



**REPORT TO
THE MINISTER OF FINANCE**

**PUBLIC INTEREST INVESTIGATION INTO
CERTAIN PREPARED BABY FOOD
ORIGINATING IN OR EXPORTED FROM
THE UNITED STATES OF AMERICA**

NOVEMBER 30, 1998

CERTAIN PREPARED BABY FOOD

PB-98-001

EXECUTIVE SUMMARY*

On April 29, 1998, the Canadian International Trade Tribunal (the Tribunal) issued a finding that the dumping of certain prepared baby food (CPBF) from the United States had caused material injury to H.J. Heinz Company of Canada Ltd. (Heinz). This finding was issued pursuant to the *Special Import Measures Act* (SIMA). The primary objective of SIMA is to protect a domestic industry from material injury caused by dumped imports. Following an injury finding and the imposition of anti-dumping duties, it is normal for prices to rise, as the effects of the injurious dumping are removed from the marketplace.

Considerable public commentary was generated by the Tribunal's finding and the subsequent exit from the Canadian market of the sole competing supplier, Gerber Products Company (Gerber US). Under SIMA and the Tribunal's guidelines, where it can be demonstrated that there may be a public interest in reducing or eliminating the anti-dumping duties imposed after an injury finding, the Tribunal may conduct a further investigation. The Tribunal commenced such an investigation with regard to CPBF on July 3, 1998.

During its investigation, the Tribunal received over 40 submissions. Some focused on health and welfare issues, particularly as they relate to low-income families. Others focused on the potential effects of the current lack of competition in the \$60 million Canadian market for CPBF. Still other submissions brought to the Tribunal's attention the question of the viability of Heinz' production in Canada and its importance to the town of Leamington, to the associated industries and to the farming communities in that region.

A hearing was held during the week of September 14, 1998, to investigate further into these public interest issues. The Tribunal heard a total of 34 witnesses. Representatives for Heinz, Gerber US, its Canadian subsidiary and the Competition Bureau appeared before the Tribunal, as did witnesses representing welfare organizations, medical and dietary professions, unions, consumers, distributors, retailers and regional interests.

After reflecting on the evidence and the testimony, ***the Tribunal recommends to the Minister of Finance that the anti-dumping duties on CPBF from the United States be reduced.*** The Tribunal's recommendation would result in a reduction of approximately two thirds of the full duties. In the Tribunal's opinion, this reduction best balances the competing public interest concerns.

Price was a concern of virtually every witness and submission, either the price increase that could occur with full duties in place or the unsustainably low price that would continue with duty elimination. At the hearing, however, Heinz recognized that, while it needs protection from injurious dumping, it does not need, nor could it charge because of market constraints, prices that reflect the full amount of the anti-dumping duties.

The concerns over the health and welfare of infants, particularly in low-income families, would be mitigated by the Tribunal's recommendation. Reduction of the duties, not elimination, is the alternative most likely to lead to the re-introduction and maintenance of competition in the Canadian market and, therefore, to the lowest prices over the longer term. The recommendation is designed to produce market prices that should entice Gerber US or another producer to supply the Canadian market. At the same time, it should allow Heinz to maintain the production of CPBF in its Leamington plant. With continued production by Heinz, the economic health of Leamington, the associated industries and the farming communities in that region is more secure.

* This serves as an unofficial summary of the Tribunal's opinion and the statement of facts and reasons for that opinion.

There are no guarantees either that Gerber US will re-enter the Canadian market or that Heinz will continue production in Canada. However, if actual competition could be restored, the concerns regarding the benefits of competitive pricing, consumer choice, security of supply, innovation and service to retailers would also be addressed.

In the event that the Minister of Finance decides to accept the Tribunal's duty reduction recommendation, the Tribunal proposes that it should be implemented through the use of a ***“minimum domestic market resale price for imports” of each category of CPBF from the United States, indexed on an annual basis, using the “Food Purchased from Stores” component of the Consumer Price Index.***

TABLE OF CONTENTS

	Page
EXECUTIVE SUMMARY	i
OPINION	v
LIST OF MEMBERS AND STAFF, PARTICIPANTS AND WITNESSES	vii
PART I - INTRODUCTION	1
1. Background	1
2. Final Determination of the Deputy Minister of National Revenue	2
3. Summary of the Tribunal's Injury Finding	2
4. Market for CPBF	4
PART II - PUBLIC INTEREST FRAMEWORK	7
PART III - POSITION OF PARTIES	13
1. Submissions in Support of Eliminating or Reducing the Anti-dumping Duties	13
a) General Public	13
b) Gerber	13
c) Director of Investigation and Research	15
2. Submissions in Support of Maintaining the Anti-dumping Duties	16
a) General Public	16
b) Heinz	17
PART IV - PRICE EFFECTS OF ANTI-DUMPING DUTIES	19
1. Introduction	19
2. Full Anti-dumping Duties	19
a) Strategic Price Options for Heinz	20
b) Potential Commercial Competition	20
c) Countervailing Power of Purchasers	24
d) Consumer Reactions to Price Increases	24
e) Conclusion	26
3. Elimination of the Anti-dumping Duties	26
a) Viability of the Domestic Industry	26
4. Reduction of the Anti-dumping Duties	27
PART V - OTHER EFFECTS OF THE ANTI-DUMPING DUTIES	29
1. Introduction	29
2. Low-income Families	29
a) Full Anti-dumping Duties	29
b) Elimination or Reduction of the Anti-dumping Duties	31
3. Infant Health	31

4. Competition	32
a) Full Anti-dumping Duties	32
b) Elimination or Reduction of the Anti-dumping Duties	34
5. Conclusion	34
PART VI - DUTY REDUCTION	35
1. Basis and Form of the Duty Reduction	35
2. Confidentiality	36
3. Consideration of Price Points	37
a) Level of Inflation	37
b) Heinz' Duty Reduction Proposal	37
c) Market Constraints	38
d) Gerber's Offer to Wholesalers and Retailers	38
e) Heinz' Cost Increases	39
f) Gerber's Duty Reduction Proposal	39
4. Recommended Minimum Domestic Market Retail Prices	40
5. Other Recommendations	40
a) Penalty	40
b) Indexing	41
6. Retroactivity	41
PART VII - SUMMARY OF RECOMMENDATIONS	43
APPENDIX - RECOMMENDED MINIMUM DOMESTIC MARKET RESALE PRICES FOR IMPORTS OF CERTAIN PREPARED BABY FOOD FROM THE UNITED STATES	45



Ottawa, Monday, November 30, 1998

Public Interest Investigation No.: PB-98-001

IN THE MATTER OF an opinion of the Canadian International Trade Tribunal, under section 45 of the *Special Import Measures Act*, resulting from Inquiry No. NQ-97-002 conducted under section 42 of the *Special Import Measures Act*;

RESPECTING whether the imposition of anti-dumping duties, or the imposition of such duties in the full amount, on 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, would not or might not be in the public interest.

OPINION

The Canadian International Trade Tribunal herewith reports to the Minister of Finance under section 45 of the *Special Import Measures Act* that it is of the opinion that the imposition of the anti-dumping duties in the full amount, in respect of the above-mentioned goods, is not in the public interest and further recommends as follows:

- that the anti-dumping duties on certain prepared baby food imported from the United States be reduced;
- that a minimum domestic market resale price for imports of certain prepared baby food from the United States be used for the implementation of an anti-dumping duty reduction;
- that the specific minimum domestic market resale prices for imports be kept confidential;
- that a specific minimum domestic market resale price for each category of certain prepared baby food imported from the United States be established as presented in the confidential appendix;
- that, when the minimum domestic market resale price for imports exceeds the actual resale price, penalties be set equal to the difference between the two; and
- that the minimum domestic market resale prices for imports be indexed on an annual basis, using the "Food Purchased from Stores" component of the Consumer Price Index.

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Patricia M. Close
Presiding Member

Raynald Guay
Raynald Guay
Member

Anita Szlazak
Anita Szlazak
Member

Susanne Grimes
Susanne Grimes
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PART I

INTRODUCTION

1. Background

On April 29, 1998, the Canadian International Trade Tribunal (the Tribunal) found, pursuant to subsection 43(1) of the *Special Import Measures Act*¹ (SIMA), that the dumping in Canada of certain prepared baby food² (CPBF) originating in or exported from the United States of America had caused material injury to the domestic industry.³ SIMA provides that, after making an injury finding, if the Tribunal is of the opinion that the imposition of anti-dumping or countervailing duties, or the imposition of such duties in the full amount, would not or might not be in the public interest, it shall report to the Minister of Finance (the Minister) that it is of that opinion and provide the Minister with a statement of facts and reasons for its opinion. Consequently, at the time of its injury finding, the Tribunal invited representations on the question of whether it should initiate a public interest investigation.

A total of 27 parties made representations to the Tribunal that there was a public interest question worthy of further investigation. Those opposed to a public interest investigation included 47 parties that made submissions, as well as 463 employees of H.J. Heinz Company of Canada Ltd. (Heinz) and 220 employees of Omstead Foods Limited, a subsidiary of Heinz, who wrote letters to the Tribunal.

After considering all the representations received on the question of public interest, the Tribunal was of the view that a number of factors existed which, when considered together, demonstrated a public interest concern worthy of further investigation. These factors were the nature and structure of the Canadian industry and market, the question of the availability of CPBF from sources other than the United States and the effect of anti-dumping duties on low-income families.⁴ On July 3, 1998, the Tribunal commenced a public interest investigation pursuant to section 45 of SIMA.

As part of this investigation, the Tribunal sent comprehensive questionnaires to the Canadian manufacturer, importers, exporters and purchasers of CPBF. The respondents updated information provided to the Tribunal in the context of its recently completed inquiry conducted under section 42 of SIMA and provided pertinent information concerning possible public interest concerns. From the replies to these questionnaires, submissions from interested parties and other available information, the Tribunal's research staff prepared public and protected pre-hearing staff reports.

The Tribunal held public and *in camera* hearings in Ottawa, Ontario, from September 14 to 18, 1998.⁵ Gerber (Canada) Inc. (Gerber), Gerber Products Company (Gerber US) and the Director of Investigation

1. R.S.C. 1985, c. S-15.

2. 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.

3. Inquiry No. NQ-97-002, *Finding*, April 29, 1998, *Statement of Reasons*, May 14, 1998.

4. *Notice of Commencement of Public Interest Investigation*, Canadian International Trade Tribunal, July 3, 1998.

5. The record of this investigation consists of all Tribunal exhibits, including the public and protected replies to questionnaires, all exhibits filed by the parties at the hearing and the transcripts of the 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 confidentiality undertaking with the Tribunal.

and Research, Competition Bureau, the Department of Industry (the Director) requested the elimination or reduction of the duties and were represented by counsel at the Tribunal's hearing. Seventeen individuals and organizations, also requesting the elimination or reduction of the duties, were parties to the public interest investigation, but were not represented by counsel. Representatives of eight of these organizations appeared at the public hearing. Heinz opposed the elimination or reduction of the duties and was represented by counsel. Thirteen other organizations that opposed the elimination or reduction of the duties were parties to the public interest investigation, but were not represented by counsel. In addition, seven witnesses representing these and other organizations appeared at the public hearing in support of Heinz' position.

2. Final Determination of the Deputy Minister of National Revenue

On March 30, 1998, the Deputy Minister of National Revenue (the Deputy Minister) made a final determination that Gerber US was dumping CPBF in Canada. The Deputy Minister's investigation revealed that 100 percent of CPBF imported during the period of investigation⁶ was dumped. The weighted average margin of dumping⁷ was 59.76 percent, when expressed as a percentage of the normal value (i.e. of comparable selling prices in the United States), or 148.51 percent, when expressed as a percentage of the export price.⁸

Because the importer, Gerber, is a wholly owned subsidiary of the exporter, Gerber US, export prices were calculated under paragraph 25(1)(c) of SIMA on the basis of the importer's resale prices in Canada less all costs incurred in importing and selling CPBF in Canada plus an amount for profit. The export prices under section 25 were lower than the export prices under section 24 for all eight of Gerber's product groupings;⁹ therefore, the Department of National Revenue (Revenue Canada) used the export prices under section 25 in its dumping margin calculations.

The Tribunal notes that this margin was calculated on the basis of constructed export prices. As such, the margin did not necessarily reflect the dumping margin that would result from an arm's length market transaction. Nevertheless, as the Tribunal noted in its statement of reasons for its injury finding, the evidence showed that retail prices for baby food in the United States were generally higher than they were in Canada, on a common currency basis, and that Gerber US sold CPBF at lower price levels into the Canadian market than those in its home market.¹⁰

3. Summary of the Tribunal's Injury Finding

On April 29, 1998, the Tribunal found that the dumping of CPBF originating in or exported from the United States had caused material injury to the domestic industry, i.e. Heinz. In coming to its determination, the Tribunal examined the relevant economic factors and found that Heinz' domestic production and sales had declined by over 20 percent during the 1995-97 period. At the same time, its costs and expenses were increasing and its average unit revenues were decreasing. In the Tribunal's view, the combination of the

6. The Deputy Minister's period of investigation was from January 1 to June 30, 1997.

7. Normal values for shipments of CPBF for these months 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.

8. The simple relationship between the margin of dumping expressed as a percentage of the normal value (MN) and expressed as a percentage of the export price (MX) is: $MX = MN / (100 - MN)$.

9. The eight Gerber product groupings are: 1st Foods, 2nd Foods, 2nd Foods - Tropical Desserts, 2nd Foods - Veggie Recipe Dinners, 2nd Foods - Meats, 2nd Foods - Simple Recipe Dinners, 3rd Foods and Juices.

10. Inquiry No. NQ-97-002, *Statement of Reasons* at 4-5.

inability to recoup cost and expense increases, the volume losses, price erosion and price suppression resulted in financial injury to Heinz. Over the three and three-quarter years covered by the 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. The Tribunal found this magnitude of injury to be material.

