CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Monday, November 9, 1992

Inquiry No.: NQ-91-002 Remand

CERTAIN BEER ORIGINATING IN OR EXPORTED FROM THE UNITED STATES OF AMERICA BY OR ON BEHALF OF PABST BREWING COMPANY, G. HEILEMAN BREWING COMPANY INC. AND THE STROH BREWERY COMPANY, THEIR SUCCESSORS AND ASSIGNS, FOR USE OR CONSUMPTION IN THE PROVINCE OF BRITISH COLUMBIA

REMAND - The Binational Panel, in Canadian Secretariat File No. CDA-91-1904-02, acting pursuant to its authority under section 77.15 of the *Special Import Measures Act* (SIMA), remanded the decision of the Canadian International Trade Tribunal (the Tribunal) in Inquiry No. NQ-91-002 to the Tribunal for a determination as to whether the dumping of beer originating in the United States of America, rather than the presence of dumped beer originating in the United States, has caused and is causing material injury to the producers of all or almost all beer production in British Columbia. Pursuant to the remand, the Binational Panel directed the Tribunal to state whether price suppression, or any other such price-based harm caused by the dumping of the subject imports, supports a determination that the subject imports have caused, are causing or are likely to cause material injury to producers of all or almost all of the production within the B.C. market.

DETERMINATION ON REMAND: The Canadian International Trade Tribunal, pursuant to section 77.16 of SIMA, hereby finds that the dumping of beer originating in the United States of America has caused, is causing and is likely to cause material injury to the production in British Columbia of like goods. Specifically, the Tribunal finds that the price suppression caused by the dumping of the subject imports supports a determination that the subject imports have caused, are causing and are likely to cause material injury to Labatt Breweries of British Columbia, Molson Brewery B.C., Ltd. and Pacific Western Brewing Company.

Charles A. Gracey
Charles A. Gracey
Presiding Member

Sidney A. Fraleigh
Sidney A. Fraleigh
Member

Michèle Blouin
Michèle Blouin
Member

Michel P. Granger
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Inquiry No.: NQ-91-002 Remand

Tribunal Members:	Charles A. Gracey, Presiding Member Sidney A. Fraleigh, Member Michèle Blouin, Member
Directors of Research:	J.A. (Sandy) Greig Douglas Cuffley
Research Manager:	Paul Berlinguette
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Counsel for the Tribunal:	Cliff Sosnow

CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Monday, November 9, 1992

Inquiry No.: NQ-91-002 Remand

IN THE MATTER of a remand under section 77.15 of the *Special Import Measures Act*[1] respecting:

CERTAIN BEER ORIGINATING IN OR EXPORTED FROM THE UNITED STATES OF AMERICA BY OR ON BEHALF OF PABST BREWING COMPANY, G. HEILEMAN BREWING COMPANY INC. AND THE STROH BREWERY COMPANY, THEIR SUCCESSORS AND ASSIGNS, FOR USE OR CONSUMPTION IN THE PROVINCE OF BRITISH COLUMBIA

TRIBUNAL: CHARLES A. GRACEY, Presiding Member
SIDNEY A. FRALEIGH, Member
MICHÈLE BLOUIN, Member

DETERMINATION ON REMAND

This determination on remand was undertaken in accordance with the Binational Panel decision in respect of its review (CDA-91-1904-02)[2] of the finding of the Canadian International Trade Tribunal (the Tribunal) in Inquiry No. NQ-91-002.[3] In its decision, the Tribunal found that the dumping of malt beverages, commonly known as beer, of an alcoholic strength by volume of not less than 1.0 percent and not more than 6.0 percent, packaged in bottles or cans not exceeding 1,180 mL (40 oz.), originating in or exported from the United States of America by or on behalf of Pabst Brewing Company, G. Heileman Brewing Company Inc. and The Stroh Brewery Company, their successors and assigns, for use or consumption in the province of British Columbia, has caused, is causing and is likely to cause material injury to the production in British Columbia of like goods.

