

Ottawa, Wednesday, April 29, 1998

**Inquiry No.: NQ-97-002**

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

**CERTAIN PREPARED BABY FOODS ORIGINATING IN OR  
EXPORTED FROM THE UNITED STATES OF AMERICA**

**FINDING**

The Canadian International Trade Tribunal, under the provisions of section 42 of the *Special Import Measures Act*, has conducted an inquiry following the issuance by the Deputy Minister of National Revenue of a preliminary determination of dumping dated December 30, 1997, and of a final determination of dumping dated March 30, 1998, respecting the importation into Canada of prepared baby foods, containing finely homogenized vegetables, fruit and/or meat which may include some visible pieces of not more than 6.5 mm in size, and strained juice, put up for retail sale as food and beverages for infants of ages 4 to 18 months, in containers of a net volume not exceeding 250 ml, excluding organic baby food and frozen baby food preparations, originating in or exported from the United States of America.

Pursuant to subsection 43(1) of the *Special Import Measures Act*, the Canadian International Trade Tribunal hereby finds that the dumping in Canada of the aforementioned goods has caused material injury to the domestic industry.

Patricia M. Close  
Patricia M. Close  
Presiding Member

Raynald Guay  
Raynald Guay  
Member

Anita Szlajak  
Anita Szlajak  
Member

Michel P. Granger  
Michel P. Granger  
Secretary

The Statement of Reasons will be issued within 15 days.

Place of Hearing: Ottawa, Ontario  
Dates of Hearing: March 30 to April 2, 1998

Date of Finding: April 29, 1998

Tribunal Members: Patricia M. Close, Presiding Member  
Raynald Guay, Member  
Anita Szlazak, Member

Director of Research: Selik Shainfarber

Researcher: John O'Neill

Economists: Dennis C. Featherstone  
Sarah Mulvey

Statistician: Lise Lacombe

Counsel for the Tribunal: Gerald H. Stobo  
Heather A. Grant

Registration and Distribution Officer: Gillian E. Burnett

**Participants:**

Lawson A.W. Hunter, Q.C.  
Randall J. Hofley  
Susan M. Hutton  
for H.J. Heinz Company of Canada Ltd.

**(Domestic Producer)**

Terrance A. Sweeney  
Salvatore Mirandola  
Brent J. Lisowski  
Kevin F. Fritz  
Farley J. Cohen  
Robert Macdonald  
Joanne Shatka  
Girish Sharma  
for Gerber (Canada) Inc.  
Gerber Products Company

**(Importer/Exporter)**

Simon V. Potter  
Brenda C. Swick-Martin  
for Director of Investigation and Research  
Competition Bureau  
Industry Canada

**(Interested Party)**

Ottawa, Thursday, May 14, 1998

**Inquiry No.: NQ-97-002**

**CERTAIN PREPARED BABY FOODS ORIGINATING IN OR  
EXPORTED FROM THE UNITED STATES OF AMERICA**

*Special Import Measures Act* - Whether the dumping of the above-mentioned goods has caused material injury or retardation to the domestic industry or is threatening to cause material injury to the domestic industry.

**DECISION:** The Canadian International Trade Tribunal hereby finds that the dumping in Canada of prepared baby foods, containing finely homogenized vegetables, fruit and/or meat which may include some visible pieces of not more than 6.5 mm in size, and strained juice, put up for retail sale as food and beverages for infants of ages 4 to 18 months, in containers of a net volume not exceeding 250 ml, excluding organic baby food and frozen baby food preparations, originating in or exported from the United States of America, has caused material injury to the domestic industry.

Place of Hearing:	Ottawa, Ontario
Dates of Hearing:	March 30 to April 2, 1998
Date of Finding:	April 29, 1998
Date of Reasons:	May 14, 1998
Tribunal Members:	Patricia M. Close, Presiding Member Raynald Guay, Member Anita Szlazak, Member
Director of Research:	Selik Shainfarber
Researcher:	John O'Neill
Economists:	Dennis C. Featherstone Sarah Mulvey
Statistician:	Lise Lacombe
Counsel for the Tribunal:	Gerald H. Stobo Heather A. Grant
Registration and Distribution Officer:	Gillian E. Burnett

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Gerber Products Company

**(Importer/Exporter)**

Simon V. Potter  
Brenda C. Swick-Martin  
for Director of Investigation and Research  
*Competition Act*

**(Interested Party)****Witnesses:**

Daphne M. Perry  
Vice-President  
Retail and Customer Marketing  
H.J. Heinz Company of Canada Ltd.

Brian Arbique  
General Manager – National Retail Sales  
H.J. Heinz Company of Canada Ltd.

Gerry Wiklund  
Manager, Financial Planning  
H.J. Heinz Company of Canada Ltd.

Joel Flatt  
Vice-President, Procurement  
Ontario Division  
Agora Food Merchants

James A. Brander  
Professor  
Faculty of Commerce  
University of British Columbia

Martin A. Lasher  
President  
Gerber (Canada) Inc.

Gordon Moffat  
National Sales Manager  
Gerber (Canada) Inc.

Donald J. Henry  
Director, Finance  
International Division  
Gerber Products Company

Saverio Bellissimo  
Director – National Procurement  
Health and Beauty Care  
Loblaw Companies Limited

William F. (Bill) Clark  
Director  
Corporate Marketing  
Sobeys Inc.

Ronald H. Rotenberg  
President  
Rotenberg Research  
Associate Professor of Marketing  
Faculty of Business  
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Gerry Gibbs  
President  
Tullira Holdings Limited

Margaret Repas-Macdonald  
Category Manager  
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Canadian International Trade Tribunal  
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Ottawa, Thursday, May 14, 1998

**Inquiry No.: NQ-97-002**

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

**CERTAIN PREPARED BABY FOODS ORIGINATING IN OR  
EXPORTED FROM THE UNITED STATES OF AMERICA**

TRIBUNAL: PATRICIA M. CLOSE, Presiding Member  
RAYNALD GUAY, Member  
ANITA SZLAZAK, Member

**STATEMENT OF REASONS**

**BACKGROUND**

The Canadian International Trade Tribunal (the Tribunal), under the provisions of section 42 of the *Special Import Measures Act*<sup>1</sup> (SIMA), has conducted an inquiry following the issuance by the Deputy Minister of National Revenue (the Deputy Minister) of a preliminary determination<sup>2</sup> dated December 30, 1997, and of a final determination<sup>3</sup> dated March 30, 1998, respecting the dumping in Canada of prepared baby foods, containing finely homogenized vegetables, fruit and/or meat which may include some visible pieces of not more than 6.5 mm in size, and strained juice, put up for retail sale as food and beverages for infants of ages 4 to 18 months, in containers of a net volume not exceeding 250 ml, excluding organic baby food and frozen baby food preparations, originating in or exported from the United States of America (hereinafter also referred to as certain prepared baby food or CPBF).

On January 2, 1998, the Tribunal issued a notice of commencement of inquiry.<sup>4</sup> As part of the inquiry, the Tribunal sent detailed questionnaires to H.J. Heinz Company of Canada Ltd. (Heinz), Gerber (Canada) Inc. (Gerber), Gerber Products Company (Gerber US) and retailers that purchase and resell certain prepared baby food. Respondents provided production, import and market information, as well as other information, for the period from January 1, 1995, to December 31, 1997. Heinz provided financial information for its 1994-95 to 1996-97 fiscal years and the first three quarters of fiscal year 1997-98 (May 1, 1997, to January 31, 1998).<sup>5</sup> From the replies to the questionnaires and other sources, the Tribunal's research staff prepared public and protected pre-hearing staff reports covering those time periods. In addition, parties exchanged interrogatories with respect to matters relevant to the inquiry.

The record of this inquiry consists of all Tribunal exhibits, including the public and protected replies to questionnaires, interrogatories and responses thereto, all exhibits filed by the parties throughout the inquiry and the transcript of all proceedings. All public exhibits were made available to the parties. Protected exhibits were made available only to independent counsel who had filed a declaration and undertaking with the Tribunal in respect of the use, disclosure, reproduction, protection and storage of confidential information in

1. R.S.C. 1985, c. S-15.
2. *Canada Gazette* Part I, Vol. 132, No. 3, January 17, 1998, at 80.
3. *Ibid.* No. 16, April 18, 1998, at 853.
4. *Ibid.* No. 2, January 10, 1998, at 63.
5. Heinz' fiscal year starts May 1 and ends April 30.

the record of the proceeding, as well as the disposal of such confidential information at the end of the proceeding or in the event of a change of counsel.

Public and *in camera* hearings were held in Ottawa, Ontario, from March 30 to April 2, 1998. Heinz, Gerber, Gerber US and the Director of Investigation and Research, *Competition Act* (the Director) were represented by counsel at the hearing.

The Tribunal issued its finding on April 29, 1998. On the same day, the Secretary of the Tribunal informed parties, and those persons who had notified the Tribunal of their intention to make public interest representations, of the procedures for a public interest consideration. The Secretary's letter invited persons wishing to make representations in support of a public interest investigation to file their representations by May 28, 1998, and those wishing to respond to these representations to submit their responses by June 11, 1998. The Tribunal will advise persons on or before July 2, 1998, whether it considers that there is a public interest concern worthy of further investigation. If it decides to initiate an investigation, it will inform persons, on the same date, of the procedures to follow in that process.

## **PRODUCTS**

The products that are the subject of the Tribunal's inquiry are defined as prepared baby food, containing finely homogenized vegetables, fruit and/or meat which may include some visible pieces of not more than 6.5 mm in size, and strained juice, put up for retail sale as food and beverages for infants of ages 4 to 18 months, in containers of a net volume not exceeding 250 ml, excluding organic baby food and frozen baby food preparations, originating in or exported from the United States of America.

Such prepared baby food is usually packed in hermetically sealed containers or glass jars and is commonly referred to in the trade as "jarred baby food." It is prepared from a variety of ingredients and in different consistencies to be suitable for infants of different ages.

Certain prepared baby food includes various single ingredient preparations and combinations of ingredients, such as multiple vegetable or fruit mixtures and meat with vegetable preparations. These preparations may include other ingredients, such as rice, pasta or cereal, in addition to vegetables, fruit and/or meat. Beginner food for infants starting on solid food is generally prepared from a single ingredient, like carrots or peas, which are strained and puréed, and, therefore, do not need to be chewed before swallowing. Multiple ingredient preparations allow for the introduction of greater variety to the growing infant's diet. Food formulated for infants old enough to begin chewing solid food contains small pieces of fruit, vegetables or meat, not more than 6.5 mm in size, making them still easy to swallow. Strained infant juices and junior juices are made in a number of varieties such as orange and apple.