Turning to the question of causality, Heinz' officials conceded that most, if not all, of the increased costs and expenses experienced after fiscal 1994-95 were unrelated to dumping. Thus, the Tribunal set aside this factor in its assessment of the injury caused by dumping.

Regarding the declining sales volumes, the Tribunal noted that, while Heinz' sales volumes declined by over 20 percent during the period of inquiry, the overall market also declined by over 20 percent. Over the same time period, Gerber's sales declined by over 25 percent. Consequently, Heinz' share of the market actually increased slightly. Several factors were suggested as the cause of the declining market. However, it was apparent to the Tribunal that Heinz' declining sales volumes were unrelated to dumping. Consequently, in assessing the injury to Heinz caused by dumping, the Tribunal set aside the financial injury resulting from the volume losses reflected in Heinz' financial statements.

During the Tribunal's period of inquiry, several major retail chains renegotiated their supply contracts. These retail chains included Loblaw Companies Limited (Loblaws) and Shoppers Drug Mart Limited (Shoppers), the largest customers of Heinz and Gerber respectively. The evidence indicated that Gerber bid very aggressively for this business. The evidence also showed that, for the three years starting in January 1995, on a national basis for sales of all categories of CPBF, Gerber's weighted average net-net price¹¹ was always lower than that of Heinz. This was true not only on a national basis but also for Ontario, where the majority of Gerber's sales were made. Given that the evidence showed that most of the large retailers played Heinz and Gerber off against each other even between contracts, this lower price throughout the three-year period of inquiry put Heinz under continuous downward pricing pressure.

The Tribunal examined other possible causes of the price erosion, such as the adverse publicity stemming from the report by the Center for Science in the Public Interest (CSPI),¹² the general market declines that were occurring, the effect of exclusivity payments, as well as the practice of packaging or linking sales of one product or group of products with other products or groups of products. After considering these factors, the Tribunal was of the view that none of them, either individually or collectively, satisfactorily explained the price erosion that occurred. The Tribunal, therefore, concluded that dumped Gerber CPBF had caused material injury through the price erosion experienced by Heinz, which amounted to several millions of dollars in decreased operating profits.

With regard to price suppression, the Tribunal was of the opinion that Heinz may not have been able to increase prices as much as it would have liked during the period of inquiry. In the Tribunal's view, 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. Further, the Tribunal recognized that Heinz incurred increased costs and expenses during

11. "Net-net price" refers to the actual net selling price for the goods after deducting all applicable discounts, allowances and rebates from the list price for the goods.

12. On September 4, 1996, the CSPI, a US-based lobby group, released a report which criticized the nutritional content of baby food in Canada and paid particular attention to baby food products produced by Heinz.

the period of inquiry and that, while these cost increases were not related to dumping, that did not negate the need to recoup some or all of these cost increases through price increases.

Heinz argued that it should have been able to increase its market share in the absence of dumped goods. Without accepting the proposition that Heinz could or should have captured all or even most of Gerber's share of the market, the Tribunal, nevertheless, drew certain conclusions with respect to this contention. It was evident to the Tribunal that Heinz would have lost market share to Gerber if it had not lowered prices to remain price competitive. Conversely, the Tribunal believed that, if Gerber had been selling in the Canadian market at higher prices, as it would have been but for the dumping, it would have lost some market share to Heinz. The Tribunal estimated that each percentage point of market share was worth approximately \$500,000 to either Heinz or Gerber. Therefore, small sustained market share shifts would have had substantial consequences on Heinz' financial performance.

4. Market for CPBF

The market for CPBF in Canada has traditionally been served by two companies, Heinz and Gerber. Heinz produces CPBF for the Canadian market in its Leamington, Ontario, production facility. Prior to June 1990, Gerber produced CPBF for the Canadian market in a production facility located in Niagara Falls, Ontario. This facility was closed in June 1990.¹³ At that point, Gerber began importing CPBF from its parent company's plant in Fremont, Michigan. This left Heinz as the sole Canadian producer of commercial CPBF, but still left the Canadian consumer with two sources of CPBF.

The market for jarred baby food in Canada has been publicly estimated to be worth approximately \$60 million in annual sales.¹⁴ The Tribunal notes that the category "jarred baby food" contains products other than CPBF, such as "toddler" food, large-size juices and "Earth's Best" organic baby food. Consequently, the total market for CPBF is somewhat smaller than \$60 million. According to various press articles, sales of Heinz CPBF have traditionally accounted for 75 to 80 percent of the Canadian market, with sales of Gerber CPBF representing the remainder, which is basically consistent with the information submitted to the Tribunal.¹⁵ In contrast, Gerber US accounts for approximately 65 percent of the US market for jarred baby food, with sales by H.J. Heinz Company (Heinz US) and Beech-Nut Nutrition Corp. (Beech-Nut) accounting for most of the remaining 35 percent.

As noted above, the overall market for CPBF in Canada declined by over 20 percent between 1995 and 1997. Figures submitted during the public interest investigation for the first six months of 1998 indicate that the market continued to decline by more than 5 percent when compared to the same six months in 1997. Heinz' production of CPBF and Gerber's imports of CPBF both declined during the 1995-97 period, with market shares staying relatively constant throughout the three years. Following the Deputy Minister's preliminary determination of dumping, however, Heinz' production volume increased during the first six months of 1998, while Gerber's volume of imports declined during the first four months of 1998 and was

13. *Transcript of In Camera Hearing*, Vol. 1, September 15, 1998, at 33-35.

14. Tribunal Exhibit PB-98-001-10.1 (protected), Administrative Record, Vol. 6 at 19.

15. As there is only one domestic producer and one importer, most of the production, import, sales and income statement data submitted to the Tribunal during both its inquiry and its public interest investigation are confidential. However, there are some publicly available figures, as well as general trends in the confidential data, which allow the Tribunal to describe the market in general terms. The confidential data are found in *Protected Pre-hearing Staff Report*, August 24, 1998, Tribunal Exhibit PB-98-001-4 (protected), Administrative Record, Vol. 2 at 22-35; and Tribunal Exhibit PB-98-001-7.1D (protected), Administrative Record, Vol. 4 at 263-71.

virtually nil after the Tribunal's injury finding of April 29, 1998. Since the Tribunal's injury finding, Heinz' share of the market has increased even further, as Gerber's former customers gradually turned to Heinz for their new supplies.

The operating profits that Heinz reported on sales of CPBF in Canada declined in each of its last three fiscal years.¹⁶ Figures submitted for the first quarter of Heinz' next fiscal year (May to July 1998), the first fiscal quarter after the Tribunal's injury finding, indicate that operating profits increased compared to the first quarter of fiscal 1997-98.

Average net-net prices for Heinz CPBF, as indicated in the financial statements submitted to the Tribunal, also declined in fiscal years 1995-96 and 1996-97, compared to fiscal 1994-95, but then increased in fiscal 1997-98. The average price reported by Heinz for the first quarter of fiscal 1998-99, the period immediately following the Tribunal's injury finding, remained relatively stable, rising only a few percentage points over the average price for fiscal 1997-98. However, it was still below the average net-net price reported for fiscal 1994-95, which was the base year for the Tribunal's injury analysis.

16. Heinz' fiscal year runs from the beginning of May to the end of April.

PART II

PUBLIC INTEREST FRAMEWORK

In 1904, Canada enacted anti-dumping legislation to combat unfair trade practices, making it the first country in the world to do so. Since then, the legislation has undergone many changes, in part, as a response to developments in the international trading community and, in part, as a response to parliamentary reviews undertaken in Canada. The most significant changes to our domestic anti-dumping legislation followed the Tokyo Round of the *General Agreement on Tariffs and Trade* (GATT) negotiations. This round resulted in the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade*¹⁷ (the 1979 GATT Anti-dumping Code).

In the early 1980s, Parliament undertook a fundamental review of Canada's anti-dumping and countervailing legislation to ensure that it was compliant with the Tokyo Round provisions of GATT and that it continued to respond to Canada's economic interests.¹⁸ During the parliamentary committee proceedings, concern was expressed about the impact on Canadian consumers and businesses when the level of duties was maintained at the full margin of dumping. Not only did the imposition of those duties inevitably lead to higher costs for consumers and downstream users of the product but it also occasionally had adverse effects on competition within the Canadian marketplace. While accepting that higher prices were indeed one of the likely consequences of the anti-dumping laws, the committee was sympathetic to these concerns. The committee was also mindful of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade*¹⁹ (the 1967 GATT Anti-dumping Code) and 1979 GATT Anti-dumping Code, which noted that the interests of those affected by the imposition of duties, as well as the interests of the domestic producers, should be taken into account when deciding whether or not to impose the full amount of duties. These codes noted that the imposition of the duties equal to the full margin of dumping should be permissive, i.e. not mandatory, and that the amount of duties imposed should be no more than necessary to remove the injury being experienced by domestic producers.²⁰

The changes proposed in the committee's report resulted in the 1984 enactment of SIMA, within which one provision, section 45, addressed the public interest issue. This provision authorizes the Tribunal to conduct public interest investigations in appropriate cases and to report to the Minister on whether duties equal to the full margin of dumping should be maintained, reduced or eliminated. Despite the inclusion of this provision, no legislative guidance is given on what the public interest is to include, nor is there any definition of "public interest" in any of the anti-dumping codes or international agreements. Consequently, the interpretation of public interest has been left to the Tribunal.

17. Geneva, March 1980, GATT BISD, 26th Supp. at 171.

18. *Report on the Special Import Measures Act*, Sub-committee on Import Policy of the Standing Committee on Finance, Trade and Economic Affairs, June 1982, House of Commons, Issue No. 31, June 9, 1982.

19. Geneva, April 1968, GATT BISD, 15th Supp. at 24.

20. The concept of duty less than the full margin ("lesser duty") was first articulated in the 1967 GATT Anti-dumping Code and the 1979 GATT Anti-dumping Code. It is now provided for in Article 9.1 of the World Trade Organization *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the WTO Anti-dumping Agreement), signed at Marrakesh on April 15, 1994. For a thorough analysis of the public interest issue, see P.I.A. Moen, *Public Interest Issues in International and Domestic Anti-dumping Law: The WTO, European Communities and Canada* (Geneva: Graduate Institute of International Studies, 1998).

The Director and Gerber both argued that the Tribunal should recommend duty reduction or elimination whenever it is of the opinion that the imposition of duties equal to the full margin of dumping “would not or might not be in the public interest.”²¹ Therefore, they continued, the threshold at which the Tribunal should recommend reduction or elimination is very low. Alternatively, Gerber argued that, if a higher threshold does exist, that threshold has been met given the special nature of CPBF and the facts of this case.

Heinz disagreed, arguing that the threshold for duty reduction or elimination is much higher and has not been met in this case. Counsel for Heinz stated that the Tribunal has interpreted the phrase “would not or might not be in the public interest” to mean that there must be a “sufficiently compelling public interest” before it can recommend the reduction or elimination of duties.

The Tribunal notes that this issue has been the subject of attention in previous public interest decisions. For example, in *Grain Corn*,²² the Canadian Import Tribunal stated:

SIMA provides a mechanism for the application of penalties, by way of a special duty, to dumped or subsidized imports which are found to be materially injurious to Canadian production of like or similar goods. Such procedures are in accordance with, and conform to, international agreements to which Canada is a signatory. In deciding what meaning is to be attached to the public interest provision, the Tribunal accepts that SIMA itself, as with all legislation, was enacted by Parliament in the interest of the public good. It would follow that section 45, being a specific provision within the statute, is to be applied on an exceptional basis, as for instance when the relief provided producers causes substantial and possibly unnecessary burden to users (downstream producers) and consumers of the product.²³ (Emphasis added)

This view was expressed again in *Refined Sugar*, Public Interest Investigation No. PB-95-002,²⁴ where the Tribunal stated:

In *Grain Corn*, the CIT stated that SIMA provides a mechanism for the application of duties on dumped and subsidized imports which are found to be materially injurious to domestically produced like goods. The CIT found that, because SIMA as a whole was enacted by Parliament in the public

21. Subsection 45(1) of SIMA reads as follows:

Where, as a result of an inquiry referred to in section 42 arising out of the dumping or subsidizing of any goods, the Tribunal makes an order or finding described in any of sections 3 to 6 with respect to those goods and the Tribunal is of the opinion that the imposition of an anti-dumping or countervailing duty, or the imposition of such a duty in the full amount provided for by any of those sections, in respect of the goods would not or might not be in the public interest, the Tribunal shall, forthwith after making the order or finding,

(a) report to the Minister of Finance that it is of that opinion and provide him with a statement of the facts and reasons that caused it to be of that opinion; and

(b) cause a copy of the report to be published in the *Canada Gazette*.

22. *Report on Public Interest - Grain Corn*, Canadian Import Tribunal, October 1987.

23. *Ibid.* at 2.

24. *Imposition of Anti-dumping Duties on Imports of Refined Sugar, Refined from Sugar Cane or Sugar Beets, in Granulated, Liquid and Powdered Form, Originating in or Exported from the United States of America, Denmark, the Federal Republic of Germany, the Netherlands and the United Kingdom, and Imposition of Countervailing Duties on Imports of Refined Sugar, Refined from Sugar Cane or Sugar Beets, in Granulated, Liquid and Powdered Form, Originating in or Exported from the European Union*, Canadian International Trade Tribunal, *Tribunal's Consideration of the Public Interest Question*, April 4, 1996.

good, it followed that section 45, being a specific provision within SIMA, should “be applied on an exceptional basis.”²⁵ (Emphasis added)

The Tribunal shares the view that a recommendation to the Minister that the level of duties should be reduced or eliminated should only be made in those cases where the facts demonstrate a sufficiently compelling public interest rationale for doing so.