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1. R.S.C. 1985, c. S-15.
2. *Certain Beer Originating in or Exported from the United States of America by or on Behalf of G. Heileman Brewing Company Inc. and Pabst Brewing Company and The Stroh Brewery Company, Their Successors and Assigns, for Use or Consumption in the Province of British Columbia (Injury)*, Article 1904 Binational Panel, Decision dated August 26, 1992.
3. *Certain Beer Originating in or Exported from the United States of America by or on Behalf of Pabst Brewing Company, G. Heileman Brewing Company Inc. and The Stroh Brewery Company, Their Successors and Assigns, for Use or Consumption in the Province of British Columbia*, Canadian International Trade Tribunal Inquiry No. NQ-91-002, Finding and Statement of Reasons, October 2 and 17, 1992, respectively.

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The Binational Panel has unanimously affirmed the decision of the Tribunal in all respects, except for one point on which it has remanded the decision to the Tribunal with instructions. The Binational Panel remanded the decision of the Tribunal "for a determination as to whether the dumping of beer originating in the United States, rather than the presence of dumped beer originating in the United States, has caused and is causing material injury to the producers of all or almost all beer production in British Columbia." The Binational Panel asked the Tribunal to state, on remand, " whether price suppression, or any other such price-based harm caused by the dumping of the subject imports, supports a determination that the subject imports have caused, are causing or are likely to cause material injury to producers of all or almost all of the production within the B.C. market."

In responding to the remand, the Tribunal wishes to reassert the reasons for its original decision, which were affirmed in all respects except for that one on which it was remanded. In order to eliminate any doubt, however, the Tribunal declares that it is convinced that there was price suppression in the B.C. market and that this price suppression was caused by the dumping of the subject goods. The price suppression was a price-based harm. As will be seen in the reasons that follow, the Tribunal is also convinced that the price suppression caused by the dumping of the subject goods was, by itself, more than sufficient to cause material injury to each of Labatt Breweries of British Columbia (Labatt), Molson Brewery B.C., Ltd. (Molson) and Pacific Western Brewing Company (the PWB).

The Tribunal now wishes to add to its original decision by answering, for the Binational Panel, the following question. Does price suppression caused by the dumping of the subject imports support a determination that the subject imports have caused, are causing and are likely to cause material injury to each of Labatt, Molson and the PWB? In adding to the original decision, the Tribunal relies exclusively on evidence and arguments that were before the Tribunal at the time of the original inquiry.

In addressing this question, the Tribunal considered whether the evidence would support a finding of material injury to each of the three producers when the costs associated with the bottle-to-can switch were removed from the analysis of injury. To carry out this analysis, the Tribunal started with the income statements of Labatt[4] and Molson[5] for British Columbia. It subtracted from the appropriate lines of the income statements, on a year-by-year basis, the costs associated with the bottle-to-can switch as reported to the Tribunal by Labatt[6] and Molson[7] in response to the letters of the Tribunal dated August 21, 1991, to Labatt[8] and Molson.[9]

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4. CITT Protected Exhibit NQ-91-002-12.1F, CST File No. 9, pp. 99.12 and 99.13.
5. CITT Protected Exhibit NQ-91-002-7, CST File No. 5, p. 103.
6. CITT Protected Exhibit NQ-91-002-12.1G, CST File No. 9, pp. 99.24-99.26.
7. CITT Protected Exhibit NQ-91-002-71, CST File No. 5, p. 173.
8. CITT Protected Exhibit NQ-91-002-47, CST File No. 5, p. 153.
9. *Ibid.*, p. 152.

The PWB did not claim in its submissions to the Tribunal that there were costs associated with the switch from bottle-to-can production, nor did our assessment of its evidence indicate such costs. We continue to be convinced, as we were the first time that we examined the evidence for the PWB, that the degree of price suppression caused by the dumping of the subject imports, by itself, supports a determination that the subject imports have caused, are causing and are likely to cause material injury.