Certain kinds of baby food are not subject to the inquiry. This baby food is described as organic baby food, frozen prepared baby food, dry cereal mixes and "toddler" food. Toddler preparations are intended for older children and contain larger pieces to challenge the child's teeth.

In the course of its inquiry, the Tribunal collected pricing information concerning four groups of CPBF. These groups contain the following products sold by Heinz and Gerber.

**Table 1**  
**Product Groups for Pricing Analyses**

	<u>Heinz Products</u>	<u>Gerber Products</u>
<b>Group 1</b>	Infant Food and Juices	1 <sup>st</sup> Foods, 2 <sup>nd</sup> Foods, 2 <sup>nd</sup> Foods - Tropical Desserts, 2 <sup>nd</sup> Foods - Veggie Recipe Dinners, Juices
<b>Group 2</b>	Junior Food and Juices	3 <sup>rd</sup> Foods
<b>Group 3</b>	Strained Meats	2 <sup>nd</sup> Foods - Meats
<b>Group 4</b>	Meat Dinners	2 <sup>nd</sup> Foods - Simple Recipe Dinners

### **DOMESTIC PRODUCER**

The single domestic producer of CPBF in Canada is Heinz. It was incorporated in 1940 and is wholly owned, directly or indirectly, by H.J. Heinz Company of Pittsburgh, Pennsylvania (Heinz US). Heinz produces CPBF for the Canadian market in its Leamington, Ontario, production facility. It also operates production facilities in Wheatley, Elmira and Toronto, Ontario; Edmonton and Calgary, Alberta; and La Guadeloupe, Quebec. These other production facilities do not produce CPBF. The Leamington facility is Heinz' largest production facility in North America.

Heinz' primary channels of distribution for CPBF are through grocery retailers and, to a lesser extent, through drugstore chains and mass merchandisers.

Heinz' Leamington plant was established in 1909. The production of CPBF in this plant started in 1934. The Leamington plant has the capacity to produce 10.5 million cases of baby food annually. The plant supplies baby food for the Canadian market as well as certain export markets such as the United States, Russia, the Middle East, Asia and the Caribbean.

Heinz produces numerous food preparations, such as ketchup and other condiments; BBQ sauce and chili sauce; tomato juice, soup, sauce and paste; canned beans and pasta (under the "Libby's" and "Heinz" brand names); vinegar; frozen coated onion products and coated appetizers (under the "Omstead" brand name); individual quick frozen vegetables (under the "Omstead" brand name); and frozen dough products. Heinz also markets products that it does not manufacture, such as a full range of eating accessories for babies; canned cat food and pet treats (under the "9Lives," "Ken-L ration" and "RearD" brand names); weight control products (under the "Weight Watchers" brand name); and canned and frozen soups.

### **IMPORTER AND EXPORTER**

Only one company, Gerber, was identified as an importer of the subject goods. Gerber imports CPBF from its parent company, Gerber US, of Fremont, Michigan.

Prior to June 1990, Gerber produced CPBF in Canada in a plant located in Niagara Falls, Ontario. However, in June 1990, the plant was closed and Gerber began importing its CPBF into Canada. Gerber



currently maintains its head office in Mississauga, Ontario. It distributes its products in all regions of the country using its own sales force and food brokers. Its primary channel of distribution in Canada is through pharmacies/drugstores, but its products are also available from some grocery stores and mass merchandisers.

Gerber US is the largest baby food producer in North America. During the course of the inquiry, Gerber US had three plants producing baby food in the United States. However, on April 3, 1998, Gerber US was scheduled to close its Asheville, North Carolina, plant, leaving it with two plants, one in Fremont, Michigan, and the other in Ft. Smith, Arkansas. All of the Gerber baby food sold in Canada is produced in its Fremont, Michigan, plant. While CPBF for sale in Canada could be produced at Gerber's Ft. Smith plant, it would require certain modifications to the following equipment: cappers, fillers, labellers, casers, glass depalletizers, palletizers and retort ovens. Also, new equipment, such as neck banders, would be required.

Gerber US has the largest share of the US market, estimated at 65 percent, while Heinz US and Beech-Nut Nutrition Corp. account for most of the remaining 35 percent.<sup>6</sup> In Canada, Heinz has, by far, the largest share of the market, with Gerber accounting for the remainder.

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

The Deputy Minister's investigation covered shipments of CPBF made during the period from January 1, 1997, to June 30, 1997.

Normal values for these shipments of CPBF were determined pursuant to section 15 of SIMA, on the basis of the weighted average selling prices to selected unrelated customers in the United States whose volumes were most comparable to those purchased by Gerber. The selling prices were adjusted pursuant to: section 5 of the *Special Import Measures Regulations*<sup>7</sup> (the Regulations), for differences in the size of jars and packaging; section 6 of the Regulations, for differences in the discounts, allowances and rebates granted on those sales; section 7 of the Regulations, for delivery costs; and section 9 of the Regulations, for differences in the trade level between the domestic customers and the importer, Gerber.

Because the importer is a wholly owned subsidiary of the exporter, export prices were calculated under both section 24 of SIMA, based on the declared selling prices, and under paragraph 25(1)(c), on the basis of the importer's resale prices in Canada less all costs incurred in importing and selling the goods in Canada plus an amount for profit. Since the export prices calculated under paragraph 25(1)(c) of SIMA were lower than those calculated under section 24, the export prices applied were those determined under paragraph 25(1)(c).

The Deputy Minister's investigation revealed that 100 percent of the goods imported during the investigation period were dumped. The weighted average margin of dumping was 59.76 percent, expressed as a percentage of the normal value.

The Tribunal notes that this margin was calculated on the basis of constructed export values under SIMA because of the non-arm's length (parent-subsidiary) relationship between Gerber and Gerber US. As such, it does not necessarily reflect, and may well be higher than, the dumping margin that might result from an arm's length market transaction. That having been said, the evidence shows that retail prices for

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6. *U.S. Baby Food Firms in Canadian Dumping Row*, Financial Post Daily Edition, October 7, 1997, at 3.

7. SOR/95-26, December 20, 1994, *Canada Gazette* Part II, Vol. 129, No. 1 at 80.

baby food in the United States are generally higher than they are in Canada, on a common currency basis,<sup>8</sup> and that Gerber US sells the subject goods at lower price levels in the Canadian market.<sup>9</sup>

## **SUMMARY OF POSITION OF PARTIES**

### **Heinz**

Counsel for Heinz submitted that the dumping of the subject goods has caused injury and is threatening to cause injury to Heinz. The injury falls primarily into two general categories, namely, (i) volume losses and (ii) price and profit erosion and suppression. Counsel submitted that the bulk of the volume losses over the period was due to Gerber's aggressive dumped pricing. Moreover, the price rivalry between Heinz and Gerber directed Heinz' energy away from product development and its efforts to increase aggregate demand.

The most significant injury suffered by Heinz, according to its counsel, resulted from price erosion and suppression, and the consequent diminished operating profits. Counsel for Heinz submitted that, "but for" the huge margins of dumping, Gerber would not have been able to compete in the Canadian market. Accordingly, the total injury to Heinz is represented by all of Gerber's sales. Thus, Heinz would have realized higher prices and profits but for the presence of dumped product in the market. In counsel's view, the degree of injury in this case is obviously material.

With respect to causality, Gerber was able to keep its customers competitive because of the dumped product. In counsel's view, buyers used competing bids from Gerber to lower prices at the wholesale level. As a result, Gerber won significant contracts, most notably the Shoppers Drug Mart Limited (Shoppers) account. Even if Gerber were the price follower with respect to changes in list prices, counsel argued that it is the net net prices that matter.

Turning to non-dumping factors raised by counsel for Gerber as the cause of injury, counsel for Heinz dismissed each one. With respect to the impact of the Center for Science in the Public Interest's (CSPI) report released on September 4, 1996,<sup>10</sup> counsel for Heinz submitted that the effects were minimal and short-lived. As to the issue of the "cannibalization" of CPBF sales by sales of other baby food products, counsel pointed out that sales of "Earth's Best" and other baby food products outside the scope of CPBF are minimal in volume and are not a competitive factor in the market for CPBF. Further, the "Earth's Best" products are twice as expensive as CPBF products.

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8. During the inquiry, the effect of exchange rates on dumping margins was raised. As noted, it is the price spreads between markets, measured on a common currency basis, that can create dumping margins, not the absolute level of exchange rates. In other words, regardless of the absolute rate of exchange that prevails at a given time, as long as a company, such as Gerber US, ensures that the unit value of its Canadian sales, expressed in US dollars at prevailing exchange rates, does not fall below the unit value of its US sales in US dollars, it may avoid dumping.

9. *Transcript of Public Hearing*, Vol. 2, March 31, 1998, at 314-15.

10. On the same day, the CSPI, a US based lobby group, held a press conference in Toronto during which it criticized the nutritional content of baby food in Canada, with a particular focus on the baby food products manufactured by Heinz. The press conference and accompanying press release received wide attention in television, radio and print media.

Regarding the effects of Heinz' exclusive selling arrangements, counsel for Heinz submitted that regardless of such arrangements, its customers are interested in their net net cost. Moreover, the use of such arrangements is largely customer-driven. In any event, buyers generally do not lock themselves into binding, long-term exclusive arrangements. Counsel submitted that it is inconsistent for other parties to argue that the power of buyers (i.e. buyer concentration) was the cause of lower prices and then suggested that Heinz was in a position to impose exclusivity on them.

Counsel for Heinz submitted that their client has a huge advantage over Gerber US's and Heinz US's production in terms of its cost structure because Heinz' inputs are priced in Canadian dollars. In other words, Heinz' policy of purchasing local inputs with Canadian currency largely explains why there are lower prices for CPBF in Canada than in the United States. Counsel also submitted that there is a price relationship between the wholesale price and the retail price, and that there is no evidence that any customer was consistently and significantly selling CPBF well below its laid-in cost.

With respect to threat of injury, counsel for Heinz submitted that Gerber US has given no indication that it intends to stop dumping the subject goods in Canada. Further, Gerber has stated that it is not satisfied with its sales in, or penetration of, the Canadian market. Counsel argued that if the dumping and competitive pricing by Gerber were to persist, the injury to Heinz would continue.

## **Gerber**

Counsel for Gerber submitted that Heinz has not suffered the injury that it claims to have suffered and, furthermore, that there is no threat of injury. In the alternative, counsel for Gerber submitted that any injury suffered by Heinz is not attributable to the presence, in Canada, of dumped CPBF.