Both the Director and Gerber encouraged the Tribunal to consider, if not the elimination, the reduction of duties to the “lesser duty” level, i.e. only that level of duties necessary to remove the injury to the domestic producer, Heinz. They maintained that this standard was the one contemplated by the anti-dumping codes and by Article 9.1 of the WTO Anti-dumping Agreement, which states:

It is desirable that the imposition [of duties] be permissive in the territory of all Members, and that the duty be less than the margin if such lesser duty would be adequate to remove the injury to the domestic industry.²⁶

In support of this interpretation, the Director and Gerber cited the Tribunal’s comments in *Beer*, Opinion No. PI-91-001,²⁷ where the majority stated:

[W]e question the need to impose duties on dumped imports that are greater than those necessary to remove the material injury to the B.C. industry. Anti-dumping duties at a level sufficient to remove the injury have accomplished their purpose ...

Anti-dumping duties at levels higher than necessary to remove material injury are excessive. Duties that are excessive penalize certain products and exporters by raising prices unnecessarily high and, perhaps, by excluding them from the market altogether. In our view, this is not in the public interest. Not only does it provide an unnecessary benefit for the B.C. industry, but it also means higher prices and less choice for consumers.²⁸

The Tribunal notes, however, that the majority in *Beer* also addressed other factors when considering the public interest:

In our view, the public interest includes the protection of B.C. employment and investment in the subject industry as well as in the upstream and associated service industries....

Furthermore, the cost-benefit analysis put forward by the Director fails to measure any potential social costs that might arise from duty removal.²⁹ (Emphasis added)

25. *Ibid.* at 4.

26. *Supra* note 20.

27. *The Imposition of Anti-dumping Duties, or the Imposition of Such Duties in the Full Amount on Malt Beverages, Commonly Known as Beer, of an Alcoholic Strength by Volume of not Less Than 1.0 Percent and not More Than 6.0 Percent, Packaged in Bottles or Cans not Exceeding 1,180 mL (40 oz.), Originating in or Exported from the United States of America by or on Behalf of Pabst Brewing Company, G. Heileman Brewing Company Inc. and The Stroh Brewery Company, their Successors and Assigns, for Use or Consumption in the Province of British Columbia, Opinion*, November 25, 1991.

28. *Ibid.* at 4.

29. *Ibid.* at 3.

In the Tribunal's view, a public interest investigation conducted pursuant to SIMA permits a wide variety of factors to be taken into account in considering the appropriate level of duties. The Tribunal finds support for this broader, more encompassing approach in a recent decision of the Federal Court of Canada, in which the Court stated:

A review of the jurisprudence concerning "public interest" reveals that it is a broad, somewhat undefined and flexible concept, which nevertheless includes considerations beyond the interests of the parties to a dispute.³⁰

This is not to say, however, that there are no boundaries on the factors that the Tribunal may take into account. As was stated in *Grain Corn*, the Tribunal is not "an advisor to the Minister of Finance on the distribution of wealth and income between different private interests."³¹ Consequently, in this case, the Tribunal has focused on those factors that are relevant to the appropriate level of duties.

The Director urged the Tribunal to give equal weight to the provisions of the *Competition Act*³² and SIMA when analyzing the public interest. The consequence of doing so, he suggested, would be to rank the interest of consumers and competition within the marketplace equal to the interests of Heinz. Parliament, he argued, intended that legislative enactments be "interpreted together, without conflict." These two acts should, he continued, be read in a manner which promotes coherence and consistency.

The clearly stated purpose of the *Competition Act* is:

to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.³³

Heinz, on the other hand, submitted that Parliament enacts all legislation in the public interest and that, by enacting SIMA, it recognized the importance of protecting domestic producers. In other words, the protection of domestic producers from unfairly traded imports is the dominant purpose and objective within SIMA's architecture. In support of this, counsel for Heinz referred to *Refined Sugar*, in which the panel concluded that "the central or primary object of SIMA is the protection of a domestic industry from unfairly traded imports."³⁴ The Tribunal concurs with that view.

In the Tribunal's view, both the *Competition Act* and SIMA were enacted to promote and protect fair business practices in Canada in order to enhance Canadian economic welfare. These interests are achieved, in part, by ensuring that Canadian industries are not harmed by unfairly traded imports. These interests are also achieved by promoting fair competition in the marketplace. Both the *Competition Act* and SIMA are important public policy tools that can be called upon to create favourable marketplace conditions by levelling the playing field, by removing obstacles and by encouraging fair competition. Depending upon the issues at play, parties can have resort to the relevant act to achieve the results that they seek. When parties come before the Tribunal seeking protection from imports that are being dumped in Canada or that are being

30. *Wang Canada Limited v. Minister of Public Works and Government Services*, Court File No. T-944-98, September 28, 1998, at 12.

31. *Supra* note 22 at 4.

32. R.S.C. 1985, c. 19 (2nd Supp.), s. 19.

33. *Ibid.*

34. *Supra* note 24 at 4.

unfairly subsidized, they do so pursuant to SIMA and not the *Competition Act*. It is SIMA that gives the Tribunal its jurisdiction to conduct inquiries with respect to these matters and, to the extent that any inconsistency exists between those acts, the Tribunal must defer to the provisions of SIMA.

Keeping in mind the primary purpose of SIMA, the Tribunal balanced the relevant public interest concerns in considering both whether the threshold has been met and, if met, what the appropriate level of duties should be. The public interest concerns taken into account were the price effects on consumers, particularly the financial burden on low-income families, the health of Canadian infants, and the price and non-price effects of competition, or the lack of competition, within the Canadian marketplace as a result of Gerber's decision to stop importing CPBF. As well, the Tribunal took into account the public interest concerns regarding the continued viability of Heinz' Leamington facility and its impact on that community and on associated upstream industries, including the farming community in Southwestern Ontario.

PART III

POSITION OF PARTIES

1. Submissions in Support of Eliminating or Reducing the Anti-dumping Duties

a) General Public

The Tribunal received written submissions and heard testimony from numerous individuals and organizations expressing the view that the public interest required the elimination or reduction of the anti-dumping duties on imports of CPBF from the United States. These persons and organizations were: The Canadian Institute of Child Health, Dr. William James, Infant Feeding Action Coalition Canada, the College of Family Physicians of Canada, Distribution Canada Inc., Ms. Angela Grella-Gos, the Canadian Federation of Independent Grocers, the Community Nutritionists' Council, the Toronto Food Policy Council, the Health Department of the Regional Municipality of Ottawa-Carleton, the Ottawa West End Community Chaplaincy, the National Anti-Poverty Organization, the Ottawa-Carleton Child Poverty Action Group, the Consumers' Association of Canada, Campaign 2000, the Ontario Society of Nutrition Professionals in Public Health and the Fédération nationale des associations de consommateurs du Québec.

These submissions and testimony raised five main public interest concerns caused by the imposition of anti-dumping duties or the imposition of such duties in the full amount. First, these parties expressed concerns about price increases for CPBF arising either from the imposition of anti-dumping duties or from Gerber exiting the market, leaving Heinz free to raise prices. They were concerned about the effects of price increases on all consumers but, in particular, about the financial burden on low-income families for a product that has become an important part of infant feeding in Canada. They were also concerned that increased prices for CPBF would lead to the inadequate preparation of homemade baby food, a watering down of CPBF or a "stretching" of the use of opened jars beyond the recommended date, thereby causing inadequate infant nutrition and other health concerns, especially choking. Second, there was the concern that the imposition of anti-dumping duties would cause Gerber and other potential US providers of CPBF to be uncompetitive in the Canadian market, thereby reducing or eliminating consumer choice in the brands and varieties of CPBF available in Canada. Third, another competition-related concern was the continuity of supply of CPBF in Canada in the event of a work stoppage or product contamination at Heinz' Leamington plant if Heinz were the only source of CPBF in Canada. Fourth, there were also concerns that service to smaller retailers would suffer with only one source of CPBF in Canada. Finally, concerns were expressed about whether, with reduced commercial competition, there would be the same incentives for Heinz to continue product innovation and quality improvements in its line of CPBF.

b) Gerber

Counsel for Gerber stated that the full amount of the duties were far in excess of what the market would bear and of what was required to eliminate injury to Heinz. They submitted that this was supported by the fact that, after the injury finding, Gerber was unable to persuade a major retailer to accept a 30 percent price increase for CPBF shipped directly from its US plant. Gerber maintained that, with this direct arm's length arrangement, a 30 percent increase would be sufficient to avoid the imposition of anti-dumping duties, but that duties must be set well below 30 percent to maintain competition. Moreover, counsel pointed out that Heinz had admitted that wholesale prices were unlikely to rise to the level of normal values, i.e. price levels in the United States, and that the President of Heinz had testified that Heinz did not need the full amount of the anti-dumping duties to eliminate the injury caused by dumping.

Counsel for Gerber stated that the evidence showed that, if the duties were maintained, many Canadian families would lose access to high-quality CPBF at affordable prices, especially families in smaller communities and low-income families. They noted that home preparation of baby food was not a reality for many Canadians because they lacked the knowledge, equipment, storage space or time to prepare it. Counsel submitted that the evidence showed that low-income parents forced to spend more on CPBF would spend less on other needs. They stated that there were concerns that a lack of competition would lessen Heinz' incentive to improve CPBF.

Counsel for Gerber noted that the witness for Shoppers testified that CPBF was a traffic draw and that the loss of Gerber CPBF meant that Shoppers had lost a means by which it could differentiate itself from grocery chains. Counsel indicated that the witness was not optimistic that private label CPBF would be a viable alternative for Shoppers, as it was a "personal use" product for which brand equity was important to consumers.

Counsel for Gerber argued that Heinz was currently the sole supplier of CPBF and submitted that there was no credible evidence that any other supplier had made a serious attempt to supply the market with CPBF. Further, counsel noted that Nestlé had chosen not to purchase Beech-Nut in the United States at a relative bargain price and stated that this was evidence that Nestlé had deliberately chosen not to re-enter the North American market for CPBF.

Counsel for Gerber noted that Gerber had identified several factors that precluded entry to the Canadian market for CPBF. They included, among others, the relatively small and declining size of the Canadian market for CPBF; existing excess production capacity in Heinz' Leamington plant; the cost of various import or new domestic production alternatives; and Heinz' dominant position in the Canadian market for CPBF.

With regard to Heinz' pro forma analysis of the possibility of new entrants to the Canadian market, counsel for Gerber noted that the price increases, which the analysis indicated would be required, were above those already rejected by Gerber's retailers. Counsel also indicated that the analysis had not considered Heinz' ability to price below potential new competitors and that no indication was given of how the competitors would overcome entry barriers. They indicated that the analysis was based on Heinz' cost structure and that there was no evidence that the cost structure of a potential competitor would be the same.

Counsel for Gerber stated that Gerber US's plants continued to have excess capacity and that it was unreasonable to expect Gerber to build a plant in Canada to export to the United States. In response to the argument that the countervailing power of retailers would restrict the size of price increases, counsel noted that Gerber's economic expert had pointed out that it was just as plausible that Heinz would use its increased bargaining power to increase prices for other products. Counsel also argued that, if Gerber left the market permanently, retailers would lose the ability to play one supplier off against the other.

Gerber submitted that the anti-dumping duties should be eliminated. If, however, the Tribunal determined that the duties should only be reduced, Gerber proposed a remedy that would raise its net-net prices by a specified percentage to compensate for the price erosion and price suppression suffered by Heinz caused by the dumping. If Gerber's resale prices fell below the specified level, duties would be set equal to the difference. The proposal also indicated that Gerber's resale prices would be adjusted on an annual basis to account for inflation. Finally, Gerber requested that the reduction of anti-dumping duties be made retroactive to the date of the Deputy Minister's preliminary determination of dumping (December 30, 1997). Counsel for Gerber submitted that the public interest concerns that were identified existed at the time of the

injury finding and the preliminary determination, that Heinz had already been compensated for injury suffered and that its financial well-being would not be affected by a retroactive reduction. They indicated that, since the duties were in excess of the injury caused by the dumping, not reimbursing the duties would penalize Gerber for non-injurious dumping.

c) Director of Investigation and Research

Counsel for the Director submitted that the Tribunal must balance the public interest in maintaining the anti-dumping duties with the public interest in eliminating or reducing the anti-dumping duties. Counsel argued that this was an exceptional case because the dumping margins, if left in place, would preclude competition by Gerber or anyone else from the United States, leaving Heinz as the sole supplier of this important product. They argued that the facts of this case called for the elimination of the anti-dumping duties and for the market to manage itself. If, however, the Tribunal decided to keep some market-correcting mechanism in place, it should be a simple mechanism, and it must not overcorrect. Counsel stated that, because of the circumstances of this case, eliminating or reducing the duties would not create a precedent that would allow exporters to dump with impunity in Canada.

In considering the public interest in maintaining the duties, counsel for the Director argued that limited injury had been found, stating that the Tribunal had found price suppression and some price erosion, the latter having largely been recaptured. They indicated that there was only one domestic producer and that CPBF accounted for only a fraction of its total corporate production. They acknowledged witnesses' assertions that the viability of Heinz' other production was highly dependent on the volume of CPBF and that several suppliers and the community depend on the health of Heinz' Leamington plant. Nevertheless, they argued that volume at the Leamington plant was largely controllable by Heinz. For instance, Heinz did not export CPBF to the United States from its Leamington plant, even though it submitted that Canada was well suited for a new plant geared to a North American market.

Counsel for the Director argued that anti-dumping duties should only prevent injury to the domestic industry and that duties beyond that go against the public interest. Counsel submitted that, in this case, the duties were more than was necessary to avoid dumping-related injury. Counsel indicated that changes in the Canada-United States exchange rate have already provided an increased degree of protection to Heinz. Further, counsel argued that Revenue Canada's methodology relied on constructed export prices and, in several cases, constructed normal values and that it was impossible to say that the prices actually paid by a retailer were higher or lower than comparable prices in the United States.

Counsel for the Director submitted that the evidence on the harm that the duties would do to users and purchasers was compelling, particularly to low-income families. Counsel indicated that CPBF was a basic need for many parents, most of whom had not used the alternative of home-prepared baby food regularly and nearly none of whom had used it exclusively. Counsel argued that the evidence was clear that many people were simply not capable of making home-prepared baby food because of a lack of skills, equipment or time. They indicated that the evidence showed that lower-income families used just as much CPBF as upper-income families; that many people in remote or northern regions of Canada relied on CPBF; that parents and older siblings in poor families sacrificed in order for infants to eat properly; and that there already was stretching and dilution of CPBF.