Labatt's income statements, for fiscal years 1988 through 1991, were adjusted to remove the operating and financial costs associated with the switch from bottles to cans. An examination of the adjusted income statements for Labatt shows that gross profits fell in each year after fiscal 1988, as did net income before taxes. As a result, by fiscal 1991, Labatt was in a loss position. The Tribunal examined the reasons for Labatt's declining financial performance. In particular, it examined carefully the decline in the average revenue per hectolitre sold in fiscal 1991 compared to fiscal 1988, the increase in the cost of goods sold per hectolitre and the decrease in the combined general selling and administrative expenses and financial expense items per hectolitre sold. The Tribunal does not believe that the increase in the average cost of goods sold diminishes the significance of the reduction in the average revenue nor the magnitude of the injury revealed by the reduction in average revenue.

Molson's income statement, for fiscal 1988, was adjusted to remove the costs associated with the switch from bottles to cans.[10] An examination of the adjusted income statement for fiscal 1988, and the unadjusted statements thereafter, shows declining gross profits and increasing losses in each fiscal period up to fiscal 1991. In fiscal 1991, gross profits improved, and Molson lost less money. However, the firm's financial position in fiscal 1991 was inferior to that in fiscal 1988. The Tribunal examined the reasons for the decline in Molson's financial performance in fiscal 1991 compared to fiscal 1988. In particular, it examined carefully the decline in the average revenue per hectolitre sold in fiscal 1991 compared to fiscal 1988. It also noted the decrease in the cost and expense items per hectolitre between the same years.

The Tribunal points out that the price suppression manifested itself in the income statements of Labatt and Molson as reductions in the average revenues per hectolitre. An examination of the reduction in the average revenues per hectolitre shows the magnitude of the injury to Labatt and Molson resulting from the price suppression caused by the dumping of the subject imports.

The Tribunal considered the average revenue per hectolitre in the income statements of Labatt. Fiscal 1988 was taken as the base year. That is the last complete fiscal year prior to the B.C. industry's price reductions in calendar year 1988 in response to the prices of the subject imports. Compared to fiscal 1988, the average revenue per hectolitre for Labatt fell in fiscal 1989 and then again in fiscal 1990. The average revenue per hectolitre rose in fiscal 1991, but did not recover to the fiscal 1988 level.

In fiscal 1991, the average revenue per hectolitre was about 5 percent less than it was in fiscal 1988. That reduction in the average revenue per hectolitre was significant for Labatt. At Labatt's actual volume of sales in fiscal 1991, that average revenue reduction per hectolitre resulted in millions of dollars of lost revenue and a

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10. For Molson, the switch from bottles to cans caused cost increases in fiscal 1988 only.

corresponding reduction in gross profits. That magnitude of injury was material for Labatt.

On the basis of this evaluation of Labatt's adjusted income statements, the Tribunal finds that the price suppression caused by the dumping of the subject imports supports a determination that the subject imports have caused and are causing material injury to Labatt.

The Tribunal considered the average revenue per hectolitre in the income statements of Molson. Once again, fiscal 1988 was used as the base year. The trend in Molson's average revenue per hectolitre followed the same pattern as that of Labatt. Compared to fiscal 1988, the average revenue per hectolitre fell in fiscal 1989 and then again in fiscal 1990. The average revenue per hectolitre rose in fiscal 1991, but did not recover to the fiscal 1988 level.

In fiscal 1991, the average revenue per hectolitre was about 5 percent less than it was in fiscal 1988. That reduction in the average revenue per hectolitre was significant for Molson. At Molson's actual volume of sales in fiscal 1991, that average revenue reduction per hectolitre resulted in millions of dollars of lost revenue and a corresponding reduction in gross profits. That magnitude of injury was material for Molson.