On the issue of injury, counsel for Gerber submitted that Heinz' allegations of market share loss to Gerber from the presence of dumped imports were flawed because they relied on retail-level trends, not the appropriate wholesale-level trends.

Counsel for Gerber emphasized that the only period for which there is evidence of dumping in this case is for the period from January 1, 1997, to June 30, 1997, covering the Deputy Minister's period of investigation.

Counsel for Gerber submitted that Heinz' attempts to quantify its financial injury were flawed. Although Heinz correctly assumed that its sales volumes should have declined in proportion to declines in the retail market, it based its analysis on AC Nielsen data, which provided an incomplete picture of the market. Furthermore, Heinz understated the operating profits attributable to its baby food business because of its method of allocating overhead and corporate general, selling and administrative expenses. Counsel also submitted that the impact of the discontinuation of Heinz' practice of "period-end loading" (sometimes referred to as "de-loading") on its volumes and operating profits was not taken into account in estimating the alleged financial injury.

With respect to alleged volume losses, counsel for Gerber submitted that these can be attributed largely to Heinz' decision to discontinue its practice of period-end loading, the "crisis" resulting from the CSPI report, the cannibalization of Heinz' sales of CPBF by other baby food products and the increasing importance of home-prepared baby food. Heinz' allegations regarding lost volumes moreover do not take into account the decline in per capita consumption of commercial baby food or other natural market forces.

Regarding Heinz' allegations of price suppression and price erosion, counsel for Gerber submitted that many characteristics of the market for CPBF, none of which are attributable to dumping, have the tendency to suppress or erode prices. As Heinz is the price leader, in counsel's view, it has been the architect of, has participated in cultivating, or has been the primary victim of, a variety of price-depressing characteristics. Counsel emphasized the impact of the CSPI report on the price and image of baby food, and the downward pressure on Heinz' wholesale prices resulting from the highly concentrated nature of Canada's retail market.

Concerning price negotiation dynamics, counsel for Gerber submitted that much of Heinz' perceived injury from the alleged loss of two accounts is likely illusory, and noted that Heinz cannot know for sure what Gerber has offered its customers or potential customers. Counsel also submitted that Heinz' propensity to pay large sums for exclusive arrangements puts downward pressure on net net wholesale prices, and that consumer preference for purchasing CPBF in grocery stores allows those stores to leverage larger discounts, allowances and rebates from Heinz.

In response to Heinz' allegation that drug retailers could not afford to offer lower, long-term retail prices without funding from Gerber, counsel for Gerber submitted that CPBF is a "traffic draw," which, in itself, puts downward pressure on retail prices but not necessarily on wholesale prices. Period-end loading and package deals offered by Heinz similarly put downward pressure on wholesale prices. Counsel submitted that the most significant factor in this case is that Heinz was able to raise its prices, in 1997, back to the level at which they were in 1995, which was considered a "banner year."

With respect to causation, counsel for Gerber referenced their earlier submissions about exclusive arrangements, channel premium and retailer consolidation in support of their position that there is no clear causal link between the dumping of the subject goods and any alleged injury. They submitted that there is little evidence that any retailers of CPBF will switch or have switched to the other brand "for a penny," nor could they, as most large accounts are contractually bound not to switch. Counsel further submitted that Heinz' claims regarding the short-term impact of the CSPI report should be rejected.

Counsel for Gerber submitted that there is no threat of injury. In this regard, they submitted that Gerber US has no excess plant capacity in the United States to produce additional CPBF. Moreover, Heinz' major accounts are generally shielded from any injury in the future because of its exclusive arrangements with them.

### **The Director**

Counsel for the Director focused their comments on the issue of causality. They submitted that other factors are the cause of any injury to Heinz. Counsel noted the declining domestic market and submitted that this has contributed to the decline in prices. They submitted that the shrinkage in the market is not due to the fact that dumping has prevented the parties from promoting their products, and noted that there has not been an enormous surge of imports across the border.

Concerning price suppression and price erosion, counsel for the Director suggested that these have been very tiny compared with those in other inquiries. Prices have not plummeted but rather reflect those in a normal operating marketplace. Where prices have fallen, the decline can be attributed to other factors, such as Heinz' exclusivity arrangements and pricing practices. Counsel further maintained that there is no evidence to support the argument that the dumping of the subject goods accentuated competition at the retail level and then worked upstream to the wholesale level.

Counsel for the Director submitted that low retail pricing is not proof of injury caused by dumping. Low retail-level pricing on a product such as CPBF (i.e. a traffic draw) is a feasible marketing strategy when the retailers' losses incurred on that product can be recouped from profits from the sales of other products. Furthermore, the presence of Gerber products in drugstores keeps prices up rather than down since it allows drugstores to distinguish themselves from grocery stores and to compete against grocery stores on the basis of factors other than price.

With respect to market share, counsel for the Director submitted that the evidence shows no material market share loss by Heinz. Any losses are the predictable result of normal competition and not dumping. Counsel further submitted that there has been no apparent material effect on Heinz' profitability, as evidenced by Heinz' financial statements, and that any impact on profitability obviously relates to non-dumping factors. They suggested that Heinz has not presented a true picture of its indirect costs. In this regard, counsel cited examples of Heinz' cost allocations pertaining to general, selling and administrative expenses and fixed factory overheads. Counsel also questioned whether the true expenses associated with Heinz' response to the CSPI report and the launch of "Earth's Best" products were reflected in the financial statements provided by Heinz. In addition, counsel submitted that the Tribunal should consider the costs resulting from Heinz' inefficient segregation of the North American market and Heinz' low export base, and not attribute these costs to dumping.

In terms of causality, counsel for the Director submitted that the opinion of Dr. Brander, Heinz' expert witness, that all of Gerber's imports are injurious, is based on a 100-year-old model that did not take wholesale- and retail-level pricing into account. Also, Dr. Brander did not consider factors such as the price suppressive effects of competitive bidding, national pricing schemes, all-or-nothing exclusivity, the impact of the loss of consumer confidence resulting from the CSPI report or the possibility that Heinz had led prices down.

Counsel for the Director submitted that the Tribunal must examine all causes of any injury. They further submitted that once it has segregated the effects of all non-dumping factors, there is nothing left to explain by dumping.

On the issue of threat of injury, counsel for the Director submitted that the current levels of exclusivity and the enormous difficulty of large retail store chains making brand switches are barriers to any "clearly foreseen and imminent" injury from dumping in the future. Further, counsel submitted that if the Tribunal finds that Heinz is the price leader in the Canadian market and that other major players would happily follow it, then the Tribunal cannot logically find clearly foreseen and imminent injury from dumping in the future.

## **ANALYSIS**

In conducting an inquiry under section 42 of SIMA, the Tribunal is required to determine whether the dumping of the goods to which the preliminary determination applies has caused injury or is threatening to cause injury. "Injury" is defined in subsection 2(1) of SIMA as "material injury to a domestic industry." "Domestic industry" is defined, subject to certain exceptions, as "the domestic producers as a whole of the like goods or those ... whose collective production of the like goods constitutes a major proportion of the total domestic production of the like goods."

In arriving at its decision, the Tribunal must, therefore, first determine which domestically produced goods are "like goods" to the subject goods and, second, identify the domestic producers of the like goods

that make up the “domestic industry.” The Tribunal must then determine whether the domestic industry has suffered injury and, if so, whether there is a causal link between the injury suffered by the domestic industry and the dumping of the subject goods. It was not alleged in this inquiry that the domestic industry has suffered retardation. In the event that the Tribunal makes a finding of no injury, it must go on and consider the evidence relating to threat of injury and make a finding in respect of that question.

### **Like Goods**

The Deputy Minister defined the subject goods in this case as prepared baby food, containing finely homogenized vegetables, fruit and/or meat which may include some visible pieces of not more than 6.5 mm in size, and strained juice, put up for retail sale as food and beverages for infants of ages 4 to 18 months, in containers of a net volume not exceeding 250 ml, excluding organic baby food and frozen baby food preparations.

Subsection 2(1) of SIMA defines “like goods,” in relation to any other goods, as:

- (a) goods that are identical in all respects to the other goods, or
- (b) in the absence of any goods described in paragraph (a), goods the uses and other characteristics of which closely resemble those of the other goods.

The evidence shows that domestically produced prepared baby food, defined in the same manner as the subject goods, is similar in terms of physical characteristics, has the same end uses and is highly substitutable.<sup>11</sup> As such, for the purposes of this inquiry, the Tribunal finds that CPBF produced by the domestic industry constitutes like goods to CPBF imported from the United States.

### **Domestic Industry**

As indicated earlier, in conducting an inquiry under section 42 of SIMA, the Tribunal must determine whether the dumping has caused injury or is threatening to cause injury. The term “domestic industry” is defined in subsection 2(1) as follows:

“domestic industry” means, other than for the purposes of section 31 and subject to subsection (1.1), the domestic producers as a whole of the like goods or those domestic producers whose collective production of the like goods constitutes a major proportion of the total domestic production of the like goods except that, where a domestic producer is related to an exporter or importer of dumped or subsidized goods, or is an importer of such goods, “domestic industry” may be interpreted as meaning the rest of those domestic producers.

As Heinz is the sole domestic producer of like goods in Canada, the Tribunal finds that, for the purposes of this inquiry, Heinz constitutes the “domestic industry.” For the purposes of this inquiry, the focus of the Tribunal’s investigation is with respect to Heinz’ production of certain prepared baby food and none of its other product lines.

### **Pricing Methodology and Terminology**

This case, like others, has its own particular terminology and methodologies related to pricing. In order to more easily understand the discussion and analysis that follow in these reasons, the Tribunal finds it useful to first describe certain relevant terms and price relationships that are important to this case.

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11. *Transcript of Public Hearing*, Vol. 1, March 30, 1998, at 89 and Vol. 2, March 31, 1998, at 232 and 244.

During the course of the inquiry, a great deal of information was presented concerning list prices, net net prices, discounts, allowances and rebates, and trade spending. In addition, numerous contracts and contract bids, detailing the discounts, allowances and rebates available to specific customers, were tendered as evidence.

Most, if not all, pricing determinations for CPBF start with prices from published price lists that Heinz and Gerber distribute to their customers. From the list prices, the customers subtract various amounts for discounts, allowances and rebates. Some of these discounts, allowances and rebates are standard for most customers, such as payment terms, co-operative advertising allowances and volume incentives. Other discounts, allowances and rebates are negotiated by each individual customer. The names or descriptions of these discounts, allowances and rebates may be different from customer to customer and between Heinz and Gerber.