Counsel for the Director stated that the evidence showed that a variety of choice in baby food was essential during an infant's formative years. They noted that the disappearance of Gerber CPBF had eliminated the choice between two brands of CPBF and that, without competing brands, the choice of

CPBF varieties would be left to the discretion of Heinz. On the subject of quality assurance, counsel questioned whether Heinz, in the absence of Gerber, would have reformulated its products as fast as it did following the report of the CSPI. Counsel argued that, if full duties remained in place, there would be only one plant supplying CPBF and that, in the event of a strike or a product recall, there would not be any alternative source of CPBF readily available in Canada.

Regarding new entrants, counsel for the Director indicated that there was no realistic likelihood that any new entrant would seek to enter a market controlled to such an extent by Heinz, with the other significant barriers to entry that exist in this market. Counsel noted that the longer Gerber was off the shelf, the harder it was going to be to get back on the shelf.

In concluding, counsel for the Director submitted that a large fraction of the full amount of the duties was gratuitous and, therefore, harmful. Counsel argued that the balancing of the public interest concerns would be best met through the elimination of the full amount of the duties. However, they submitted that, if the Tribunal was convinced that anti-dumping duties were required, the duties should be held to a level that does not cause superfluous harm. They argued that an absolute duty per jar would be best because it would accomplish any price-restoring objective, be easily administrable, avoid overcorrection and avoid inflexibility of market response. Counsel noted that the Director's written submissions called for a duty of 4 cents per jar and argued that evidence presented during the public hearing made it clear that, if any amount of duty was warranted, it should be less than 4 cents per jar. Finally, counsel argued that any recommendation for the elimination or reduction of duties must be accompanied by a recommendation for the reimbursement of the excess duties paid so far.

2. Submissions in Support of Maintaining the Anti-dumping Duties

a) General Public

The Children's Hospital of Western Ontario Foundation and the Children's Miracle Network expressed support for Heinz' position, indicating that Heinz has provided considerable financial support through various charitable or research-related programs. Their submissions stressed the ethical behaviour of Heinz as a corporate citizen.

Recker Distribution, Hepburn Farms Ltd., Uniplast Industries Inc., Marshland Gardens Limited, The Laird Group, Hensall District Co-op, Design Partners and Gay Lea Foods Co-operative Limited provided written submissions to the Tribunal in support of Heinz' position. The United Food and Commercial Workers International Union, the International Union of Operating Engineers Local 772, the Ontario Ministry of Agriculture, Food and Rural Affairs, the Ontario Tender Fruit Producers' Marketing Board, The Ontario Vegetable Growers' Marketing Board, the Corporation of the Town of Kingsville, the Corporation of the Town of Leamington, the Leamington District Chamber of Commerce and Mr. Bruce Crozier, M.P.P. for Essex South, provided written submissions expressing support for maintaining the anti-dumping duties on imports of CPBF from the United States. Many of these individuals and organizations raised concerns about the viability of Heinz' Leamington plant in the absence of anti-dumping duties and the resulting impact on employees, suppliers and the communities around Leamington if that plant were to close.

In addition, Mr. Crozier and representatives of the Ontario Tender Fruit Producers' Marketing Board, The Ontario Vegetable Growers' Marketing Board, the United Food and Commercial Workers International Union, the International Union of Operating Engineers Local 772, the Corporation of the Town

of Leamington and the Leamington District Chamber of Commerce appeared at the public hearing in support of Heinz' position.

b) Heinz

Counsel for Heinz submitted that increased prices flowed naturally and logically from the imposition of anti-dumping duties. However, counsel contended that, in this case, price increases would be disciplined by the countervailing power of retailers, existing or potential competition from new domestic production, imports and a switch to home-prepared baby food.

Counsel for Heinz submitted that the relevant market for a consideration of the public interest could be established by considering what products are substitutable for CPBF. They submitted that home-prepared baby food is considered substitutable for CPBF and, therefore, must form part of the market under consideration. As a result, Heinz is not in a monopoly situation with Gerber leaving the market, as it has to compete with home-prepared baby food.

Counsel for Heinz submitted that the imposition of anti-dumping duties did not require that Gerber withdraw from the market and that, by selling directly to Canadian customers from its US plants, it could substantially reduce the level of duties that would be levied by eliminating the non-arm's length sales transactions that resulted in constructed export prices calculated under paragraph 25(1)(c) of SIMA.

With regard to potential competition, counsel for Heinz submitted that the barriers to trade identified during the public interest investigation were not insurmountable. Economies of scale can be achieved in a North American context, if not in a Canadian context. If the expert witness for the Director was correct in stating that Heinz had a natural monopoly, then there would be no public welfare argument for reducing the duties, since, as a natural monopoly, Heinz' existing production would be the most efficient means of supply.

As regards distribution channels, counsel for Heinz submitted that the evidence indicated that the long-term, exclusive contracts between Heinz and its customers were not worth the paper on which they were written because customers were quite prepared to seek extra concessions and price reductions during the tenure of the contracts and because Heinz felt that it had to accommodate those requests. Counsel stated that these contracts did not constitute a barrier to entry.

Counsel for Heinz contended that Gerber's brand equity will endure and that the cost of Gerber re-entering the Canadian market in the future will not be prohibitive. Furthermore, new market entrants, such as Milupa or Nestlé, had established reputations in the infant feeding business that would help them enter the Canadian market for CPBF.

Counsel for Heinz argued that consumer choice would be maintained through competition with Gerber, a new entrant or Heinz' ongoing program of developing new varieties. Counsel submitted that the CSPI, the Consumers' Association of Canada and consumer opinion had not disappeared from the market and that these forces would ensure that Heinz continued to offer quality products at a reasonable price.

Counsel for Heinz stated that the evidence did not support contentions that the anti-dumping duties had a disproportionate effect on low-income families. These families, like all families, counsel stated, had benefited from artificially low prices caused by dumping. Heinz was only asking for the opportunity to return prices to reasonable levels. According to estimates provided through the testimony of a witness for the

Director, a 30 percent increase in the prices for CPBF would translate into an increase of \$43.20 in the cost of feeding an infant for the entire 30-week feeding period, or only \$1.44 per week. Furthermore, counsel argued, there was no evidence presented that linked any increase in health problems to increases in baby food prices, either in Canada or elsewhere in the world, where baby food prices were generally higher and there was a higher usage of home-prepared baby food.

In conclusion, counsel for Heinz submitted that the evidence presented in this case did not warrant a recommendation to the Minister that the anti-dumping duties should be eliminated or reduced. If the Tribunal was convinced that a reduction is warranted, counsel submitted that the reduction should take the form of setting a minimum price to the first arm's length customer in Canada. The starting point for the calculation of a price increase should be the amount by which Heinz was able to increase its prices in the Quebec market during its 1996-97 and 1997-98 fiscal years. Added to this price increase should be an amount to account for the price-erosive and price-suppressive effect of Gerber's presence in the Quebec market. This amount should include compensation for the long-term commitments to increased discounts, allowances and rebates that were necessitated by the availability of dumped products in the market. Finally, counsel submitted that, if the Tribunal recommends a reduction in the anti-dumping duties, there is no public interest in recommending a retroactive reduction of the duties paid to date and that such a refund can only serve Gerber's own commercial interest.

PART IV

PRICE EFFECTS OF ANTI-DUMPING DUTIES

1. Introduction

Almost all of the public interest submissions, whether addressing the benefits or the burdens created by the imposition of the anti-dumping duties, referenced price increases. Specifically, there were submissions expressing concern that a lack of competition in the market for CPBF would result in prices rising unduly. Further, submissions expressed concerns over the effects that the higher prices would have on low-income families and infant health. Other submissions addressed the necessity of increased prices in order to ensure the viability of Canadian production and to protect the employment in Heinz' Leamington plant, the upstream suppliers, and the communities and the farming industry in the vicinity of the Leamington plant.

Before starting its analysis, the Tribunal notes that, once a finding of material injury is made and an anti-dumping regime is in place, prices typically increase, as the domestic industry is relieved of the downward pressure imposed by import competition at dumped prices. The amount of that increase, however, may be constrained by other factors. In this section, the Tribunal first analyzes the factors that could constrain the rise in prices with full anti-dumping duties in place. The Tribunal then analyzes the effects of the elimination of the duties and, finally, the effects of partial duty reductions.

In assessing the effects of the anti-dumping duties, the Tribunal focused not on retail prices, which vary across the country and across different retail outlets, but on changes or potential changes in net-net wholesale prices, as it is at the wholesale trade level that Heinz and Gerber compete. The term "net-net prices," as stated earlier, refers to the net delivered selling prices charged by Heinz and Gerber to their customers in Canada, after accounting for all forms of discounts.³⁵ As with retail prices, net-net prices varied from region to region across Canada. For its analyses, the Tribunal focused on the weighted average net-net prices for Canada as a whole.

2. Full Anti-dumping Duties

The Tribunal calculated that the average margin of dumping and, thus, the average amount of anti-dumping duties that would have been assessed on imports of Gerber CPBF during Revenue Canada's period of investigation (January to June 1997) ranged from 20 to 45 cents per jar, depending on the category of CPBF.³⁶ Thus, using the information from Revenue Canada's period of investigation as a proxy, the average net-net price of Gerber CPBF would need to increase by 20 to 45 cents per jar, depending on the category of CPBF, to avoid anti-dumping duties.

Since the Tribunal's injury finding of April 29, 1998, Gerber has virtually stopped importing CPBF into Canada, allegedly due to the effect of the full duties on the price that it could quote to purchasers in the low price environment that existed at that time. Without a continued supply of CPBF from Gerber, stores

35. These discounts include all allowances, rebates and other trade spending programs agreed to by the supplier of CPBF, whether the discounts, allowances, rebates and other trade spending programs are granted at the time of sale or on a periodic basis or are related to purchase volumes.

36. The Tribunal notes that, during its public hearing, a figure of 40 cents per jar was suggested as the average amount of anti-dumping duties that would be payable if duties were imposed in the full amount of the margin of dumping. However, for the eight categories of Gerber CPBF, the weighted average anti-dumping duty per jar would have been less than 30 cents per jar.

which had carried Gerber CPBF have been clearing their shelves of existing Gerber stock, and most are now buying Heinz CPBF. Meanwhile, during the May to July 1998 period, Heinz' first fiscal quarter following the Tribunal's finding, the price of Heinz CPBF in the Canadian market stayed relatively stable, increasing only a few percentage points above the average price reported for the previous fiscal year. As indicated earlier, Heinz' share of the market for CPBF rose sharply through June (the last month for which the Tribunal has data), and Heinz will probably have close to 100 percent of new sales of CPBF, if not all, by the end of 1998.

a) Strategic Price Options for Heinz

While Heinz has not yet increased its prices for CPBF, in the presence of full anti-dumping duties, it is likely to do so. Testimony indicated that Heinz is currently not meeting its return objectives on sales of CPBF in Canada.³⁷

Mr. Brian E. Falck, President of Heinz, submitted that Heinz sets prices based on return objectives and then tries to "add value" to its products so that customers will be willing to pay the target prices.³⁸ In other words, Heinz tries to design its products and its pricing strategies to meet its shareholder return objectives and then tries to achieve the best market share that it can at that level.

As the sole supplier of commercial CPBF, Heinz has considerable discretion in choosing how it will go about increasing prices for CPBF. It may choose to increase list prices, or it may decrease the amount of discounts, allowances and rebates offered to its customers as their contracts come up for renewal. If it decides to increase list prices, it may attempt to implement a large increase in one step, or it may decide to "test" the market with a series of smaller increases in order to better judge the market reaction and determine the extent of price increases that may be possible, as witnesses for Heinz testified it was likely to do.³⁹

In the Tribunal's view, Heinz will attempt to increase its prices for CPBF in the Canadian market in order to increase its operating profit level on these products. However, it is likely to do so through a series of gradual increases, so as to minimize the reactions of its wholesale customers and the ultimate retail purchasers of CPBF. The level to which these prices can rise, however, may be affected by the factors discussed below.

b) Potential Commercial Competition

During the public hearing, Mr. Falck suggested that, on average, price increases of 33 to 48 percent would be required before the Canadian market became attractive to imports from other sources or to new Canadian production. Mr. Falck equated this magnitude of price increase to approximately 13 to 19 cents per jar over the current average net-net price of CPBF in Canada.⁴⁰

Heinz argued that there were several potential sources of commercial competition that could enter the Canadian market, either as direct imports or as new Canadian production. This potential for new market entrants would, Heinz maintained, keep price increases lower than the level of the full amount of anti-dumping duties.

37. *Transcript of In Camera Hearing*, Vol. 3, September 17, 1998, at 164.

38. *Transcript of Public Hearing*, Vol. 4, September 17, 1998, at 827.

39. *Ibid.* at 1014-15.

40. *Ibid.* at 858 and 989.