On the basis of this evaluation of Molson's adjusted income statements, the Tribunal finds that the price suppression caused by the dumping of the subject imports supports a determination that the subject imports have caused and are causing material injury to Molson.

Having reached its conclusion, the Tribunal believes that, in the absence of the dumping in the B.C. market, the average revenue per hectolitre for beer in fiscal 1991 would have recovered to, at least, fiscal 1988 levels. The Tribunal considers, however, that this is a conservative expectation. In this regard, the Tribunal observes that in all other provinces of Canada, where Labatt and Molson have operations, the average revenues per hectolitre rose[11] in fiscal 1991 compared to fiscal 1988.

In respect of the likelihood of material injury resulting from price suppression, the Tribunal believes that if the dumping duties are not kept in place, the exporters will resume their dumping and restore their prices at the low end of the market. At these low prices, the exporters will continue to suppress the prices of Labatt, Molson and the PWB. For this reason, the Tribunal believes that, in the absence of dumping duties, the price suppression is likely to cause material injury to Labatt, Molson and the PWB.

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11. CITT Protected Exhibit NQ-91-002-7, CST File No. 5, pp. 117-124 and 150.7-150.12.

In summary and on the basis of the foregoing, the Tribunal finds that the price suppression caused by the dumping of the subject imports supports a determination that the subject imports have caused, are causing and are likely to cause material injury to Labatt, Molson and the PWB. These three producers represent all or almost all of the production of beer in the B.C. market.

Charles A. Gracey
Charles A. Gracey
Presiding Member

Sidney A. Fraleigh
Sidney A. Fraleigh
Member

Michèle Blouin
Michèle Blouin
Member

Concurring Opinion of Member Michèle Blouin

I concur with the determination of my colleagues, Members Gracey and Fraleigh. I am in agreement with their opinions and conclusion, but I wish to add my views on two issues.

I. Standard of Binational Panel Review

The Binational Panel, in reviewing the Tribunal's decision according to Article 1911 of the *Canada-United States Free Trade Agreement*[12] (the FTA), applied the standard of review set forth in subsection 28(1) of the *Federal Court Act*[13] that reads as follows:

> *28. (1) Notwithstanding section 18 or the provisions or any other Act, the Court of Appeal has jurisdiction to hear and determine an application to review and set aside a decision or order, other than a decision or order of an administrative nature not required by law to be made on a judicial or quasi-judicial basis, made by or in the course of proceedings before a federal board, commission or other tribunal, on the ground that the board, commission or tribunal*
>
> *(a) failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;*
>
> *(b) erred in law in making its decision or order, whether or not the error appears on the face of the record; or*
>
> *(c) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.*

Subsection 76(1) of SIMA provides that "every order or finding of the Tribunal under this Act is final and conclusive."

Gonthier J. of the Supreme Court of Canada states, in the *National Corn Growers*[14] case at page 1369, that:

> *[The] courts, in the presence of a privative clause, will only interfere with the findings of ... [the] tribunal where it is found that the decision of that tribunal cannot be sustained on any reasonable interpretation of the facts or of the law.*

In the Binational Panel review of the *Beer*[15] case, Chairman Greenberg declares, in his concurring opinion, that:

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12. *Canada-United States Free Trade Agreement*, signed January 2, 1988 (Enacted on December 30, 1988, by *An Act to Implement the Free Trade Agreement between Canada and the United States of America*, S.C. 1988, c. 65).
13. R.S.C. 1985, c. F-7.
14. *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324.
15. *Supra*, note 2, at p. 43.