Some discounts, allowances and rebates are calculated on a volume basis, that is, a certain amount per case of product purchased. Other discounts, allowances and rebates are negotiated on a percentage of sales basis, that is, a fixed percentage of the invoice amount. Still other discounts, allowances and rebates are negotiated on an up-front lump sum or annual payment basis. These last types of payments are sometimes referred to as listing fees, conversion fees or up-front payments, or by various other names, and they are often paid regardless of the actual sales volume achieved. Regardless of what these payments are called, they have the effect of reducing the average per unit price that Heinz and Gerber receive for their respective products. Thus, the unit price paid by purchasers of CPBF, at the wholesale level of sales, is the list price less all discounts, allowances and rebates, including lump-sum payments. This price is hereinafter referred to as the net net price.

Two other factors raise or lower the net net price of CPBF at any particular time. First, as explained above, list prices are the basis for the price calculations. From time to time, both Heinz and Gerber raise list prices, thereby raising the base upon which the net net price is calculated. Second, notwithstanding the terms and conditions of a particular contract, interim deals may be negotiated at any time between Heinz and its customers to meet an individual customer's concerns about competitive conditions in that customer's particular market.<sup>12</sup> Through these interim deals, some of Heinz' customers obtain price concessions, additional advertising support or other compensation and support that are not provided for in their contracts.<sup>13</sup>

Thus, ultimately, net net prices are the wholesale prices obtained by Heinz and Gerber from their respective customers, based on applicable list prices at a given time, after deducting all terms and conditions, that is, all payments, compensation or other offsets from list prices granted to these customers by Heinz or Gerber, as provided for by existing contracts, or granted over and above existing contracts.

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12. The evidence in this case indicated that agreements or contracts are usually not binding on the customer as to volume or price. *Transcript of Public Hearing*, Vol. 1, March 30, 1998, at 21; *Transcript of In Camera Hearing*, Vol. 2, March 31, 1998, at 272; and Tribunal Exhibit NQ-97-002-10.1 (protected), Administrative Record, Vol. 4 at 177.

13. Gerber maintains that it neither negotiates nor grants interim deals on CPBF prices. However, it does structure certain deals to provide for increasing discounts, rebates or allowances if certain conditions are met, such as achieving specified levels of sales volumes.

Retail prices, of course, are the prices at which Heinz' and Gerber's customers sell CPBF to consumers, and these prices are frequently alluded to in these reasons. However, in assessing injury to Heinz, it is prices at the wholesale level of trade that is of paramount importance.

### **Injury**<sup>14</sup>

Subsection 37.1(1) of the Regulations sets out a variety of factors that the Tribunal may have regard to when determining whether a domestic industry has suffered injury. These factors are neither mandatory in application nor exhaustive in scope. The Tribunal's responsibility is to consider those factors that are relevant to the assessment of injury in any particular case. The extent to which these, or other factors, may be relevant is driven by the facts of each case. Consequently, in some cases, certain of the factors set out in subsection 37.1(1) will have particular significance yet, in another case, be of marginal, or no, relevance.

This list of factors that the Tribunal may have regard to for the purposes of determining whether the domestic industry has been injured include the following: the volume of the dumped or subsidized goods and whether there has been a significant increase in the volume of imports of dumped or subsidized goods; the effect of the dumped or subsidized goods on the price of like goods by, for example, significantly undercutting or depressing the price of like goods, or suppressing price increases; the impact of the dumped or subsidized goods on the state of the domestic industry as evidenced by any actual or potential decline in output, sales, market share, profits, productivity or utilization of industrial capacity; the effects on cash flow, inventories, employment, wages or ability to raise capital; the magnitude of the margin of dumping or amount of subsidy; and any other relevant factors. While the Tribunal is mindful of these and other factors, it only needs to focus on those which are relevant to this inquiry.

In conducting this inquiry, the Tribunal has found that, from 1995 to 1997, Heinz' domestic production and sales declined by over 20 percent, substantially reducing its capacity utilization.<sup>15</sup> As a result of these lower sales, Heinz' sales revenues declined substantially. At the same time, according to its financial statement for CPBF, Heinz' costs and expenses were increasing and its average unit prices were falling.<sup>16</sup>

It is these three factors, namely, cost and expense increases, volume losses and price erosion, that the Tribunal considers to be the most pertinent indicators of injury to Heinz. In the Tribunal's view, the combined effect of these three factors, which are more fully analysed in the following section, resulted in significant financial injury to Heinz. More specifically, over the three and three-quarter years covered by the

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14. As Heinz, alone, constitutes the domestic industry for the purposes of this inquiry and Gerber is the sole importer of CPBF, much of the data that the Tribunal would usually present in its reasons are confidential and cannot be disclosed in these reasons.

15. *Protected Pre-Hearing Staff Report*, February 19, 1998, Tribunal Exhibit NQ-97-002-7 (protected), Administrative Record, Vol. 2 at 91.

16. *Protected Pre-Hearing Staff Report*, revised March 11, 1998, Tribunal Exhibit NQ-97-002-7A (protected), Administrative Record, Vol. 2 at 164.3.



financial statement for CPBF, Heinz lost tens of millions of dollars in operating profits, compared to the base or first fiscal year of the Tribunal's inquiry, namely, Heinz' 1994-95 fiscal year.<sup>17</sup>

Counsel for Gerber and counsel for the Director argued that Heinz had inaccurately reported its financial losses in preparing the financial statements for this inquiry. Specifically, they contended that Heinz had used an allocation methodology<sup>18</sup> for apportioning costs and expenses between CPBF and other products that resulted in higher costs and expenses being applied to CPBF than were warranted.

The Tribunal does not accept this contention. It has examined the allocation methodology used by Heinz and does not consider it inappropriate, having regard to generally accepted accounting principles. The Tribunal regularly deals with cost allocations during the conduct of injury inquiries such as the present case. It recognizes that there are often different accounting and allocation methodologies that may be chosen for application in a given situation, each with features that make one method better in some respects than others, but each with drawbacks as well. In the Tribunal's view, the allocation methodologies chosen by Heinz were acceptable. In this case, those allocation methodologies yielded an appropriate indication of the financial results attained by the company for its sales of CPBF during the Tribunal's period of inquiry.

Accordingly, the Tribunal accepts that Heinz' operating profits have declined and that, in total, it has lost tens of millions of dollars in operating profits over the period examined compared to its level of operating profit in fiscal year 1994-95. The Tribunal finds that the magnitude of this financial injury is material.

In addition to the injury indicated by the decline in operating profits that is reflected in its actual financial results over the period of inquiry, Heinz also claims that it has suffered injury in the form of price suppression. Specifically, Heinz contends that, rather than see its prices fall as they did after fiscal year 1994-95, it would have, and should have, been able to raise its prices beyond the levels attained in fiscal year 1994-95, were it not for dumped Gerber products in the Canadian market.

Further, Heinz has made claims with respect to market share that would add to the magnitude of the financial injury that is already reflected in its reported financial statements for CPBF. These claims are evaluated in the next section, after the Tribunal's examination of Heinz' actual financial results and consideration of the reasons for the profit declines that were experienced.

## Causality

Having determined that Heinz has been materially injured, the Tribunal must determine whether there is a causal link between the injury and the dumping of CPBF from the United States. Subsection 37.1(3) of

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17. At the outset of its inquiry, the Tribunal selected a period of inquiry that it considered would provide a reasonable time period over which to examine market and industry trends. The first year of the period selected is 1995 and it thus represents the base year for the Tribunal's injury analysis. As it turned out, according to the evidence, fiscal year 1994-95 apparently was a "banner year" for Heinz' Infant Feeding Unit. This does not invalidate fiscal year 1994-95 as a base year from which to measure injury, nor does it render the injury suffered less significant.

18. For example, it was argued that Heinz allocated certain expenses incurred at the corporate level to CPBF using the same fixed percentage rate in each fiscal year rather than allocating these expenses to CPBF using a variable rate based on the actual percentage of total throughput accounted for by the production of CPBF in each fiscal year. As throughput of CPBF declined during the period of inquiry, the latter allocation methodology would have resulted in lower allocations of expenses to CPBF and, hence, larger operating profits for CPBF.

the Regulations prescribes factors that the Tribunal may consider in examining this issue. The Tribunal must ensure that injury caused by factors other than dumping is not attributed to the dumped imports.

As noted above, the decrease in operating profits of tens of millions of dollars experienced by Heinz, over the period of inquiry, was driven by three factors: increasing costs and expenses; reduced volumes and associated revenues; and reductions in average unit prices (price erosion).

#### Cost and Expense Increases

As far as the first factor is concerned, increased costs and expenses, Heinz conceded during the course of the hearing that most, if not all, of the cost and expense increases after fiscal year 1994-95 that were reflected in its financial statements for CPBF were unrelated to dumping.<sup>19</sup> Accordingly, at the Tribunal's request, Heinz prepared a revised financial statement showing what operating profits would have been but for the increased levels of costs and expenses.<sup>20</sup> The analysis was performed by holding all variable costs constant at their fiscal 1994-95 per unit rate and all fixed expenses constant at their fiscal 1994-95 level. Thus, all increases in costs of material, labour, overhead, media, promotion and general, selling and administrative expenses were effectively removed from the income statements for fiscal years 1995-96 and 1996-97 and the first three quarters of fiscal year 1997-98.

The Tribunal notes that there was nothing improper about the financial statement originally submitted by Heinz, as it was prepared in accordance with the Tribunal's requirements. However, the revised statement allows the Tribunal to readily identify the injury caused by a variety of factors, including the increases in expenses related to Heinz' need to counter the adverse publicity surrounding the 1996 CSPI report, the costs associated with reformulating CPBF products and other non-dumping related events that occurred over the period of inquiry. Accordingly, in its assessment of the injury to Heinz caused by the dumping, the Tribunal has been able to set aside the cost increases that are attributable to these other factors.

#### Volume Losses

The second factor, which has reduced Heinz' profitability, is declining sales volumes and related revenue declines. The Tribunal notes that, during the period of inquiry, the overall market for CPBF declined by over 20 percent, Heinz' sales declined by over 20 percent and those of Gerber declined in excess of 25 percent, leaving their respective market shares roughly unchanged when comparing 1997 to 1995.<sup>21</sup> Several factors were advanced by counsel for Gerber and counsel for the Director to explain the reasons for the overall decline in the market for CPBF. These included declining birth rates, the switch to homemade baby food as a result of the CSPI publicity, the discontinuation of period-end loading and the cannibalization of the market for CPBF by alternative food, such as toddler food, "Earth's Best" products and "saver-size" juices.