Gerber agreed that prices may rise only to this level, not because there would actually be new entrants to the Canadian market but because, in its opinion, Heinz would ensure that its prices were set below the point at which Heinz thought new entrants might find the Canadian market attractive. Heinz, while disagreeing that it would purposely price in such a manner, did admit that it would not welcome new entrants. As Mr. Falck stated, “welcoming is not -- you know, not part of our vocabulary.”⁴¹ He went on to state that Heinz would implement a product and marketing strategy designed to make Canadian consumers not give the new entrant a second thought and that Heinz would charge “the best prices that [it] could achieve in the marketplace.”⁴²

i) Imports from the United States

As mentioned earlier, after the imposition of anti-dumping duties, Gerber found that it could no longer continue to import and sell CPBF to customers in Canada at competitive prices. Heinz suggested that it would be viable for imports from Gerber US and other producers in the United States to enter the Canadian market at “undumped” prices. To do so, Gerber US would have to change its present selling arrangement and sell directly to unrelated customers in Canada in order to avoid the higher duties entailed by non-arm’s length transactions.⁴³ Gerber US, in fact, tried to sell directly to Gerber’s Canadian customers at prices 30 percent higher, which, it estimated, was the required level to eliminate the anti-dumping duties in a direct sale. None of Gerber’s customers accepted the proposal. While Gerber cited price as the major reason, Shoppers indicated that other factors influenced its decision not to purchase directly from Gerber US.⁴⁴

As far as other US exporters are concerned, the only other producer of CPBF in the United States that was identified to the Tribunal is Beech-Nut. While Beech-Nut was sent a questionnaire by the Tribunal, the company did not provide a response. Information submitted by Gerber suggests that the prices of Beech-Nut products in the United States are similar to those of comparable Gerber products.⁴⁵ It is likely, therefore, that, if Revenue Canada were to be requested to determine normal values for Beech-Nut products for export to the Canadian market, they would be comparable to the normal values for Gerber products at similar trade levels. Because these are higher than current Canadian price levels, if Beech-Nut were to sell its products to unrelated parties in Canada, it would probably have to sell these products at prices similar to those estimated by Gerber for arm’s length sales.

ii) Imports from Other Countries

Heinz submitted that jarred baby food is produced in many countries around the world and that these countries are free to sell CPBF to Canadian customers. However, Gerber pointed out that evidence submitted by Heinz indicated that Canada enjoys the lowest price levels of the industrialized countries identified.⁴⁶ Thus, companies wishing to export CPBF to Canada would have to do so at prices lower than the prices in their home country, which means that these companies would have to be concerned with the possibility of a dumping action in Canada.

41. *Ibid.* at 864.

42. *Ibid.* at 865.

43. As noted in Part I of this report, the dumping margins calculated for Gerber’s imports (i.e. for non-arm’s length transactions) were probably higher than they would have been for imports by unrelated parties.

44. *Transcript of In Camera Hearing*, Vol. 1, September 15, 1998, at 86-87.

45. *Ibid.* at 20.

46. Manufacturer’s Exhibit A-6 (protected), Appendix A, Administrative Record, Vol. 10.

iii) Imports of Private Label CPBF

The Heinz evidence suggested that “private label” CPBF would be an economical and relatively inexpensive product that large retailers in Canada could import. As submitted by Heinz, the private label import option would require a considerably smaller increase over current net-net prices to make importing these products attractive.⁴⁷ However, the Tribunal inferred from the testimony of the witness for Shoppers that retailers would not wish to pursue the option of a private label line of CPBF.⁴⁸ A key reason, according to this witness, is that, for some “personal use” items, consumers place their trust primarily in branded products.⁴⁹ Also, an analysis done by Shoppers showed that mothers wanted to have the recommendation of a paediatrician or physician before using private label baby food.⁵⁰ Mr. Michael T. Lawton, Senior Vice-President and Chief Operating Officer of Gerber US, testified that, in his experience, private label baby food has not been accepted around the world because of concerns relating to quality.⁵¹ Further, he testified that, in the United Kingdom, one of the few markets where private label baby food is sold, it accounts for less than 10 percent of the total market. Moreover, he stated that he had not seen private label baby food sold in any other market to any significant degree.⁵² The Tribunal also heard that, currently, private label baby food is not sold in the US market.⁵³

The Tribunal notes that, while the initial cost of purchasing private label products is usually lower than the cost of purchasing comparable branded products, retailers must incur additional expenses to promote and distribute these products in Canada, including ongoing promotions to new mothers and expectant mothers. When these extra costs and the factors discussed earlier are considered, the option of importing private label products becomes much less attractive. The Tribunal is not persuaded, therefore, that imports of private label CPBF would be an economical alternative to products with an established brand presence such as Heinz and Gerber CPBF.

iv) New Production

Heinz submitted that, if prices rose sufficiently, i.e. by 13 to 19 cents per jar, other producers, including Gerber, would be enticed to produce CPBF in Canada. This production could take the form of a new “greenfield” production facility or a co-packing arrangement with an existing Canadian food processor that has excess capacity in its existing plant. Gerber submitted that neither a new production facility nor a co-packing arrangement was a viable option for it, due to the size of the Canadian market and the investment that would be required.⁵⁴

In the Tribunal’s view, the Canadian market is likely too small, on its own, to support a new production facility. The Tribunal does not have sufficient information concerning the US market to form a judgement about whether other suppliers of CPBF might find it attractive to set up another production facility in Canada to serve the broader North American market. In addition, the Tribunal does not have sufficient information concerning existing plants that could enter into a co-packing arrangement to form a

47. Manufacturer’s Exhibit A-32 (protected), Appendix A, Administrative Record, Vol. 10A.

48. *Transcript of Public Hearing*, Vol. 2, September 15, 1998, at 426.

49. *Ibid.* at 427.

50. *Ibid.*

51. Importer’s/Exporter’s Exhibit B-16, para. 10, Administrative Record, Vol. 11.

52. *Transcript of Public Hearing*, Vol. 2, September 15, 1998, at 298-99.

53. *Ibid.* at 306-307.

54. *Transcript of In Camera Hearing*, Vol. 1, September 15, 1998, at 57.

judgement about whether Gerber or another baby food producer would find co-packing CPBF in Canada an attractive option.

v) Barriers to Entry

Gerber and the Director claimed that there are a number of barriers to entry that new entrants to the Canadian market for CPBF would face and that these barriers effectively prohibit any new source of imports or new Canadian production. These barriers include: customs duties; government regulations, such as the *Processed Products Regulations*,⁵⁵ the *Consumer Packaging and Labelling Regulations*⁵⁶ and the *Food and Drug Regulations*;⁵⁷ the control of distribution channels, market acceptance of new brands and fluctuating exchange rates.

Customs duties on CPBF from countries other than the United States range from 0 to 15 percent. Government regulations specify, among other things, unique jar sizes and labelling requirements. Gerber and the Director submitted that Heinz effectively controlled the distribution channels for CPBF in Canada through the use of exclusivity agreements with the large grocery retail chains. Further, they argued that any new entrant to the Canadian market for CPBF would need to have an extensive and expensive advertising program to gain acceptance in the market. Finally, they stated that the recent depreciation of the Canadian dollar vis-à-vis the US dollar has made exports of products from the United States more expensive in Canada and that not only is this another barrier to entry but this has already provided a degree of protection to Heinz.

Mr. Falck testified that these barriers to entry could be overcome, albeit at a cost, and that this is routinely done when a company enters a new market.⁵⁸

vi) Conclusion

In the Tribunal's view, with the imposition of anti-dumping duties in the full amount, there is little likelihood that there will be new entrants to the Canadian market for CPBF. Either Gerber would have to change its sales structure in Canada or Beech-Nut would have to show a considerable interest in the Canadian market. Even if prices did rise enough for other suppliers of CPBF to export to Canada or to set up new production, the barriers to their entry are fairly effective. Although the supply agreements between Heinz and its customers are not seen to be binding on the customers, the existence of the terms contained in those agreements would require a new entrant to match or better the terms and conditions offered by Heinz. Market acceptance also represents a potentially expensive barrier to entry for a new company marketing a brand unknown to Canadian consumers. However, this barrier may not be insurmountable if the new entrant already had a recognized brand name and a good reputation in similar food or baby care products.⁵⁹ A new brand of CPBF might, in fact, be welcomed by some retailers as a means of differentiating their product offerings from those of competing retailers. Finally, the Tribunal notes that an expectation of a further depreciation of the Canadian dollar could be viewed by potential exporters as a barrier to entering the

55. C.R.C. 1978, c. 291, as amended by SOR/82-701, July 16, 1982, *Canada Gazette* Part II, Vol. 116, No. 14 at 2607.

56. C.R.C. 1978, c. 417.

57. C.R.C. 1978, c. 870.

58. *Transcript of Public Hearing*, Vol. 4, September 17, 1998, at 876-78 and 1053.

59. Companies such as Nestlé and Milupa were mentioned as having a good reputation in baby care products, such as cereals or formula, and as companies that may produce jarred baby food for other markets. *Transcript of Public Hearing*, Vol. 2, September 15, 1998, at 347-48.

Canadian market. Conversely, however, if the Canadian dollar appreciates, entry to the Canadian market could become more attractive.

c) Countervailing Power of Purchasers

Other factors might constrain prices below the level necessary to entice new entrants. Mr. Falck testified that factors in the Canadian market, such as the countervailing power of purchasers, would likely limit the average price increase to a lower amount in the range of 9 to 15 cents per jar,⁶⁰ which equates to an increase of approximately 23 to 37 percent in average net-net prices for CPBF.

Heinz submitted that, even though it is currently the only source of CPBF in Canada, the concentration of power in only a few large wholesale and retail grocery chains means that these large retailers can effectively discourage Heinz from increasing its prices for CPBF. For instance, Heinz' largest customer, Loblaws, accounts for over 20 percent of Heinz' overall sales of all products, while Loblaws' total purchases of Heinz products account for approximately 1 percent of Loblaws' overall purchases.⁶¹ Heinz submitted that, given the size of Canadian grocery and drug retailers and the breadth of products offered by Heinz, it cannot afford to risk its relationships with important wholesale and retail customers by increasing prices for CPBF by an unreasonable amount. Moreover, as a witness for Heinz testified, it could not risk its reputation with consumers by increasing the prices for CPBF to unreasonable levels and still hope to entice these consumers to buy its other products, such as Heinz ketchup.⁶²

In current Canadian circumstances, where Heinz is the sole supplier of CPBF, purchasers clearly have less countervailing power than when Gerber was also present in the Canadian market. Nevertheless, the Tribunal believes that purchasers will still be able to exert some countervailing power over Heinz' attempts to increase prices, since CPBF is only one of many products, albeit a significant one, sold by Heinz. However, the extent of this countervailing power is much less than it would be with two or more suppliers of CPBF.

d) Consumer Reactions to Price Increases

Mr. Falck also identified consumer reactions, such as switching to home-prepared baby food, as a factor that would limit the potential amount of price increases for CPBF in the Canadian market to the range of 9 to 15 cents per jar.

The Tribunal received a great deal of evidence in this investigation concerning home-prepared baby food and the degree to which it is, in fact, an alternative to CPBF for many caregivers. On the one hand, evidence was presented that not only is home-prepared baby food substitutable for CPBF but it is the ultimate or "gold standard" in baby food. The Tribunal heard that many parents consider home-prepared baby food superior to CPBF in quality and nutrition. Furthermore, home-prepared baby food is considered a less expensive option to commercial CPBF. In many cases, home preparation of baby food simply means separating some food from the family meal before spices are added and mashing the food to a consistency that the infant can handle. Foods can also be cooked, then blended, puréed or strained and stored for future use.

60. *Transcript of Public Hearing*, Vol. 4, September 17, 1998, at 989.

61. *Ibid.* at 900. Heinz also indicated that global baby food sales account for only 10 percent of Heinz' total global sales. *Ibid.* at 830.

62. *Ibid.* at 831.

On the other hand, the Tribunal heard from numerous witnesses that CPBF was a necessity and that home-prepared baby food, while relatively simple and inexpensive, was, for many caregivers, not a viable option. While home-prepared baby food should be a less expensive alternative to commercially prepared baby food, there can be considerable waste involved in making baby food at home unless there is sufficient storage space available to safely store the food until it is consumed, which negates or diminishes the desired savings of preparing baby food at home.

Furthermore, witnesses testified that, while many foods, such as carrots and bananas, can be mashed with a fork to obtain the desired consistency, other foods such as meats and more fibrous fruits and vegetables must be blended or puréed to achieve the desired consistency. The Tribunal heard that many low-income families do not have the necessary equipment to do this properly. Further, the Tribunal heard that some mothers do not have the necessary skills and/or confidence to prepare food properly for their infants.

Several parties suggested that convenience was a major attractive feature of commercially prepared CPBF. There is often insufficient time to make home-prepared baby food. Using CPBF also provides reassurance to the parents that their children are being fed the proper food while in the care of others. Many parents consider CPBF to be a necessity, primarily because of these factors. For these families, therefore, home-prepared baby food was not generally considered readily substitutable for CPBF, at least in the price range that prevailed in the market during the Tribunal's period of inquiry.

While CPBF is widely used to feed Canadian infants, some parents will continue to use home-prepared baby food to feed their infants regardless of the price of CPBF. Other parents will continue to view CPBF as a necessity for one reason or another and will be prepared to pay much higher prices for that necessity. Still other parents will use a combination of home-prepared baby food and CPBF during the period of infancy and may be prepared to switch if prices rise sufficiently.

During its inquiry concerning CPBF, the Tribunal found that overall demand for CPBF was price inelastic, i.e. if prices of all types and brands of CPBF were to fall by, say, 1 percent, consumers would increase their total purchases of CPBF, but by significantly less than 1 percent. Conversely, consumers would purchase less CPBF if prices were to rise somewhat from current levels, but the fall in quantities purchased would be proportionately less than the increase in price. Thus, for the general price range of CPBF that existed during the Tribunal's period of inquiry, there would probably only be a small degree of change from CPBF to alternative foods, such as home-prepared baby food, solely in response to a rise in the price of CPBF.

The Tribunal is of the opinion that the economic principles of price elasticity also hold true for CPBF. In some higher price range, the demand for CPBF will become more price elastic. In other words, at a certain price, there will be proportionally larger declines in the demand for CPBF, as more parents look to alternative products for some or even all of the baby food requirements that were previously being met by CPBF at lower prices.

Professor James A. Brander, an expert witness for Heinz, provided an estimate of the price elasticity of demand for CPBF, citing Quebec as an example.⁶³ The situation in Quebec was cited because Gerber had little presence in the Quebec market during the period of April 1997 to April 1998 (the period examined by Professor Brander) and, over the last few years, Heinz had been able to implement larger price increases in

63. Manufacturer's Exhibit A-40 (protected), Administrative Record, Vol. 10A.

Quebec than elsewhere in Canada. While admitting that his analysis was rough in nature, Professor Brander submitted that it strongly suggests that demand in Quebec is price elastic, at the prices for CPBF recently prevailing in Quebec. In other words, higher prices will result in at least a proportional reduction in demand.