> *It is submitted that the question of whether the issues before this Panel concerning the proper interpretation and application of section 42(3)(a) of SIMA by the Tribunal are jurisdictional and subject to the "correctness" test applied by the Majority, or are ordinary ones of law and fact subject to the "patently unreasonable" test, already has been decided conclusively by the Supreme Court of Canada in the National Corn Growers case. The plain answer of the Court -- notwithstanding the lengthy opinions as to the proper application of that standard -- was that section 42(3)(a) of SIMA is not a "jurisdictional" statute and therefore the "patently unreasonable" test is the proper standard of review.*

Chairman Greenberg also states, at page 47, that:

> *[T]he Panel need only find that it rests on a reasonable interpretation of the law, not necessarily the only such interpretation, or even the interpretation which the Panel might consider best. This is the teaching of National Corn Growers. The only inquiry is whether the Tribunal had rational basis for its decision.*

The prior Binational Panel, which reviewed the Tribunal's decision in the *Induction Motors*[16] case, followed the decision of the Supreme Court of Canada in the *National Corn Growers* case and found that the interpretation of paragraph 42(3)(*a*) of SIMA was subject to the "patently unreasonable test."

The *National Corn Growers* decision rendered in 1990 is the latest decision of the Supreme Court of Canada and includes an extensive review of Canadian jurisprudence. It concludes that the "patently unreasonable test" applies to paragraph 42(3)(*a*) of SIMA.

Article 1904.3 of the FTA provides that:

> *The panel shall apply the standard of review described in Article 1911 and the general legal principles that a court of the importing Party otherwise would apply to a review of a determination of the competent investigating authority.*

The Tribunal and the Binational Panel are bound by the *National Corn Growers* decision. Canadian law and jurisprudence apply to the importing party, which is Canada. The Tribunal cannot be subject to the "correctness test" (as established by the majority of the Binational Panel in this case) in respect of cases originating in the United States only, and be subject to another one, namely, the "patently unreasonable test" (recognized by the Supreme Court of Canada) in respect of cases originating in countries other than the United States. Canadian law and jurisprudence apply equally to all countries doing business in Canada.

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16. *Certain Dumped Integral Horsepower Induction Motors, One Horsepower (1 HP) to Two Hundred Horsepower (200 HP) Inclusive, with Exceptions Originating in or Exported from the United States of America,* 4 T.C.T. 7065 (Article 1904 Binational Panel) September 11, 1991.

In my view, the "patently unreasonable test" clearly applies to paragraph 42(3)(*a*) of SIMA.

II. Presence of Dumped Goods Causing Material Injury

The Binational Panel remanded the decision to the Tribunal on one issue only:

> *for a determination as to whether the dumping of beer originating in the United States, rather than the presence of dumped beer originating in the United States, has caused and is causing material injury to the producers of all or almost all beer production in British Columbia. On remand, the CITT shall state whether price-suppression, or any other such price-based harm caused by the dumping of the subject imports, supports a determination that the subject imports have caused, are causing or are likely to cause material injury to producers of all or almost all of the production within the B.C. market.*[17]

I am in agreement with my colleagues that, in this determination, the price suppression caused by the dumping of the subject imports supports a determination that the subject imports have caused, are causing and are likely to cause material injury to Labatt, Molson and the PWB, which represent all or almost all of the beer production in British Columbia of like goods. The injury to the three producers is significant, and the price suppression by itself has had an impact that is sufficient to give rise to a finding of material injury.

Moreover, I am convinced that the presence of low-priced imports of beer in cans created a consumer preference for cans in the B.C. market because the price of these imports was very low. Indeed, consumers developed a preference for cans over bottles on the basis of price. B.C. producers, therefore, had to compete with the dumped imports of beer in cans with a domestic product packaged in cans.

B.C. producers also had to change their existing pricing strategy whereby bottled beer was generally sold at a cheaper price than canned beer. This switch, to price favour the canned product, is best exemplified by the decision of Labatt and Molson, in December 1988, to lower the prices of their major brands of regularly priced beer sold in cans from $6.30 to $5.60 per 6-pack in order to compete with the U.S. imports of beer. This pricing move made cans cheaper than bottles in the regular market, the latter selling at $11.85 per 12-pack. Such action resulted in an increase in the volume of sales of canned beer. In this connection, the Tribunal noted, in the Statement of Reasons,[18] that:

> *Sales of beer in cans in British Columbia accounted for 63 percent of the total B.C. packaged beer sales in 1990, up from 30 percent in 1987. In comparison, in the rest of Canada, sales of beer in cans accounted for only 16 percent of the total market for packaged beer in 1990, up from 12 percent in 1987.*

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17. *Supra*, note 2, at p. 39.
18. *Supra*, note 3, at p. 18.