Whatever the specific reasons for the market declines, it is evident to the Tribunal that the declines in the overall market are unrelated to dumping. Furthermore, it would be normal to expect the general market contraction that occurred to cause Heinz' volumes to decline in a manner proportionate to its market share.

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19. *Transcript of In Camera Hearing*, Vol. 2, March 31, 1998, at 177-84.

20. Manufacturer's Exhibit A-23A (protected), Administrative Record, Vol. 14A.

21. Heinz actually lost market share in 1996 compared to 1995, but subsequently regained this market share in 1997. In fact, Heinz' market share in 1997 was slightly higher than it was in 1995.

As such declines are unrelated to dumping, any financial losses stemming from them cannot be attributed to dumping.

Accordingly, the Tribunal has analysed the relevant sales figures, overall market volumes and market shares of Heinz, as detailed in the *Pre-Hearing Staff Report* for this inquiry.<sup>22</sup> This analysis reveals that, during the Tribunal's period of inquiry, the decline in Heinz' sales volume was entirely accounted for by the overall general decline in the market.<sup>23</sup> Thus, in assessing the injury the dumping caused to Heinz, the Tribunal has set aside the financial injury resulting from the volume losses reflected in the financial statements for the fiscal years following 1994-95.

However, it is apparent that the principal reason Heinz suffered no volume injury to dumped Gerber products is because it chose to defend its market share by dropping its prices and ensuring its customers remained competitive with Gerber's customers. The evidence in this case clearly shows how quickly and significantly market shares can swing from retailer<sup>24</sup> to retailer, from grocery channel to drug channel, from month to month, depending on feature price initiatives by one retailer or another.<sup>25</sup> In these circumstances, Heinz had the choice of losing volume and market share or suffering price erosion. It chose to lower its prices, as will be discussed in the next section.

### Price Erosion

The third factor which must be considered in analysing Heinz' reported financial performance over the period of inquiry is price erosion. The Tribunal finds that even after discounting the financial losses incurred by Heinz over the period of inquiry that resulted from cost increases and volume declines, financial statements still show several millions of dollars in decreased profits by Heinz due to price erosion, accounting for an important percentage of Heinz' cumulative net operating profits over the period of inquiry. After reviewing the evidence in this case, the Tribunal is satisfied, for the reasons set out below, that the primary cause behind this price erosion is the supply of Gerber's CPBF to the Canadian market at dumped prices.

#### - General Considerations

Before looking at specific pricing evidence, the Tribunal considers it helpful to present certain salient features about the market for CPBF.

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22. During the Tribunal's inquiry, Heinz submitted an analysis of its volume losses based on AC Nielsen retail-level sales data, and the Tribunal staff evaluated that analysis. For the purposes of these reasons, the Tribunal staff has done a similar analysis, but this time based on confidential wholesale-level data contained in the *Pre-Hearing Staff Report*, which the Tribunal considers to be the appropriate level of trade to examine. See *Protected Pre-Hearing Staff Report*, February 19, 1998, Tribunal Exhibit NQ-97-002-7 (protected), Administrative Record, Vol. 2 at 91.

23. In fact, Heinz actually absorbed less than its proportional share of the overall market decline and slightly increased its market share for CPBF in calendar year 1997, compared to calendar year 1995.

24. For the purposes of explaining the Tribunal's analysis, the word "retailer" refers to customers that purchase and resell CPBF, many of whom operate at both the wholesale and retail levels of trade.

25. See, for example, Tribunal Exhibit NQ-97-002-16.1 (protected), Administrative Record, Vol. 6 at 75, 80 and 172; and *Transcript of Public Hearing*, Vol. 1, March 30, 1998, at 23 and Vol. 4, April 2, 1998, at 416.

In the past, the Tribunal has held that dumping is particularly significant when the domestic and imported products are highly interchangeable.<sup>26</sup> The evidence presented in this case shows that, for all practical purposes, both Heinz' and Gerber's CPBF products are of comparable quality and both enjoy essentially the same, or a similar extent of, consumer awareness and acceptance. Witnesses testified as to the quality of Heinz' and Gerber's baby food<sup>27</sup> and, although some did express a preference for one or the other, it was generally agreed that the products were highly substitutable.

The evidence also establishes that, while aggregate demand for CPBF is price inelastic, demand at any particular store is highly price elastic.<sup>28</sup> Thus, while lower prices across the board may not increase aggregate demand for this product, special feature prices in one chain of retail stores will draw more customers into those particular stores at the expense of other stores.<sup>29</sup> Consequently, it is apparent to the Tribunal that many consumers will and do react to price reductions at the retail level in choosing where they will buy CPBF.<sup>30</sup> Moreover, when consumers change from one channel of distribution, such as that of grocery, to another channel, such as that of drug, or vice versa, based on relative price differences between the channels, they tend to change the brands they buy as Gerber is the predominant supplier in the retail drug channel, and Heinz is the predominant supplier in the retail grocery channel.

According to the evidence, parents with young children typically have a larger "shopping basket," that is, they purchase more goods than the average consumer.<sup>31</sup> Accordingly, retailers use products such as CPBF as traffic draws to attract these customers, often featuring these products in sales flyers and media advertisements. Given the importance of the product as a traffic draw, retailers know that they must get a

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26. *Machine Tufted Carpeting Originating in or Exported from the United States of America*, Inquiry No. NQ-91-006, *Finding*, April 21, 1992, *Statement of Reasons*, May 6, 1992, at 28; *Certain Solder Joint Pressure Pipe Fittings and Solder Joint Drainage, Waste and Vent Pipe Fittings, Made of Cast Copper Alloy, Wrought Copper Alloy or Wrought Copper, Originating in or Exported from the United States of America and Produced by or on Behalf of Elkhart Products Corporation, Elkhart, Indiana, Nibco Inc., Elkhart, Indiana, and Mueller Industries, Inc., Wichita, Kansas, their Successors and Assigns*, Inquiry No. NQ-93-001, *Finding and Statement of Reasons*, October 18, 1993, at 18; and *Gypsum Board Originating in or Exported from the United States of America*, Inquiry No. NQ-92-004, *Finding*, January 20, 1993, *Statement of Reasons*, February 4, 1993, at 17.

27. *Transcript of Public Hearing*, Vol. 1, March 30, 1998, at 89 and Vol. 2, March 31, 1998, at 232; and *Transcript of In Camera Hearing*, Vol. 4, April 2, 1998, at 591.

28. *Public Pre-Hearing Staff Report*, February 19, 1998, Tribunal Exhibit NQ-97-002-6, Administrative Record, Vol. 1 at 113-14; and *Transcript of Public Hearing*, Vol. 1, March 30, 1998, at 23, Vol. 2, March 31, 1998, at 247 and 334 and Vol. 4, April 2, 1998, at 416.

29. *Transcript of Public Hearing*, Vol. 1, March 30, 1998, at 23 and Vol. 4, April 2, 1998, at 416; *Transcript of In Camera Hearing*, Vol. 3, April 1, 1998, at 462-63; and Tribunal Exhibit NQ-92-007-RI-1A (protected), Administrative Record, Vol. 12 at 99.

30. In summary, parents will change where they buy CPBF on the basis of price and may purchase a larger volume when the product is on sale, but they will not feed their children more CPBF simply because it is on sale. Thus, the demand over the longer term is not affected by short-term price changes.

31. *Transcript of Public Hearing*, Vol. 2, March 31, 1998, at 236-37 and Vol. 3, April 1, 1998, at 373; and *Transcript of In Camera Hearing*, Vol. 3, April 1, 1998, at 511.

competitive source of supply or risk losing sales of CPBF and other products in the new parents' shopping basket to their competitors.<sup>32</sup>

The Tribunal acknowledges that retailers might sometimes use CPBF as a loss leader and temporarily absorb a loss on the sale of the product because of the desire to draw new parents into the store and build traffic. However, the evidence shows that retailers will not sell at a loss on a sustained basis.<sup>33</sup> This underlines the importance of getting a competitive source of supply that will avoid or minimize such losses. In short, the importance of the product and its effectiveness as a consumer draw, especially on feature, in the Tribunal's view, make wholesale buyers very price conscious.

The Tribunal further notes that the market for CPBF is highly concentrated. A small number of grocery chains account for a large percentage of the grocery market in Canada. Similarly, a small number of drug retail chains account for a large percentage of the retail drug market in Canada. For example, Heinz' largest customer for CPBF, Loblaw Companies Limited (Loblaw Companies), accounts for a substantial proportion of Heinz' CPBF sales. Likewise, Gerber's largest customer, Shoppers, accounts for a substantial proportion of Gerber's CPBF sales. Consequently, there is a small number of very large customers at the wholesale level for CPBF. This means that the loss of any one large customer, for either supplier, is capable of seriously damaging their business.

In this environment, when Heinz and Gerber bid against each other, as they do at most important accounts, the retailers are in an excellent position to play one supplier off against the other, with a view to getting the lowest possible price. The evidence adduced in this inquiry clearly shows that the retailers do this, not only when supply contracts are being negotiated for renewal but, on occasion, after contracts have been agreed.<sup>34</sup>

It is possible that, in some cases, bids are invited from one or the other supplier by a retailer, even though the retailer may not be enthusiastic about switching from its current brand.<sup>35</sup> However, suppliers cannot be sure of this so that, even in this situation, the bidding and counter bidding which take place allow retailers to extract more favourable contract terms and conditions and exert downward pressure on the net net prices they pay Heinz and Gerber.<sup>36</sup> Moreover, even if the buyer intends to continue purchasing from its current supplier, competing price quotations cannot be ignored by the retailer if it is to remain competitive against other retailers.

Another important feature of this market is that average retail prices are consistently higher in the grocery channel than in the drug channel.<sup>37</sup> This indicates that, on average, the grocery channel can command a premium for CPBF. This premium appears related to the fact that many consumers prefer, as a

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32. *Ibid.*

33. *Transcript of Public Hearing*, Vol. 1, March 30, 1998, at 185 and Vol. 2, March 31, 1998, at 341; and *Transcript of In Camera Hearing*, Vol. 3, April 1, 1998, at 350 and 410-13.

34. Manufacturer's Exhibit A-6 (protected), par. 19, 24, 26, 56 and 67, Administrative Record, Vol. 14; and *Transcript of In Camera Hearing*, Vol. 3, April 1, 1998, at 327-29 and 551-52.

35. *Transcript of In Camera Hearing*, Vol. 3, April 1, 1998, at 332.