The Tribunal is of the view that it is not necessary, and indeed may not be possible, to know the precise price at which demand for CPBF becomes elastic. Economic theory supports the existence of such a price point. Professor Brander's example suggests that prices in Quebec may have moved above this point. Wherever this point is for Canada as a whole, it is clear to the Tribunal that, at some point, higher prices for CPBF will increasingly encourage consumers to turn to substitutes. This fundamental nature of consumer demand, therefore, will provide some limitation on the degree to which the price of CPBF can rise without a significant loss in the sales volume of CPBF to alternative products.⁶⁴

e) Conclusion

The Tribunal is of the view that the expected increase in the net-net price for Heinz CPBF will likely fall well short of the price at which Gerber products, under the existing sales structure, would have to be sold in the Canadian market with the full amount of anti-dumping duties imposed. The net-net price for Heinz CPBF will, nevertheless, likely increase by a significant amount from the current level before it is constrained by market factors. These market factors are, first, the relative bargaining strength of retailers and parents switching from commercial CPBF to home-prepared baby food and, second, potential new entrants to the market. In this environment of full anti-dumping duties in place, these market constraints could prevent average net-net prices from rising much more than 15 cents per jar.

3. Elimination of the Anti-dumping Duties

If the anti-dumping duties on imports of CPBF from the United States were eliminated, US producers would be free to enter the Canadian market at any price level. There is no guarantee, however, that Gerber would actually re-enter the market, nor is it certain what other potential new entrants, such as Beech-Nut, might do.

If Gerber were to re-enter the market, the effect on prices would largely depend on decisions by Gerber and responses by Heinz. If Gerber decided to try to regain its historical share of commercial sales by selling at prices which were previously found to be dumped, then prices would likely decrease or remain at current levels over the short term, depending on whether Heinz was willing to let the historical division of the market prevail between the two competitors. If Gerber chose to remain out of the Canadian market, then Heinz could probably increase its prices for CPBF and do so more quickly, since there would be no commercial competition with which to contend.

a) Viability of the Domestic Industry

Mr. Falck testified that the Canadian market was, by far, the lowest profit market for Heinz in infant feeding anywhere in the world.⁶⁵ Further, Mr. Falck submitted that, if the anti-dumping duties were reduced

64. A short-run profit-maximizing monopolist will usually try to price where marginal cost equals marginal revenue, which will invariably be in the elastic portion of the price range.

65. *Transcript of Public Hearing*, Vol. 4, September 17, 1998, at 816.

or eliminated and the injurious dumping is permitted to resume, continued poor performance relating to the production of CPBF would put the entire Leamington operation in question.⁶⁶

The Tribunal notes that it is not uncommon in SIMA-related inquiries for domestic industries to argue that injurious dumping will lead to the closure of certain plants or even the elimination of domestic industries. These submissions are always difficult for the Tribunal to evaluate with the limited information available to it through the inquiry process. In this case, the evidence is persuasive that Heinz' Leamington plant would be in jeopardy. The testimony of union officials who represent Heinz' employees indicated that these employees see the closure of the Leamington plant as a real possibility and that they take this possibility into serious consideration when negotiating labour agreements with Heinz.⁶⁷ It is well known that Heinz' parent company is continually evaluating all of its production facilities and has closed plants at an accelerating rate over the past several years.⁶⁸ In addition, its Pittsburgh, Pennsylvania, plant, where CPBF for the US market is produced, is a much newer, larger plant with more than sufficient excess capacity to produce CPBF for the Canadian market.⁶⁹

The main impact of a closure of Heinz' Leamington CPBF production facility would be on the employees, farmers, suppliers and communities in the vicinity of the Leamington plant. The loss of the CPBF production volume could potentially threaten the viability of the entire plant, which would exacerbate these concerns. While this is a localized concern in Southwestern Ontario, it is, nevertheless, a public interest concern that the Tribunal considered. The loss of direct jobs relating to the production of CPBF in Leamington, combined with the loss of indirect jobs in the plant,⁷⁰ would be significant. The economic impact on suppliers of goods and services in communities surrounding the plant, as well as the income losses to farmers, would also be significant.

There was ample evidence provided during both the Tribunal's inquiry and its public interest investigation that Heinz has not been meeting its return objectives on its sales of CPBF in Canada.⁷¹ The Tribunal was persuaded that, unless Heinz can improve its rate of return through increased prices and earnings, the continued production of CPBF in Canada is in jeopardy. If production of CPBF in Leamington were to cease, all CPBF sold in Canada would be imported and would be influenced by the corporate pricing strategies of Heinz US and Gerber US, as well as by economic factors such as price levels in the United States and the Canada-United States exchange rate. In the Tribunal's view, this loss of domestic production and a reliance on imports would likely lead, over time, to significantly higher prices for CPBF in Canada.

4. Reduction of the Anti-dumping Duties

During the public hearing, Heinz indicated that the full amount of anti-dumping duties was not required to alleviate the injury caused by dumping, but stated that it should not have to compete with

66. Manufacturer's Exhibit A-3, para. 11, Administrative Record, Vol. 9.

67. *Transcript of Public Hearing*, Vol. 3, September 16, 1998, at 750.

68. *Transcript of Public Hearing*, Vol. 4, September 17, 1998, at 831.

69. *Ibid.* at 831-32.

70. Mr. Falck estimated that 200 jobs would be affected by a potential shutdown of Heinz' Leamington jarred baby food production. *Transcript of Public Hearing*, Vol. 4, September 17, 1998, at 980.

71. *Transcript of Public Hearing*, Vol. 4, September 17, 1998, at 1011; and *Transcript of In Camera Hearing*, Vol. 3, September 17, 1998, at 164.

dumped goods.⁷² Thus, Heinz recognizes that the full amount of anti-dumping duties is not required to protect it from the effects of injurious dumping.

As indicated earlier, the Tribunal is of the view that market factors will keep the expected price of Heinz CPBF well below the price at which Gerber would have to sell its CPBF if it included the full amount of anti-dumping duties. It follows that there is a range of duty reductions that would have no effect on the upper limit of prices that Heinz can charge for its CPBF. That range of duty reductions is superfluous in the determination of the domestic price for CPBF. That is, the upper limit of prices that Heinz would be able to charge for its CPBF is determined not by the full anti-dumping duties but by the various factors discussed earlier.

72. *Transcript of Public Hearing*, Vol. 4, September 17, 1998, at 814-15.

PART V

OTHER EFFECTS OF THE ANTI-DUMPING DUTIES

1. Introduction

In Part IV of this report, the Tribunal considered the effects of the anti-dumping duties on average prices under the three alternatives of full anti-dumping duties, reduced anti-dumping duties and elimination of anti-dumping duties. This part of the report examines the effects of CPBF price increases resulting from the imposition of anti-dumping duties on low-income families and on the incidence of health problems in infants. It also considers the non-price benefits of competition that are affected by anti-dumping duties.

2. Low-income Families

The Tribunal received submissions before and during the hearing regarding the level of child poverty in Canada. The Tribunal heard, for example, that one in five children in Canada lives in poverty⁷³ and that almost 42 percent of people who are assisted by food banks are children. Single mothers under the age of 25 had an alarming poverty rate of over 91 percent. Although the Canadian government set out in 1989 to eliminate child poverty by the year 2000, according to some reports, the incidence of children living in poverty in Canada has actually increased by 500,000, or 58 percent, since that time. For parents who are already struggling to provide for their children, price increases for any products that they use, be they diapers or baby food, will adversely affect them.

Canada is internationally recognized as a highly successful and compassionate country with an enviable standard of living. At the same time, Canada's child poverty rate ranks among the highest of industrialized countries.⁷⁴ Not only is the magnitude of the poverty troubling, but the adverse effects caused by poor or insufficient nutrition on a child's emotional, physical and social development are also disturbing.

a) Full Anti-dumping Duties

Many of the parties arguing for a reduction or elimination of the duties were concerned about the effect that price increases resulting from the imposition of anti-dumping duties would have on low-income families. More specifically, the concern was whether the effects of the full duties would have a disproportionate effect on low-income families.

Several parties appearing before the Tribunal, as well as written submissions to the Tribunal, portrayed the financial difficulties facing low-income families. Budgets are stretched or, in many cases, over-stretched to the point where parents and older siblings may go without food in order to feed younger children and infants. Some witnesses testified that some low-income parents lack the equipment, skills and knowledge to make home-prepared baby food. Frequently, low-income parents view CPBF as the only way to feed their infants. The Tribunal also heard that many of these parents lack access to automobiles or cannot afford public transportation to travel to stores which advertise lower feature prices for CPBF. As well, the parents may lack the money in their budget to stock up on CPBF when it is featured at special low prices. As a result, low-income families often purchase CPBF at the most convenient location. This may be a nearby

73. Poverty is defined as the condition of those living in families whose total income, before taxes, falls below the low-income cut-off as defined by Statistics Canada.

74. Other Party's Exhibit Z-1, Administrative Record, Vol. 11B.

large grocery or drug retailer but, in many cases, it may be a corner convenience store where the price for CPBF is generally substantially higher than the regular price at large retailers.⁷⁵

In response to questions during the hearing, witnesses who spoke about the problems confronted by low-income families acknowledged that they did not have systematic statistical data on the effect of the cost increases for CPBF on low-income families. Their information was anecdotal in nature. The only additional statistical information on low-income families other than that provided in the Tribunal's staff report was a survey that Heinz submitted.⁷⁶ This submission suggested that the lowest-income families, as a group, purchase less CPBF than families with higher incomes.

Information in the Tribunal's staff report, based on estimates published by the Government of Manitoba,⁷⁷ indicates that the food costs for raising a child from 4 to 18 months is estimated at \$1,348. Of this amount, \$630 is the average cost for jarred baby food⁷⁸ (47 percent of \$1,348), with the remainder being mostly for infant formulas and cereals. The estimate of \$630 assumes that the infant is fed commercial baby food and no home-made baby food.⁷⁹ This translates into a cost of about \$42 per month over the 15-month infant feeding period.⁸⁰ This could vary among families and income groups.⁸¹

If the retail price of commercial baby food were to increase by 10 percent, then the cost of commercial baby food for the average family that uses only commercial baby food would increase by \$63.00 over the 15-month infant feeding period, or \$4.20 per month. If the price were to increase by 20 percent, then the cost increase would be twice as much, i.e. \$8.40 per month. This same linear relationship would continue with each 10 percentage point increase in price.

As stated previously, the Tribunal does not think that retail price increases would reach the levels that full duties imply. Gerber would not be able to sell CPBF at those prices, nor would Heinz be able to raise prices that high, given the market constraints of potential commercial competition, the countervailing power of retailers and consumer reaction to price increases. Nevertheless, prices could still rise significantly if full duties were left in place. This significant rise, in the Tribunal's view, is too high for low-income consumers to bear.

75. Prices for CPBF in convenience stores were considerably higher than in large grocery retailers. For example, testimony indicated that the price of CPBF in convenience stores was as high as 69 to 79 cents per jar. *Transcript of Public Hearing*, Vol. 1, September 14, 1998, at 161. Prices at other larger retailers ranged from 39 to 49 cents per jar. *Transcript of Public Hearing*, Vol. 1, September 14, 1998, at 139.

76. Manufacturer's Exhibit A-6 (protected), Appendix J, Administrative Record, Vol. 10.

77. *Public Pre-hearing Staff Report*, August 24, 1998, Tribunal Exhibit PB-98-001-3, Administrative Record, Vol. 1A at 93.

78. The Tribunal notes that this estimate does not include jars of juices, but may include other baby food, such as toddler food or organic baby food, that is not included in the definition of CPBF.

79. The estimates assume that the average baby consumes roughly 580 jars of baby food over the 15-month infant feeding period.

80. The Tribunal notes that there were other estimates of the cost of CPBF or jarred baby food for an infant provided by various parties. However, in its analysis, it relied on these figures.

81. In a public witness statement, it was stated that the cost of jarred baby food for a 7-month-old infant was \$32.40 per month. Other Party's Exhibit R-2, Administrative Record, Vol. 11B.

b) Elimination or Reduction of the Anti-dumping Duties

Given that CPBF is so widely used in Canada, it may be concluded that many or, perhaps, even most families with infants aged 4 to 18 months will be affected by increases in the prices for CPBF. Higher-income families are undoubtedly better able to cope with an increase in the cost of a basic food item than are low-income families. The evidence available to the Tribunal suggests that low-income families will be more affected, given their greater financial constraints, if not their greater reliance on commercial CPBF. Although the Tribunal recognizes that any increase in prices for CPBF will exacerbate the financial difficulties being experienced by low-income families, nevertheless, its analysis shows that, regardless of whether or not duties are eliminated, the price of CPBF will, over time, likely rise in Canada.

As indicated earlier, the elimination of the anti-dumping duties would likely lead to higher prices over the longer term, as Heinz could decide to abandon production in Canada. The resulting price increase could be perhaps as high as could occur if the full duties were kept in place. It may take longer to get to those higher prices, however, as Heinz would not likely stop producing CPBF in Canada immediately. While the elimination of the duties might seem to be a good thing for low-income families in the short term, the probable higher prices resulting from the absence of a domestic source of production, would, in the Tribunal's view, have a greater adverse effect on low-income families in the long run.

If the duties were reduced, on the other hand, the increased possibility of competition between suppliers of commercial CPBF, along with continued Canadian production, could be expected to lead to a smaller increase in the price of CPBF than would occur under either the imposition of the full amount of anti-dumping duties or, in the long run, the elimination of the duties. In the Tribunal's view, this is the option that will cause the least concern for low-income families in the long run.