The bottle-to-can switch, and its relation to the dumping of the subject imports, was a subject explored at length at the hearings and in the Tribunal's deliberations. It is possible, however, that we dealt with the matter too briefly in our reasons for decision. That is why I have elaborated above on the relation between the switch and the pricing of the dumped imports and the domestic product. For the same reason, I also wish to elaborate on the relation between the switch and the presence of imports at dumped prices in the marketplace. I would like to illustrate my thinking on this matter by way of an example drawn from the automotive industry.

If a foreign manufacturer were dumping automobiles in the North American market and if these goods contained several new and technologically advanced features, not available on automobiles produced by domestic manufacturers, it is reasonable to expect that consumers, having become accustomed to these new features offered on automobiles at dumped prices, would demand the same from domestic producers. Under the circumstances, in order to maintain or recover market share, North American manufacturers would be forced to make production changes at considerable expense so as to incorporate these new features into their product. However, in the presence of dumped imports, they would not be in a position to pass on these additional expenses to the consumer. The costs incurred, as a result of the presence of new features available on dumped automobiles may be considered as costs associated with or caused by the "dumping" and by the "presence of dumped goods" in the marketplace. In this context, the price suppression resulting from the presence of dumped goods will, in turn, affect the financial position of the domestic industry.

On the other hand, if the same goods were entering the North American market at undumped prices, any injury suffered by the domestic industry would be caused by normal competitive factors and not by dumping.

Turning to the *Beer* case, when B.C. prices are still suppressed after the B.C. industry has taken action, such as investing in new packaging equipment to counter the negative effects of dumping, then it is definite that the presence of dumped beer in cans has caused, is causing and is likely to cause material injury to the B.C. beer producers.

In my view, it would not be "patently unreasonable or incorrect" to find that dumped imports of beer in cans and their presence in the B.C. market have caused, are causing and are likely to cause material injury to the B.C. beer producers of like goods.

Canadian jurisprudence has recognized that the presence of dumped goods can cause material injury to the domestic industry. Hugessen J. of the Federal Court of Appeal in the *Sacilor Aciéries*[19] case states that:

> *While I accept that the dumping is the introduction of dumped goods into the commerce of Canada, I do not think that we can, as a matter of law (or even of logic), create an impenetrable barrier between the effects of the presence of dumped goods and the effects of the actual dumping itself. If the presence of foreign goods in the domestic market at dumped prices results in domestic*

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19. *Sacilor Aciéries v. The Anti-dumping Tribunal et al.*, Federal Court of Appeal No. A-1806-83, June 27, 1985.

> *producers being obliged either to lose sales or to sell their own products at a loss, then it is open to the Tribunal to make a finding that the dumping has caused injury. Of course, there may be other factors which may have contributed to the injury. As a matter of common sense, it seems to me that there almost always will be. Such matters as efficiency, quality, cost control, marketing ability, accuracy in forecasting, good luck, and a host of others come to mind. It is the function of a specialised, expert tribunal such as this one to weigh and balance those factors and to decide the importance to be given to each. That, as it seems to me, is what it has done in the decision under attack.*

In summary and on the basis of the foregoing, I am in agreement with my colleagues that the price suppression caused by the dumping of the subject imports supports by itself a determination that the subject imports have caused, are causing and are likely to cause material injury to Labatt, Molson and the PWB. Furthermore, I find that the presence of the dumped goods has caused, is causing and is likely to cause material injury to the producers of all or almost all of the beer production in the B.C. market.

Michèle Blouin
Michèle Blouin
Member