36. Importer's Exhibit B-6 (protected), par. 51, Administrative Record, Vol. 16.

37. Manufacturer's Exhibit A-4 (protected), Appendix F, Administrative Record, Vol. 14.

matter of convenience, to buy all their food, including baby food, in one place, i.e. in a grocery store.<sup>38</sup> Given this retail premium, if drug retailers are to achieve similar margins to those of grocery retailers on the sale of CPBF, they will need correspondingly lower wholesale prices from their suppliers such as Gerber.

Although there is a gap between average grocery and average drug retail prices, the evidence shows that, overall, market shares have been relatively stable between the two main retail channels of distribution for these products over the past several years. Specifically, during the Tribunal's period of inquiry, each channel has maintained its market share, with the grocery channel accounting for approximately three quarters of the market to the drug channel's one quarter.<sup>39</sup>

However, the evidence also shows that, despite this overall stability, there can be significant short-term instability when the price gap between the two channels narrows or widens as happens, for example, when companies in one channel offer deep discount feature prices.<sup>40</sup> This causes temporary changes in market shares between channels as consumers take advantage of the low feature prices.<sup>41</sup> These short-term market share shifts are reversed when companies in the other retail channel respond with similar features, in the end leaving little net overall changes in shares despite the swings that have occurred.

In sum, the evidence shows that Heinz and Gerber compete directly for the same accounts at wholesale, as well as indirectly in the market at retail through their respective customers. This indirect competition is most obvious and acute in the competition between the grocery channel of distribution, where Heinz is dominant, and the drug channel of distribution, where Gerber is dominant. The evidence establishes that there is (and has been for years) an intense rivalry between these two distribution channels for the new parents' shopping basket and that CPBF is at the forefront of the battle.<sup>42</sup>

Although this battle between channels of distribution is being fought at the retail level, and neither Heinz nor Gerber can control pricing at that level, the Tribunal is of the view that the depth, intensity and duration of the retail market share war would not be possible without appropriate contractual terms and conditions, price concessions and support at wholesale of the respective channels' principal suppliers, Heinz and Gerber.

- Specific Pricing

Against the general considerations outlined above, the Tribunal examined the pricing information submitted by the parties in this case. First, the evidence submitted in this case reveals that, over the period of inquiry, a number of contracts for customers previously supplied, in whole or in part, by Heinz, came up for

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38. Manufacturer's Exhibit A-4 (protected), par. 36, Administrative Record, Vol. 14; and *Transcript of Public Hearing*, Vol. 4, April 2, 1998, at 416.

39. The market share accounted for by mass merchandisers is minimal.

40. Tribunal Exhibit NQ-97-002-16.1 (protected), Administrative Record, Vol. 6 at 80 and 172; *Transcript of Public Hearing*, Vol. 1, March 30, 1998, at 23; and Tribunal Exhibit NQ-97-002-RI-1A (protected), Administrative Record, Vol. 12 at 99.

41. See, for example, Tribunal Exhibit NQ-97-002-RI-1A (protected), Administrative Record, Vol. 12 at 55, 89, 99 and 123.

42. Tribunal Exhibit NQ-97-002-16.1 (protected), Administrative Record, Vol. 6 at 99; *Transcript of In Camera Hearing*, Vol. 3, April 1, 1998, at 353 and 511; and *Transcript of Public Hearing*, Vol. 2, March 31, 1998, at 236 and Vol. 3, April 1, 1998, at 373.

renewal or were re-negotiated.<sup>43</sup> These contracts included Heinz' single largest customer, Loblaw Companies and, accordingly, they represented a substantial proportion of Heinz' total CPBF business. Gerber was invited to bid for the Loblaw Companies business as well as some of the other businesses, and did so at aggressive prices. The evidence shows that this enabled these customers to obtain counterbids from Heinz and to extract better terms and conditions and other concessions from Heinz than might otherwise have been the case, driving down the net net price per case.<sup>44</sup> The evidence also shows that customers that did not receive or solicit bids from Gerber were, nonetheless, still able to use the availability of aggressive Gerber prices to get lower net net prices from Heinz.<sup>45</sup>

As noted earlier, it is not uncommon for purchasers to play one bid against the other in trying to get the best possible price and contract terms. Purchasers often refer to competing bids when negotiating contracts, and the suppliers often have no way of knowing what the actual terms of the competing bids are, but they must respond or risk losing the customer's business. In this case, the evidence presented shows unequivocally that the terms of Gerber's specific bids and, generally, its net net prices, in both the drug and grocery channels, were extremely competitive throughout the period of inquiry.<sup>46</sup>

Moreover, the Tribunal notes that the injury Heinz suffered as a result of having to offer its customers better terms and conditions is not fully reflected in its financial statement because the contracts are for multiple-year periods. Hence, the effects of the terms and conditions of the contracts negotiated during the 1995-97 period could be felt beyond the period of inquiry. Heinz may well be able to mitigate some of the price effects of these contracts through list price increases. However, the basic terms and conditions of these contracts, as negotiated during the period of inquiry, which incorporate large lump-sum payments and specified levels of discounts, allowances and rebates, will tend to depress the net net prices that would otherwise have been achievable, as long as they are in effect.

Second, over the period of inquiry, Gerber renewed contracts with customers it had previously supplied, in whole or in part, including its single largest customer, Shoppers. Heinz, which had previously supplied Shoppers in Eastern and Western Canada, was invited to bid, and did bid,<sup>47</sup> for the Shoppers business. However, Gerber won the business, including that portion previously supplied by Heinz. Although there is evidence that indicates that price was not the only factor in the selection of Gerber by Shoppers as its sole national supplier of CPBF,<sup>48</sup> the fact remains that Gerber's bid was very aggressive,<sup>49</sup> and the Tribunal does not believe that Shoppers could, or did, ignore the price consideration.<sup>50</sup>

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43. Manufacturer's Exhibit A-6 (protected) at 4-6, 11 and 12, Administrative Record, Vol. 14; and *Transcript of In Camera Hearing*, Vol. 3, April 1, 1998, at 523.

44. Manufacturer's Exhibit A-6 (protected) at 4-6, 11 and 12, Administrative Record, Vol. 14.

45. *Ibid.* at 6.

46. Tribunal Exhibits NQ-97-002-10.1J and NQ-97-002-10.1K (protected), Administrative Record, Vol. 4C at 142-95 and 196-206, respectively; Tribunal Exhibit NQ-97-002-16.1H (protected), Administrative Record, Vol. 6A at 125-48; and Tribunal Exhibits NQ-97-002-39 and NQ-97-002-39A (protected), Administrative Record, Vol. 2 at 180-81 and 182-85, respectively.

47. Manufacturer's Exhibit A-6 (protected) at 11 and 12, Administrative Record, Vol. 14.

48. *Transcript of In Camera Hearing*, Vol. 4, April 2, 1998, at 669-70.

49. Tribunal Exhibit NQ-97-002-16.1H (protected), Administrative Record, Vol. 6A at 129-33.

50. Importer's Exhibit B-12 (protected), par. 29, Administrative Record, Vol. 16A.

Furthermore, the evidence shows that, under the terms and conditions of this contract, which came into effect in May 1996, Shoppers was, and is, well positioned to compete aggressively against the grocery channel.<sup>51</sup> Indeed, in June 1996, shortly after this contract came into effect, Shoppers' stores began to feature frequently a price of \$0.39 per jar for "1<sup>st</sup> Foods," the largest category of CPBF sales for Shoppers.<sup>52</sup>

In early September 1996, Heinz' largest customer, Loblaw Companies, signed a new agreement with Heinz for the supply of CPBF at lower net net prices (higher total discounts, allowances and rebates) than those in the previous Heinz-Loblaw Companies agreement.<sup>53</sup> Around the same time, Loblaw's grocery store banner<sup>54</sup> (Loblaw's) adopted an everyday low price (EDLP) of \$0.39 per jar for Heinz' "Infant Food and Juices" group, which is Heinz' CPBF equivalent to Gerber's "1<sup>st</sup> Foods" group. Witnesses stated that Loblaw's move was a reaction to the prices in the drug channel and, in particular, to Shoppers' prices.<sup>55</sup> Other factors have been advanced by counsel for Gerber and counsel for the Director to explain Loblaw's move. However, the evidence and the sequence of events outlined above suggest to the Tribunal that Loblaw's move to an EDLP of \$0.39 per jar in the fall of 1996 flowed out of the new agreement with Heinz, which enhanced Loblaw's ability to respond to the prevailing competitive situation, especially in the drug channel.

Whatever the cause of Loblaw's EDLP initiative, it is clear from the evidence that it created a ripple effect in the market as one retailer after another sought financial support from Heinz to compete against other grocery and drug retailers at the lower everyday prices that had become established.<sup>56</sup> Heinz responded with a variety of measures, including rolling back wholesale prices, providing refunds to the retailers and making other forms of payments, all of which had the effect of eroding Heinz' net net prices.<sup>57</sup>

The events surrounding the Gerber-Shoppers agreement in May 1996 and the Heinz-Loblaw Companies agreement in September 1996 demonstrate the intense price competition in the retail sector and its underpinnings at the wholesale level. This competition appears to have been particularly intense during the spring, summer and fall of 1996, which coincides with the signing of the major contracts with Shoppers and Loblaw Companies. However, the evidence shows that Gerber's average wholesale prices were aggressive in 1995, as well as in 1997,<sup>58</sup> and that price competition at the retail level, especially between grocery and

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51. Tribunal Exhibit NQ-97-002-16.1H (protected), Administrative Record, Vol. 6A at 129-33; and Tribunal Exhibits NQ-97-002-10.1J and NQ-97-002-10.1K (protected), Administrative Record, Vol. 4C at 142-95 and 196-206, respectively.

52. Manufacturer's Exhibit A-4 (protected), Appendix G, Administrative Record, Vol. 14; and Tribunal Exhibit NQ-97-002-16.1 (protected), Administrative Record, Vol. 6 at 222.

53. Tribunal Exhibit NQ-97-002-10.1 (protected), Administrative Record, Vol. 4 at 102-3 and 177-78.

54. The Loblaw's store "banner" is one of several grocery store banners owned or supplied by Loblaw Companies.

55. *Transcript of In Camera Hearing*, Vol. 1, March 30, 1998, at 30 and Vol. 3, April 1, 1998, at 321; Manufacturer's Exhibit A-6 (protected), par. 42, Administrative Record, Vol. 14; and Tribunal Exhibit NQ-97-002-16.1 (protected), Administrative Record, Vol. 16 at 222.