Accepting that child poverty is an issue which needs critical attention, as was stated earlier, the Tribunal nevertheless is not "an advisor to the Minister of Finance on the distribution of wealth and income between different private interests" nor on social policy issues.⁸² In Professor Brander's view, "it would be very poor public policy to try to address child poverty by seeking to control the price of Heinz Canada baby food."⁸³ He acknowledged the serious problem of child poverty, particularly in single-parent families, but saw no evidence that linked "the price of Heinz Canada baby food and the problems associated with child poverty, and [questioned] whether maintaining an artificially low price for Heinz Canada CPBF would make any significant contribution toward relieving the problems associated with child poverty."⁸⁴

While mindful of the hardships that any price increases can cause for low-income families, the Tribunal is not persuaded that their problems can be solved by maintaining an artificially low price for baby food. Indeed, for reasons outlined earlier, doing so may well result in significant price increases in the future, serving only to compound the problems faced by this disadvantaged group.

3. Infant Health

A potential increase in the incidence of health problems in infants arising from increased CPBF prices resulting from the imposition of anti-dumping duties was also raised as a public interest concern. Several parties expressed concerns that some parents or caregivers would improperly use CPBF

82. *Supra* note 22 at 4.

83. Manufacturer's Exhibit A-35 at 13, Administrative Record, Vol. 9A.

84. *Ibid.*

because of higher prices arising under the imposition of the full duties. The improper use might take the form of watering down the contents of a jar of food or stretching the use of a given jar of food beyond the recommended date in an effort to minimize the per-meal cost. Other witnesses expected more cases of improper preparation and use of home-prepared baby food which, it was submitted, some parents would use in place of the higher-priced CPBF. Several parties appearing before the Tribunal, as well as written submissions to the Tribunal, related specific cases of infants choking on improperly prepared baby food.

The evidence indicates that, in 1992, the latest year for which statistics are available, almost 500 children under the age of one were hospitalized for choking on some sort of food and that 24 children under the age of one died from inhalation and ingestion of food.⁸⁵

Witnesses were not able to provide systematic statistical data on the incidence of health problems in infants arising from the improper use of CPBF that resulted from increases in the price of CPBF. Dr. William James, a paediatrician with many years of experience, testified that certain improper practices of food preparation and use already occur and cause health problems in infants. He also indicated that he has not seen an increase or a decrease in the misuse of CPBF in the past 10 years, despite significant fluctuations in its price.⁸⁶

Information on the record indicates that the retail price of CPBF is lower in Ontario than in Quebec. Nevertheless, no evidence was provided to the Tribunal that there were proportionally more infant health problems in Quebec than in Ontario arising from the retail price differential.

The Tribunal, on the evidence before it, cannot make a statistical link between an increase in the price of CPBF and an increase in the incidence of health problems in infants. This lack of a linkage does not minimize the seriousness of even one infant death due to choking, nor does it minimize the concerns regarding infant nutrition. In the Tribunal's view, if the concern over infant health is due to increased prices, then the best solution is to keep prices as low as possible over the long term.

4. Competition

a) Full Anti-dumping Duties

The Tribunal received submissions and heard testimony that, in addition to increased prices, there were several other competition-related public interest concerns arising from the imposition of anti-dumping duties on imports of CPBF from the United States. These concerns, which were based on the fact that the imposition of the anti-dumping duties has created a situation of a single supplier of CPBF, were consumer choice of CPBF varieties and brands, the security of supply of commercial CPBF, frequency of product and quality innovations, and the degree of service to smaller retailers.

i) Consumer Choice

One of the major advantages of competition identified in the submissions and testimony of parties was consumer choice. The term "consumer choice" was used, in part, to describe the choice among the particular stock-keeping units provided by a supplier of commercial CPBF. It was also used to describe the basic choice between the brands offered by Heinz and Gerber.

85. *Transcript of Public Hearing*, Vol. 1, September 14, 1998, at 245-46.

86. *Ibid.* at 59-60 and 94-95; and Other Party's Exhibit F-1, Administrative Record, Vol. 11B.

Although Heinz is currently the sole supplier of commercial CPBF, the Tribunal is of the view that parents and caregivers continue to have a large choice among stock-keeping units. With over 100 varieties of CPBF, the choice offered by Heinz is sufficiently large that many infants probably do not have an opportunity to taste each of the products if parents and caregivers are following the nutritional recommendations of gradual introduction and testing of the response of babies to the new varieties over the normal feeding cycle.⁸⁷ Heinz will undoubtedly continue to remove slow sellers from its list and will probably continue to introduce new varieties to its list.

In the Tribunal's view, the more important element of choice is the availability of choice between commercial brands. The disappearance of Gerber products from the shelves means that parents and caregivers will no longer have a choice between commercial brands. Although the Tribunal stated in its injury finding that the two brands are substitutable one for the other, this does not mean that the products are completely interchangeable, as is the case for a commodity product. If the brands from Heinz and Gerber were viewed essentially as a commodity with indistinguishable characteristics, then parents and caregivers might not be concerned over the unavailability of one of the two brands. However, both companies advertise their products as differentiated from each other. Many consumers have responded with brand loyalty on which each company counts in its marketing strategies. These attachments by consumers mean that the unavailability of their preferred choice leads to a real or perceived feeling of a loss of the benefits that they received from their use of that brand.

ii) Security of Supply

Security of commercial supply was raised as a competition-related public interest issue by several parties. During the public hearing, several "what if" questions were addressed to Heinz to determine how it would respond to various emergency situations as the sole domestic supplier of CPBF. In the Tribunal's view, the responses indicated that Heinz has adequate contingency plans in place because of its safety procedures, its inventories and its ability to obtain product from Heinz US in major emergency situations. The Tribunal, however, notes that, even in an emergency, it could take a few weeks before supplies of CPBF were available from the United States.⁸⁸

iii) Innovation

A third burden or interest arising from the lack of competition between two or more suppliers is a reduction in the frequency of product and quality innovations. The Tribunal heard argument that these innovations result from the strategy of firms seeking to differentiate their products from competitive suppliers. In the Tribunal's view, when there is only one supplier, it is likely that product and quality innovations will be less frequent than when there are two or more suppliers. The Tribunal is of the view, however, that Heinz will continue to introduce new varieties to its line of CPBF in Canada, as it tries to increase consumer demand for its product.

iv) Service

A fourth public interest issue arising from competition between two or more suppliers is the degree of service to smaller retailers. Several submissions indicated that Gerber provided more suitable delivery arrangements for smaller retailers than did Heinz. During the hearing, the Tribunal heard testimony that, after

87. *Transcript of In Camera Hearing*, Vol. 3, September 17, 1998, at 182.

88. *Ibid.* at 170.

Gerber stopped importing into Canada, Heinz changed its minimum shipment policy for smaller retailers.⁸⁹ Heinz officials testified that the change in minimum order size is Heinz' new policy for CPBF. While the Tribunal recognizes that this initiative by Heinz is helpful in the marketplace and will make it easier for smaller outlets to carry baby food at reasonable prices, Gerber originally began its policy of shipping smaller orders in order to differentiate itself from Heinz at a time when there were two competitors in the Canadian market for CPBF. If there were still two competitors, then small retailers would be more likely to obtain further improvements in the price and shipping policy for their transactions with a supplier of commercial CPBF.

b) Elimination or Reduction of the Anti-dumping Duties

While there are public interest issues concerning the sole supply situation for CPBF that have arisen from the imposition of anti-dumping duties in the full amount, the Tribunal recognizes that, even if the duties were eliminated, there is no guarantee that Gerber will re-enter the Canadian market. Thus, the loss of benefits from actual competition in the Canadian market may continue even if the duties are eliminated.

At some higher level of prices, competition from other sources, such as new Canadian production or imports, could enter the Canadian market. This potential for new competition would likely place some limits on the amount by which Heinz could increase its prices.

If, with the elimination of the duties, Gerber were to re-enter the market and injurious dumping were to resume, the possibility of Heinz transferring its production of CPBF from Leamington to Pittsburgh would be heightened. If this shift were to occur, all CPBF sold in Canada would be imported, which would likely lead, over time, given the higher prices in the United States, to significantly higher prices for CPBF in Canada.

A reduction in the duties, however, could both entice Gerber or another US producer to supply the Canadian market and still allow Heinz to maintain the production of CPBF in its Leamington plant. If actual competition could be restored, the concerns regarding the benefits of competitive pricing, consumer choice, security of supply, innovation and service would also be addressed. With continued production of CPBF in Canada by Heinz, the economic health of associated upstream industries, as well as the town of Leamington and neighbouring farm communities, is more secure.

5. Conclusion

On the basis of the foregoing analysis of the other effects of the anti-dumping duties and the price effects discussed in Part IV, the Tribunal is of the opinion that there exists a sufficiently compelling public interest rationale to report to the Minister. Moreover, a reduction rather than the elimination of the duties is the preferred alternative.

Therefore, *the Tribunal recommends that the anti-dumping duties on CPBF imported from the United States be reduced.* Such a reduction best serves the public interest of keeping prices as low as possible over the long term. As a result, the concerns of low-income families and those regarding the health and welfare of infants would be mitigated. Reduction of the duties, not elimination, is also the alternative most likely to lead to the re-introduction and maintenance of competition in the Canadian market.

89. *Transcript of Public Hearing*, Vol. 4, September 17, 1998, at 836-37.

PART VI

DUTY REDUCTION

Having concluded that there is a sufficiently compelling public interest in reducing the level of the anti-dumping duties, the Tribunal must go on to consider at what level the duties should be. This part of the report contains six sections. The first section discusses the form that the duty reduction should take. The second section discusses the question of the confidentiality of the precise levels of the Tribunal's duty reduction recommendations. The third section reviews the price points that the Tribunal considered in making its determination of the amount of duty reduction that would be appropriate. The fourth section presents, in general terms, the Tribunal's recommendation for the level of net-net prices that should apply to imports of CPBF from the United States. The fifth section presents other recommendations associated with operational aspects of the duty reduction. The final section discusses requests for retroactivity.

1. Basis and Form of the Duty Reduction

Anti-dumping duties are based on the amount by which normal values exceed export prices. It was the level of net-net prices at which Gerber sold CPBF in the Canadian market, however, that ultimately caused material injury to Heinz. As a result, the Tribunal focused on net-net prices as the basis for determining the amount by which anti-dumping duties should be reduced.

The Tribunal selected Heinz' average net-net price for fiscal 1994-95 as a starting point for its calculations. Fiscal 1994-95 was chosen as a base year (rather than any subsequent year) because it was before the period for which dumping was found to be causing injury to Heinz, and it was the base year for the Tribunal's injury determination.⁹⁰ Having selected a base year, the Tribunal was in a position to focus on an appropriate net-net price in relation to the average price for CPBF in that base year. In doing so, the Tribunal was able to refer to the constraints and proposed amounts of price increases included in submissions and testimony.

The Tribunal considered a number of alternatives for incorporating a recommended net-net price into Revenue Canada's enforcement of anti-dumping duties.⁹¹ Enforcement usually involves ensuring that export prices are at least equal to normal values and, when they are less, ensuring that anti-dumping duties are paid.

Both Heinz and Gerber submitted that a minimum domestic market resale price for imports of CPBF from the United States would be the most appropriate vehicle for implementing a duty reduction. They also recommended that, if the first arm's length resale price fell below the minimum domestic market resale price, anti-dumping duties should be assessed equal to the difference between the two. The Director, on the other hand, submitted that the duty should be levied as an absolute amount on each jar of baby food, regardless of its actual import price or net-net price.

90. Fiscal 1994-95 was also a banner year for Heinz' Infant Feeding Unit, which is the unit that includes its jarred baby food sales. For this reason, arguments were made that it is not a suitable choice for a base year. However, the Tribunal is limited in its choice by the information available on the record which covered the period from 1995 to early 1998. In the later part of this period, however, the net-net prices were found to have been affected by dumping, leaving 1994-95 as the only possible choice.

91. A discussion of various alternative forms that a duty reduction might take was presented in the public version of the Tribunal's staff report.

The Tribunal compared the attributes of the various approaches. The Tribunal foresees that there would be a number of problems if an absolute levy per jar were used to implement an anti-dumping duty reduction. For example, the amount of the duties would be fixed in a remission order⁹² and, as a result, Revenue Canada would not have the ability to go back and redetermine and re-assess the amount of anti-dumping duties on imports if an exporter lowered the export or resale price. An absolute levy would also not be prospective in nature, i.e. the payment of anti-dumping duties could not be avoided through increasing export or resale prices. An exporter or importer would have to pay a levy on each jar of CPBF entering Canada from the United States, regardless of the level of its export or resale price.

A minimum domestic market resale price is defined as the delivered price of the first arm's length sale to a customer in Canada of CPBF imported from the United States. It would be a net-net price exclusive of all discounts, allowances, rebates and other trade spending, regardless of whether the discounts, allowances, rebates and other trade spending programs are granted at the time of sale or on a periodic basis or are related to purchase volumes.

Overall, a minimum domestic market resale price would be relatively simple to administer and would not place additional burdens on Gerber, Gerber US or other importers and exporters of CPBF produced in the United States. It should also not place a significant additional burden on Revenue Canada.⁹³ It would be enforceable and would be prospective in nature, allowing Gerber US or any other US exporter to raise resale prices up to the proposed minimum and, thus, eliminate the need for importers to pay anti-dumping duties. A minimum domestic market resale price would be flexible enough to accommodate new US exporters of CPBF or direct sales of CPBF by Gerber US to retailers and wholesalers in Canada.

Therefore, *the Tribunal recommends that a minimum domestic market resale price for imports of CPBF from the United States be used for the implementation of an anti-dumping duty reduction.*

2. Confidentiality

The Tribunal has considered whether its specific recommendations on the minimum domestic market resale prices should be made public or kept confidential. In keeping with its fundamental objective of transparency, the Tribunal would have preferred to publicly disclose these minimum domestic market resale prices. In the circumstances of the present case, however, the disclosure of these prices would inform Heinz, as well as retailers and wholesalers, of the prices below which Gerber and other importers/exporters could not sell. This would provide retailers and wholesalers with a significant commercial advantage in their dealings with Gerber or other importers/exporters of CPBF from the United States. It would also give Heinz a commercial advantage over Gerber in its dealings with retailers and wholesalers.

