-adhesive leaves and self-adhesive leaves for customs tariff purposes.

It is clear from the evidence that subject albums and self-adhesive leaves are closely related. One is a finished product for final sale, the other, its major component part. Some producers, like the complainant, are fully integrated. They make both self-adhesive leaves, and finished photo albums. Other manufacturers, like Crown, produce subject albums with purchased leaves from several sources including imports. There is also a small market for refill leaves; however, with greater demand for albums containing more pages, this market has practically disappeared.

Because the "class of goods" under inquiry contains two separate and distinct products, I do not find it appropriate to only look at one broad class of goods without distinguishing the separate products in making the required findings. This approach has been used in most of the previous injury findings that involved a "class of goods"

containing a finished product and its component parts. In these prior decisions,<sup>2</sup> the Tribunal found it appropriate to make, in respect of each product, distinct findings of past, present or future material injury caused by dumping of like goods.

In addition, the decision of the Federal Court of Appeal in the case *Noury Chemical Corp. v. Pennwalt of Canada Ltd.*<sup>3</sup> further supports this approach. In summary, the Federal Court of Appeal stated that where the preliminary determination applies to four distinct product classes that are not generally substitutable for each other, it is the duty of the Tribunal to inquire whether the dumping of each class of goods, for which separate margins of dumping have been determined, has caused, is causing or is likely to cause material injury to the production in Canada of goods that can be considered to be like goods in relation to that class.

Having concluded that separate findings must be made, I now turn to the issue of material injury and causality.

There was clear evidence that the complainant lost substantial sales of photo albums with self-adhesive leaves respecting one of its major accounts because of offerings of photo albums at low-prices that were made possible by the dumping and that such loss had material consequences on the complainant's operations in terms of lost production, sales, profits, employment and increased unit production costs. In addition, dumped imports of subject photo albums have made substantial inroads in the marketplace since they began in volume in 1989, taking 7 percent of the market in that year and 24 percent in the first half of 1990. In my view, it is the low price made possible by the dumping and quality features of these imports (that were mainly in the form of coil-bound 40-page albums) that have allowed such quick market penetration.

For these reasons, I find that the dumping of photo albums with self-adhesive leaves from the three named countries caused past and present material injury to Desmarais' production of like goods. In view of this past performance, I also find that the dumping of photo albums with self-adhesive leaves from the named countries is likely to cause material injury to the production of like goods.

I cannot find, however, that the dumping of self-adhesive leaves from the three named countries has or is causing material injury to Desmarais' production of like goods, i.e., self-adhesive leaves. In the case of Thailand and the Philippines, there has yet to be any imports of self-adhesive leaves. In the case of Indonesia, imports of leaves have been

---

2. See for example the findings made by the Anti-dumping Tribunal in Inquiry No. ADT-4-74, respecting photo albums with self-adhesives leaves and component parts thereof originating in Japan and the Republic of Korea, and in Inquiry No. ADT-11-77, respecting bicycles, assembled or unassembled, and bicycle frames, forks, steel handlebars and wheels (not including tires and tubes) originating in or exported from the Republic of Korea and Taiwan; and the finding made by the Canadian Import Tribunal in Inquiry No. CIT-18-84, respecting photo albums with self-adhesives leaves, originating in or exported from Hong Kong and the United States of America and self-adhesives leaves, originating in or exported from Hong Kong, the United States of America and the Republic of Korea.

3. [1982] 2 F.C. 283.

quite small and not such as to have caused material injury to the complainant's production of self-adhesive leaves.

Evidence was provided during the hearings that there was production capacity to make self-adhesive leaves in all three named countries and that such leaves were readily available at attractive prices based on the dumped prices from Indonesia. As finished albums were dumped from all three countries, as well as leaves from Indonesia, I conclude that self-adhesive leaves are likely to be dumped from all three countries and that such dumping is likely to cause material injury to the complainant's production of like goods.

Finally, I turn to the issue of massive importations. I cannot agree that the facts in this case warrant such a draconian measure.

There is no question that the dumped imports (that formed part of a series of importations) were considerable, at least in the case of subject albums. However, the considerable importation test, in my view, is certainly not met in the case of self-adhesive leaves. Dumped imports of self-adhesive leaves were quite small and totalled less than \$50,000. In my view, that cannot amount to a considerable importation and certainly not a massive importation.

With respect to subject albums, the evidence reveals that such imports from the three named countries increased from a negligible amount in 1988 to less than \$1 million in 1989 and to more than \$1 million in the first half of 1990. This constitutes a considerable importation taking into account the size of the market. The second test to meet, however, in finding massive importations, is to determine whether the imports that formed part of a series of importations into Canada, as is the case here, in the aggregate are massive and have occurred within a relatively short period of time.

Factors to consider in making such an assessment are the relative size of dumped imports, rapidity and degree of market penetration, other product displacement and time span over which dumped imports have occurred.

The evidence indicates that dumping from the subject countries began in early 1989 and persisted through to the middle of 1990, a period of about 18 months. During that time, the percent share of market gained by the imports that entered Canada from the named countries is calculated to be about 11 percent. The statistics can be looked at another way however.

In the first half of 1990, market share of dumped imports attained 24 percent on the basis of value. The evidence also indicates that the complainant, in the first half of 1990, only lost 6 percentage points of market share compared to the same period in 1989. Who then was adversely affected by the penetration of the dumped products? In my view, it was other domestic producers. The statistics show that the share of market of other domestic producers was reduced by 11 percentage points. Furthermore, photo album imports from the named countries in 1989 had replaced in large part imports from other countries, mainly Malaysia. The representative of a major importer testified that his imports were at the same rate over a nine-month period and, furthermore, he had ceased importing upon the initiation of the dumping investigation. In addition, over the years, these low-priced imports have always been in the Canadian market in volume and have continued even from countries subject to material injury

findings. There was no evidence adduced to suggest that any of the few importers of the dumped goods was trying to stockpile photo albums or leaves following the initiation of the Deputy Minister's investigation on June 8, 1990, and in advance of a preliminary determination being made.

In summary, we are dealing with dumping presumably taking place over a period of some 18 months. In aggregate over that period, dumped imports have taken about 11 percent of the domestic market. There are other factors such as the complainant not taking the full brunt of the dumped imports as these imports replaced those from other sources or sales by other domestic producers. In view of these facts, I cannot conclude that this is a case of massive importations, or more precisely, that material injury was caused by reason of the fact that the dumped goods formed part of a series of importations which in the aggregate are massive and have occurred within a relatively short period of time.

Therefore, I would not have invoked the provisions of paragraph 42(1)(b) of SIMA.

Arthur B. Trudeau

Arthur B. Trudeau

Member