56. Manufacturer's Exhibit A-6 (protected) at 7-10, Administrative Record, Vol. 14.

57. *Ibid.*

58. *Protected Pre-Hearing Staff Report*, February 19, 1998, Tribunal Exhibit NQ-97-002-7 (protected), Administrative Record, Vol. 2 at 106; and *Protected Pre-Hearing Staff Report*, revised March 31, 1998, Tribunal Exhibit NQ-97-002-7D (protected), Administrative Record, Vol. 2 at 164.37.



drug channels, was sharp and persistent throughout the entire period of the Tribunal's inquiry.<sup>59</sup> In other words, the price competition, at both wholesale and retail levels, did not start in the spring of 1996, nor did it end in the fall of 1996. The price erosion that Heinz suffered manifested itself over the full period examined,<sup>60</sup> both through the terms and conditions of contracts as well as through interim deals that reduced Heinz' net net prices.<sup>61</sup>

The Tribunal notes that even if grocery retailers, with the support of Heinz, had started the downward price movements and drug retailers, with the support of Gerber, were merely responding to maintain their market share, this would not excuse injurious dumping. Indeed, the evidence shows that, over the period of inquiry, there are instances where Heinz' net net prices were lower than Gerber's prices at particular accounts<sup>62</sup> and that Heinz not only lost some accounts,<sup>63</sup> but also obtained some business that formerly had been Gerber's.<sup>64</sup> Nevertheless, it is a long-standing principle of anti-dumping tribunals, which this Tribunal shares, that the domestic industry may lower its prices, and its competitors may be expected to follow, but not to the point where they "cross the line into injurious dumping."<sup>65</sup>

The evidence of aggressive Gerber bids for the major contracts that were available for renewal during the Tribunal's period of inquiry is corroborated by the general pricing information gathered through Tribunal questionnaires. Specifically, the pricing information collected for three twelve-month periods, starting January 1995, shows that, on a national average basis over the period of inquiry, Gerber's net net prices were always lower than Heinz' net net prices.<sup>66</sup> This is true on a national level as well as in the Ontario market, where the majority of Gerber's sales are made.<sup>67</sup> Moreover, on particular product categories, pricing data collected for five six-month periods, starting July 1995, show that Gerber's average

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59. Tribunal Exhibit NQ-97-002-10.1 (protected), Administrative Record, Vol. 4 at 175 and 180-81; Manufacturer's Exhibit A-6 (protected) at 7, 10 and 11 and Tab A, Administrative Record, Vol. 14; and Tribunal Exhibit NQ-97-002-16.1 (protected), Administrative Record, Vol. 6 at 83 and 172.

60. *Protected Pre-Hearing Staff Report*, revised March 11, 1998, Tribunal Exhibit NQ-97-002-7A (protected), Administrative Record, Vol. 2 at 164.3; and *Protected Pre-Hearing Staff Report*, revised March 31, 1998, Tribunal Exhibit NQ-97-002-7D (protected), Administrative Record, Vol. 2 at 164.37.

61. Manufacturer's Exhibit A-6 (protected), Administrative Record, Vol. 14.

62. Importer's Exhibit B-6 (protected) at 15 and 16, Administrative Record, Vol. 16.

63. Manufacturer's Exhibit A-6 (protected) at 11-13, Administrative Record, Vol. 14.

64. Importer's Exhibit B-6 (protected), par. 38-45 and 57-61, Administrative Record, Vol. 16.

65. *Commercial Grade Sodium Carbonate, Commonly Known as Soda Ash, Originating in or Exported from the United States of America*, Anti-dumping Tribunal, Inquiry No. ADT-7-83, *Finding and Statement of Reasons*, July 7, 1983, at 12; *Certain Corrosion-Resistant Steel Sheet Products, Originating In or Exported From Australia, Brazil, France, the Federal Republic of Germany, Japan, the Republic of Korea, New Zealand, Spain, Sweden, the United Kingdom and the United States of America*, Canadian International Trade Tribunal, Inquiry No. NQ-93-007, *Finding*, July 29, 1994, *Statement of Reasons*, August 15, 1994, at 30; and *Faced Rigid Cellular Polyurethane-Modified Polyisocyanurate Thermal Insulation Board Originating In or Exported From the United States of America*, Canadian International Trade Tribunal, Inquiry No. NQ-96-003, *Finding*, April 11, 1997, *Statement of Reasons*, April 28, 1997, at 22-23.

66. *Protected Pre-Hearing Staff Report*, February 19, 1998, Tribunal Exhibit NQ-97-002-7 (protected), Administrative Record, Vol. 2 at 106.

67. *Ibid.*

net net prices were generally below those of Heinz in three of the four categories examined, including the two most important categories.<sup>68,69</sup>

In summary, the Tribunal observes that the pricing evidence in this case, which the parties themselves have submitted, clearly establishes that, over the period of inquiry, Gerber has competed directly and indirectly with Heinz for market share on the basis of aggressive prices. In the Tribunal's opinion, these aggressive net net prices would not have occurred had it not been for the dumping by Gerber US.

In order to maintain its market share, Heinz responded with aggressive prices of its own. The Tribunal is of the view that this price competition against the dumped products is at the root of the price erosion experienced by Heinz, as reflected in its financial results over the period. The Tribunal estimates that this price erosion amounts to several millions of dollars in decreased operating profits over the period of inquiry.

Before coming to the above conclusion, the Tribunal also considered other possible causes of the price declines that Heinz experienced over the period. These include the adverse publicity stemming from the CSPI report, the general market declines that were occurring, the effect of exclusivity payments as well as the practice of packaging or linking the sales of one product or group of products with another product or group of products (packaged sales).<sup>70</sup>

Insofar as the CSPI report is concerned, the Tribunal accepts that this was an important market event that adversely affected both Heinz and Gerber, but especially Heinz. However, the preponderance of the evidence indicates to the Tribunal that this event had its primary effect not on wholesale prices, but on market volumes. In this connection, as the Tribunal previously noted, wholesale prices were falling and there was aggressive feature retail pricing well before the release of the CSPI report on September 4, 1996.<sup>71</sup>

Moreover, several witnesses, including witnesses representing retailers, testified that the CSPI report raised health and quality issues that may have turned some consumers away from CPBF. In their view, price was not the real issue.<sup>72</sup> The Tribunal finds these observations to be consistent with the study of Dr. Rotenberg, a witness who appeared on behalf of Gerber. Specifically, Dr. Rotenberg found, among other things, that new parents rated health and nutrition to be more important than price in making their baby food purchase decisions.<sup>73</sup>

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68. The two most important categories, in terms of sales volume, were Groups 1 and 2. Group 1 consists of Heinz' "Infant Food and Juices" and Gerber's "1<sup>st</sup> Foods, 2<sup>nd</sup> Foods, 2<sup>nd</sup> Foods - Tropical Desserts, 2<sup>nd</sup> Foods - Veggie Recipe Dinners and Juices." Group 2 consists of Heinz' "Junior Food and Juices" and Gerber's "3<sup>rd</sup> Foods."

69. *Protected Pre-Hearing Staff Report*, revised March 31, 1998, Tribunal Exhibit NQ-97-002-7D (protected), Administrative Record, Vol. 2 at 164.37.

70. For example, Heinz may offer to sell CPBF at a certain price to a retailer on the condition that the retailer purchases Heinz' ketchup or other products.

71. Tribunal Exhibit NQ-97-002-10.1 (protected), Administrative Record, Vol. 4 at 175 and 180-81; and Manufacturer's Exhibit A-6 (protected) at 7, 10 and 11, Administrative Record, Vol. 14.

72. *Transcript of Public Hearing*, Vol. 1, March 30, 1998, at 29, 56-57 and 166 and Vol. 3, April 1, 1998, at 369-70 and 382; and *Transcript of In Camera Hearing*, Vol. 1, March 30, 1998, at 26 and 39, Vol. 2, March 31, 1998, at 213-14 and 271-72 and Vol. 3, April 1, 1998, at 324.

73. Importer's Exhibit B-10 (protected), "Exhibit B," Administrative Record, Vol. 16A.

Finally, although the September 1996 CSPI event and the move by Loblaw's to an EDLP of \$0.39 per jar were relatively coincident in time, the evidence shows that this was an initiative that had been under consideration by Loblaw's for several months prior to September 1996,<sup>74</sup> and that it was intended to meet other competitive prices in the market, as noted above.

A second factor considered by the Tribunal in terms of the price erosion that occurred is the decline in aggregate demand over the period of inquiry. In the Tribunal's view, it is not obvious that prices should have fallen since, as noted earlier, the suppliers faced an inelastic aggregate demand with respect to price. If demand is relatively unresponsive to changes in price, suppliers may increase prices to offset the revenue effects of declining demand, without significantly further depressing demand, as would be the case when demand is more price elastic. Given the characteristics of demand in this case, therefore, suppliers have both the incentive and the opportunity to increase prices rather than watch them fall. Indeed, Dr. Brander, an expert witness who appeared on behalf of Heinz, testified that, despite the market declines that occurred, Heinz could have raised its prices in line with, or even exceeding, its objectives were it not for the presence of dumped Gerber products.<sup>75</sup>

Moreover, where there are only two suppliers that tend to track each other's prices, as Heinz and Gerber do,<sup>76</sup> the link between lower demand and lower prices becomes even more problematic. This is illustrated by the fact that, even prior to the period of inquiry when demand was relatively stagnant, as it was in 1993-94,<sup>77</sup> Heinz proceeded to implement list price increases, as it had regularly endeavoured to do, year in and year out, and Gerber subsequently followed.<sup>78</sup>

In considering the issue of market declines, it is also relevant to note that one of the principal apparent reasons for the decline in consumption of commercial CPBF is the increased consumption of home-prepared baby food. This development may be related to adverse publicity from the CSPI report and/or changing values and attitudes toward infant nutrition. However, no one who participated in this inquiry suggests that these declines are related to prices or that lower prices would be an effective strategy to bring users of homemade baby food back into the market for CPBF in substantial numbers and reverse the falling demand for the commercial product.

A third factor to be considered is exclusivity payments. The Tribunal notes that such payments are, and have been, a common practice in this market for many years prior to the period of inquiry. These payments, although they may be given different names, are made by both Heinz and Gerber to secure exclusive listings at retail accounts. In the Tribunal's view, whatever their purpose, from a price standpoint, the effect of these payments is to lower net net prices. As such, at the Tribunal's request, these payments and all other payments have been subtracted by Heinz and Gerber in the pricing information provided to the Tribunal.

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74. Manufacturer's Exhibit A-6 (protected), par. 42 and Tab H, Administrative Record, Vol. 14; and *Transcript of In Camera Hearing*, Vol. 1, March 30, 1998, at 119.

75. *Transcript of Public Hearing*, Vol. 2, March 31, 1998, at 286.

76. *Transcript of Public Hearing*, Vol. 1, March 30, 1998, at 26 and Vol. 2, March 31, 1998, at 324-25; and *Transcript of In Camera Hearing*, Vol. 3, April 1, 1998, at 426-27 and Vol. 4, April 2, 1998, at 636-37.

77. Tribunal Exhibit NQ-97-002-10.1E (protected), Administrative Record, Vol. 4A at 372.

78. Tribunal Exhibit NQ-97-002-10.1G (protected), Administrative Record, Vol. 4C at 122.

Accordingly, the Tribunal has conducted its price comparisons after accounting for the effects of any exclusivity payments. The Tribunal's conclusions about Gerber's low and aggressive prices, compared to those of Heinz, remain valid notwithstanding such payments. The incidence of these payments increased during the period of inquiry and it seems evident to the Tribunal that these increases are simply manifestations of the type of price concessions that Heinz felt required to make in order to keep its prices competitive with those of Gerber.

As regards packaged sales, the evidence shows that most of Heinz' customers practice category management. Therefore, they evaluate the products in each category on a stand-alone, separate basis from other categories of products.<sup>79</sup> The evidence indicates that other products outside the category of CPBF have been addressed or even included in contract negotiations for CPBF. Heinz' officials testified that, where appropriate, any benefits to other products that were gained through contract negotiations for CPBF have been allocated to those other products.<sup>80</sup> They also acknowledged that, in some cases, there were other minor concessions that would be very difficult to quantify, and they have, therefore, not been allocated to the other products.<sup>81</sup>

In the Tribunal's view, there was no evidence submitted that would support a link between the price erosion experienced by Heinz and practices that may be considered trade restrictive. The evidence with respect to packaged sales did not, in the Tribunal's estimation, have any evident impact on the injury suffered by Heinz.

After considering these and other factors, such as retailer price wars, the Tribunal has concluded that none of these factors, either individually or collectively, satisfactorily explain the price erosion that occurred.

### Price Suppression

In addition to its claims of price erosion, Heinz has alleged that it suffered injury in the form of price suppression. It submitted that its average net net prices should have increased over the 1994-95 level, when, in fact, they were actually lower due to price erosion. In support of its contention, Heinz submitted that, prior to 1995, it had been able to increase list prices by an average of 3 to 4 percent per year, but that its ability to continue this practice, in 1995 and the years following, was constrained by the dumping.

The evidence indicates that Heinz increased list prices in various regions of Canada at different times. As an example, the Tribunal examined the evidence pertaining to list price increases in Ontario, the largest volume region for CPBF sales.<sup>82</sup> In August 1995, Heinz announced a list price increase in Ontario of almost 4 percent.<sup>83</sup> However, the new prices were not accepted in the market, and Heinz was forced to "deal back" most or all of the price increase, that is, it had to somehow refund or otherwise offset the list

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79. *Transcript of Public Hearing*, Vol. 3, April 1, 1998, at 373 and Vol. 4, April 2, 1998, at 411-12; and *Transcript of In Camera Hearing*, Vol. 1, March 30, 1998, at 55 and Vol. 2, March 31, 1998, at 270.

80. Tribunal Exhibit NQ-97-002-10.1 (protected), Administrative Record, Vol. 4 at 9.

81. *Transcript of In Camera Hearing*, Vol. 2, March 31, 1998, at 200-201.

82. The evidence shows that there were problems implementing list price increases in all regions of Canada. See Manufacturer's Exhibit A-6 (protected), par. 58 and 59, Administrative Record, Vol. 14.

83. As explained earlier, due to the complex nature of the contracts for CPBF and the various methods of calculating the discounts, allowances and rebates, a list price increase of a certain percentage does not necessarily translate into a net net price increase of the same percentage.

price increase.<sup>84</sup> Heinz did not attempt a list price increase in Ontario in 1996, but, in January 1997, it announced a list price increase for this region of just under 5 percent.<sup>85</sup> This list price increase was only partially successful, with many customers in Ontario demanding increased refunds, price roll-backs or other compensation that diminished or even negated the effect of the increase.<sup>86</sup> The 1997 Ontario list price increase did not become fully implemented until May of that year, when Gerber followed with an increase to bring its list prices back in line with Heinz'.<sup>87</sup>

Thus, overall, during the Tribunal's period of inquiry, Heinz managed to increase its list prices in Ontario by a total of approximately 10 percent. Despite these list price increases, however, the evidence shows that Heinz' CPBF net net prices in 1997 for Ontario, as well as for Canada as a whole, had not recovered fully to their 1995 level.<sup>88</sup> Clearly, the list price increases did not have their desired and intended effect on net net returns to Heinz.

In the Tribunal's opinion, Heinz may not have been able to achieve its full net net return objectives during a period of low overall inflation (as measured by the annual change in the consumer price index) such as prevailed over the Tribunal's period of inquiry. Nevertheless, the Tribunal is of the view that, to a large extent, the inability of Heinz to increase its net net prices beyond 1995 levels was due to it having to deal back some of the benefits of these price increases to its customers to counter the effects of low pricing, with dumped goods, by Gerber.

Furthermore, there is no question that Heinz incurred increased costs during the Tribunal's period of inquiry. While Heinz has admitted that these increased costs are not due to the effects of dumping, that does not negate the need to recoup these cost increases through price increases. In the Tribunal's opinion, the inability of Heinz to increase its net net prices beyond 1995 levels, because of Gerber's dumping, contributed to its deteriorating financial performance during the last two and three-quarter fiscal years.

#### Market Share

Finally, Heinz has submitted that, absent the dumping of CPBF, it would have been able to capture a greater portion, perhaps all, of the market. Without accepting the proposition that Heinz could or should have captured all or even most of Gerber's share of the market, the Tribunal has nevertheless drawn certain conclusions with respect to this contention. The Tribunal notes that Heinz' market share depends first on its distribution channels, that is the number and size of its customers. Heinz' market share also depends on the success of these customers in selling CPBF in competition with distributors of Gerber's CPBF. During the

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84. Manufacturer's Exhibit A-6 (protected), par. 58 and 59, Administrative Record, Vol. 14; and Manufacturer's Exhibit A-10 (protected), par. 16, Administrative Record, Vol. 14.

85. Tribunal Exhibit NQ-97-002-10.1 (protected), Administrative Record, Vol. 4 at 126.

86. Manufacturer's Exhibit A-6 (protected), par. 58 and 59, Administrative Record, Vol. 14.

87. *Transcript of Public Hearing*, Vol. 1, March 30, 1998, at 68 and Vol. 2, March 31, 1998, at 323; and *Transcript of In Camera Hearing*, Vol. 1, March 30, 1998, at 38.

88. *Protected Pre-Hearing Staff Report*, February 19, 1998, Tribunal Exhibit NQ-97-002-7 (protected), Administrative Record, Vol. 2 at 106. This same pattern is also reflected in the average unit values presented in Heinz' income statements for CPBF. See *Protected Pre-Hearing Staff Report*, revised March 11, 1998, Tribunal Exhibit NQ-97-002-7A (protected), Administrative Record, Vol. 2 at 164.3.

Tribunal's period of inquiry, Heinz, overall, did not lose market share.<sup>89</sup> However, the Tribunal believes that Heinz was only able to achieve this by absorbing net net price declines to defend itself against dumped Gerber products.

If Heinz had not reacted to the dumped prices offered by Gerber, it is clear to the Tribunal that it would have suffered some sustained loss in market share to Gerber. It seems evident to the Tribunal that, just as Heinz would have lost some market share to Gerber if it had not remained price competitive, Gerber would have lost some market share to Heinz if Gerber's prices had been higher by some degree, as they certainly would have been but for the dumping.

The Tribunal estimates that each point of market share at the wholesale level is worth somewhere in the order of \$500,000 or more in net revenues<sup>90</sup> to either Heinz or Gerber. Thus, small sustained market share shifts would have had substantial financial consequences on Heinz' performance.

## **CONCLUSION**

The Tribunal notes that it is a long established principle that dumping need not be the only, the major, or even principal cause of injury to the domestic industry.<sup>91</sup> However, the effects of dumping must be of sufficient importance to enable the Tribunal to conclude that the dumping has caused material injury to the domestic industry. In this case, there were certainly other significant causes of injury to Heinz, most notably the adverse publicity surrounding the CSPI report and the general volume decline in the market.

The Tribunal has done an extensive examination of all of these other factors causing injury to Heinz and, after accounting for their effects, is still left with material injury to Heinz caused by dumping. This injury is most obviously manifested in the price erosion which occurred. However, the Tribunal also finds that Heinz suffered injury because its net net prices have been suppressed and because its market share could have been higher than it was during the period of inquiry but for the dumping.

The magnitude of the injury from price erosion alone, in financial terms, is in the millions of dollars in decreased operating profits, an amount that accounts for an important percentage of Heinz' cumulative net operating profits over the period of inquiry. This injury obviously increases when the effects of price suppression and any market share changes are factored in. Consequently, the Tribunal finds that the dumping of prepared baby foods, containing finely homogenized vegetables, fruit and/or meat which may include some visible pieces of not more than 6.5 mm in size, and strained juice, put up for retail sale as food and

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89. Heinz actually lost market share in 1996 compared to 1995, but subsequently regained this market share in 1997. In fact, Heinz' market share in 1997 was slightly higher than it was in 1995. It should also be noted that the evidence concerning retail prices and market shares presented in this case shows significant market share movements from month to month, following product featuring and counter featuring by retailers in the grocery and drug channels. These month-to-month changes in the market have tended to balance out over the period, but only because Heinz, both directly and through its customers, maintained its price competitiveness with Gerber.

90. Approximately 1 percent of the average apparent market value during the 1995-97 period. See *Protected Pre-Hearing Staff Report*, February 19, 1998, Tribunal Exhibit NQ-97-002-7 (protected), Administrative Record, Vol. 2 at 91.

91. *Fresh, Whole, Delicious, Red Delicious and Golden Delicious Apples, Originating In or Exported from the United States of America*, Canadian International Trade Tribunal, Inquiry No. NQ-94-001, *Finding*, February 9, 1995, *Statement of Reasons*, February 24, 1995, at 21.

beverages for infants of ages 4 to 18 months, in containers of a net volume not exceeding 250 ml, excluding organic baby food and frozen baby food preparations, originating in or exported from the United States of America, has caused material injury to the domestic industry.

Patricia M. Close

Patricia M. Close  
Presiding Member

Raynald Guay

Raynald Guay  
Member

Anita Szlajak

Anita Szlajak  
Member