The Tribunal recognizes that, over time, through participation in the normal functioning of the market and the intelligence that this provides, these parties may be able to estimate, with a reasonable degree of accuracy, the level of minimum domestic market resale prices, just as they can for normal values during

92. An anti-dumping duty reduction could be implemented by the Governor in Council on the recommendation of the Minister.

93. Revenue Canada would enforce the minimum domestic market resale prices, which would be implemented through a remission order. Revenue Canada would also continue to determine and compare export prices and normal values, as it always does for a product subject to an injury finding. This is necessary to ensure, among other things, that the amount of the anti-dumping duty does not exceed the margin of dumping as required by Article 9.3 of the WTO Anti-dumping Agreement.

the enforcement of injury findings. If the minimum domestic market resale prices are kept confidential, except for being issued to Gerber US or any other US exporter of CPBF to Canada, which has obtained normal values for its CPBF shipment, a commercial advantage would not be gained by Heinz, retailers or wholesalers. The Tribunal, however, strongly believes that neither the Tribunal nor the Government, if it decides to reduce the duties, should provide a commercial advantage, even if short-lived, to any market participant by disclosing the minimum domestic market resale prices to its business competitors or customers.

Therefore, *the Tribunal recommends that the specific minimum domestic market resale prices for imports be kept confidential.*

3. Consideration of Price Points

The Tribunal received several submissions on net-net prices and on market factors that the Tribunal should consider in determining a recommended duty reduction. In this section, the Tribunal reviews these submissions and other market factors to assist it in determining the minimum domestic market resale price which, in its view, would balance the various interests that would be affected by a reduction in the anti-dumping duties.

a) Level of Inflation

In developing its recommendation, the Tribunal considered whether Heinz would have been able to achieve price increases equal to or greater than the rate of inflation in consumer prices. The Tribunal, therefore, examined changes in the Consumer Price Index (CPI) and its component parts to obtain an understanding of the inflationary trends in consumer prices since 1995. More specifically, the Tribunal reviewed trends in total CPI, the “Food Purchased from Stores” component of the CPI and the “Infant and Junior Foods” component of the CPI from 1995 to July 1998. The total CPI increased over this period by 4.1 percent,⁹⁴ which is approximately equal to a 1.6 cents per jar increase in the price of CPBF. The “Food Purchased from Stores” index increased in the same period by 4.7 percent,⁹⁵ which is equivalent to about a 1.9 cents per jar increase in the price of CPBF. The two indexes indicate that the rate of inflation in consumer prices in general and, more particularly, in the prices of food purchased from stores has been relatively low since 1995. The “Infant and Junior Foods” index, which includes CPBF and other infant foods, declined by 2.5 percent.⁹⁶ This decline, however, in large part reflects the price decreases for CPBF due to dumping.

b) Heinz’ Duty Reduction Proposal

Heinz proposed that the starting point for determining the amount of price increases that it would need to eliminate the injury suffered as a result of the erosion and suppression brought about by dumping was the amount of price increases that it had been able to implement in Quebec. In that province, where Heinz encountered very little competition from Gerber products, it had been able to increase prices during

94. On a base of 1992=100, the total CPI grew from 104.2 to 108.5. Statistics Canada, CANSIM, Consumer Price Indexes for Canada, Monthly, 1996 Classification, Databank ID P100000.

95. On a base of 1992=100, the “Food Purchased from Stores” component of the CPI grew from 104.6 to 109.5. Statistics Canada, CANSIM, Consumer Price Indexes for Canada, Monthly, 1996 Classification, Databank ID P100002.

96. On a base of 1992=100, the “Infant and Junior Foods” component of the CPI declined from 104.6 to 102.0. Statistics Canada, CANSIM, Consumer Price Indexes for Canada, Monthly, 1996 Classification, Databank ID P100069.

its 1996-97 and 1997-98 fiscal years. Heinz also proposed an additional increase to account for the fact that Gerber was present to some extent in the Quebec market and that this presence had price-erosive and price-suppressive effects. Also, this further price increase would compensate for the fact that Heinz entered into long-term contracts during the period when dumping and injury occurred, which committed Heinz to make trade expenditures at a higher level than it otherwise would have.

After considering the size of the price increases that Heinz had been able to achieve in the Quebec market since fiscal 1995-96 and examining what effect dumped CPBF might have had on Heinz' ability to raise prices in that market, the Tribunal concluded that the effect of dumped CPBF on prices in the Quebec market was not as great as elsewhere in Canada. Nevertheless, a 30 percent share of the drug channel, albeit a small share of the total Quebec market,⁹⁷ was likely to have had some suppressive effect on prices in the Quebec market.

With regard to Heinz' submission that prices should be increased beyond the price actually achieved in Quebec to compensate for the additional long-term trade spending to which it committed because of dumping, the Tribunal notes that a minimum domestic market resale price for imports should provide Heinz an opportunity to eliminate the impact of this additional trade spending. All other things being equal, the anti-dumping protection provided by those minimum import prices should allow Heinz to increase its list prices and have those increases translate fully into net-net price increases. The increased prices would, therefore, compensate for any reduction in net-net prices caused by dumping, including increased trade spending.

c) Market Constraints

As was discussed earlier, Mr. Falck estimated that net-net price increases of 33 to 48 percent, or absolute increases of 13 to 19 cents per jar, would allow profitable entry to the Canadian market for new sources of imports of branded CPBF, new co-packed CPBF or new domestic production of CPBF.⁹⁸ He went on to say, however, that it may not be possible to raise prices by 33 to 48 percent because other price disciplines, such as home-prepared baby food and the countervailing power of retailers, would lower the range of potential price increases to 9 to 15 cents per jar, or 23 to 37 percent.⁹⁹ This suggested to the Tribunal that, in current market conditions, these domestic market constraints could prevent net-net prices from rising much more than 15 cents per jar.

d) Gerber's Offer to Wholesalers and Retailers

Subsequent to the Tribunal's injury finding, Gerber made presentations to its Canadian customers based on selling CPBF directly to them from Gerber US. The Tribunal notes that the prices that Gerber proposed to its customers overlap with the bottom of the price range that results from increasing Heinz' average price by the 23 to 37 percent to which Mr. Falck referred. According to Gerber, Canadian customers

97. A witness for Heinz noted that the Gerber influence that was significant in the rest of Canada during the 1995-97 period was not so significant in Quebec. That witness also indicated, however, that Gerber had about 30 percent of the drug channel in Quebec. *Transcript of Public Hearing*, Vol. 4, September 17, 1998, at 1065.

98. *Transcript of Public Hearing*, Vol. 4, September 17, 1998, at 858 and 989.

99. *Ibid.* at 989.

rejected these arrangements because of the proposed prices, while Shoppers indicated that other factors influenced its decision not to purchase directly from Gerber US.¹⁰⁰

e) Heinz' Cost Increases

The Tribunal examined increases in Heinz' cost of goods sold for CPBF and its expenses for CPBF covering freight, media and promotion, and general selling and administration. It took note of the degree to which Heinz CPBF costs had increased since fiscal 1994-95, but it also observed that some of the expenses that Heinz had made were of a non-recurring nature. These non-recurring expenses would include increased promotion, selling and administrative expenditures that Heinz incurred to overcome the effects of the report by the CSPI, to react to the effects of dumping and to support its dumping complaint, the injury inquiry and the public interest investigation. Because these expenditures will not recur in the future, the Tribunal has not considered them in determining the cost increases that Heinz should have been able to recover through price increases.

When analyzing cost increases, the Tribunal considered the effect of increases or decreases in the volume of production on costs per unit.¹⁰¹ The Tribunal notes that the volume of production of CPBF is driven by the demand for CPBF and that market demand, as a whole, as well as Heinz' production volume, declined over the period examined for the Tribunal's injury inquiry.

The Tribunal notes, however, the possibility that the decrease in demand for CPBF could have been mitigated. A witness for Heinz indicated that, had it not been for Gerber's dumping, Heinz was convinced that it would have invested more in promotion, which would have expanded consumption at a time when the target population of infants was decreasing due to declining births.¹⁰² Given the company's overall success as a marketer of consumer goods, the Tribunal believes that Heinz may have been able to "grow consumption" through effective marketing and, thus, increase or, at least, reduce the degree of decrease in the volume of production. To the extent that production would have increased, fixed costs would have been allocated across more jars, thereby decreasing the cost per jar of CPBF. This would have reduced the amount by which Heinz would have had to increase prices to recoup the growth in total costs per jar.

f) Gerber's Duty Reduction Proposal

Gerber proposed that its minimum domestic market resale prices be set no higher than a specified percentage above its current 1998 wholesale prices.¹⁰³ This percentage was based on two factors. One was the decline in Gerber's net-net prices between fiscal 1994-95 and the end of calendar year 1997. The other was the 4.7 percent increase in consumer prices between December 1994 and December 1997.¹⁰⁴

The Tribunal notes the narrowness of Gerber's proposal. The Tribunal questions whether inflation in consumer prices by itself is an adequate indicator of the extent to which prices would have increased in the absence of dumping. It is clear to the Tribunal that, at the level of price increases proposed by Gerber, Heinz

100. *Transcript of In Camera Hearing*, Vol. 1, September 15, 1998, at 86-87.

101. For example, if the volume of production decreases, fixed costs are spread across fewer units of sales, increasing the cost per jar. Conversely, if volumes increase, the cost per case or jar is spread over more units and unit costs decline.

102. *Transcript of Public Hearing*, Vol. 4, September 17, 1998, at 938.

103. Importer's/Exporter's Exhibit B-2 (protected) at 9-10, Administrative Record, Vol. 12.

104. An expert witness for Gerber noted that the International Monetary Fund, *International Financial Statistics*, reports a 4.7 percent increase in consumer prices. See Importer's/Exporter's Exhibit B-7 at 16, note 31, Administrative Record, Vol. 11.

would not have been able to capture all of its cost increases nor achieve long-term viable operating profit margins. In a complex situation such as this, the Tribunal believes that it must consider and weigh several factors together to arrive at a decision on the level of prices that might prevail in the domestic market for CPBF under competition free of injurious dumping.

4. Recommended Minimum Domestic Market Retail Prices

In finalizing its proposal for the minimum domestic market resale price for imports of CPBF from the United States, the Tribunal selected the net-net price, from within the range of potential price points considered earlier, that best balanced the various public interest concerns. The resultant net-net price was then translated into minimum domestic market resale prices per case equivalent for each of the four categories of Heinz CPBF. These prices were then further adjusted to correspond to the eight product categories and jar sizes sold by Gerber.¹⁰⁵

Therefore, *the Tribunal recommends that a specific minimum domestic market resale price for each category of CPBF imported from the United States be established as presented in the confidential appendix.*¹⁰⁶

The Tribunal estimates that, based on Revenue Canada's final determination of the margin of dumping, the recommended average minimum domestic market resale price would, in effect, lower the full duty "pass through" by approximately two thirds.¹⁰⁷ That is, the price of CPBF imported from the United States would increase by about one third of the increase that would have occurred if the full duty remained in place.

5. Other Recommendations

a) Penalty

The Tribunal examined the question of what amount of anti-dumping duties should be payable when actual domestic market resale prices of imports of CPBF from the United States fall below the minimum domestic market resale prices. The Tribunal considered two options. The first option would be to set duties payable equal to the difference between the minimum domestic market resale price and the actual resale price of the imports. The second option would be to assess anti-dumping duties on the basis of normal values and export prices determined by Revenue Canada. This option would likely result in a larger duty assessment or a more severe penalty. The Tribunal prefers the first option.

Therefore, *the Tribunal recommends that, when the minimum domestic market resale price for imports exceeds the actual resale price, penalties be set equal to the difference between the two.* The Tribunal is of the view that this approach would continue to maintain the balance between the competing public interest concerns whenever resale prices for imports from the United States fall below the minimum domestic market resale prices.

105. If other US exporters ship CPBF to Canada, Revenue Canada would need to match their products to the four categories of Heinz CPBF and translate the associated price from a case equivalent basis to the actual case size used by the exporter.

106. This report contains the public version of the confidential appendix.

107. The estimate of the reduction in duties was prepared using exchange rates for the period from January to June 1997 in order to reflect the exchange rates that prevailed over the period for which Revenue Canada determined the margin of dumping.

b) Indexing

The Tribunal considered whether the minimum domestic market resale prices for imports should be indexed to reflect overall price developments in the Canadian economy. Both Heinz and Gerber submitted that the minimum domestic market resale prices should be indexed on an annual basis. The Tribunal notes that, if the minimum domestic market resale prices for imports are not indexed to account for inflation (or deflation) in the domestic market, there is a risk that the balance among the various public interest concerns, including the protection of the domestic industry, could be lost due to general changes in prices. As a result, the domestic industry may once again suffer injury from dumping.

Therefore, *the Tribunal recommends that the minimum domestic market resale prices for imports be indexed on an annual basis, using the “Food Purchased from Stores” component of the CPI.* The Tribunal is of the view that this index, of all readily available public indexes, is likely to most closely reflect relevant price movements in the market for CPBF.

6. Retroactivity

Both Gerber and the Director submitted that any reduction in anti-dumping duties should be retroactive to the date of Revenue Canada’s preliminary determination. Gerber argued that the public interest concerns that exist now existed at the time of the injury finding and at the time of the preliminary determination. Gerber also suggested that Heinz has already been compensated for any injury suffered. This compensation has taken the form of increased production, market share, capacity utilization, employment, net sales and operating profit. Gerber argued that Heinz’ financial condition would not be affected by retroactivity. Gerber further argued that it is not in the public interest to provide the Government of Canada with a windfall just because the public interest investigation comes after Revenue Canada’s preliminary and final determinations. Gerber submitted that the duties are more than what is necessary to cover the injury and that not refunding excessive past duties would punish Gerber and Gerber US for dumping that was not injurious. Gerber also argued that SIMA does not preclude the Tribunal from recommending a retroactive reduction.

The Director argued that any recommendation for duty reduction must be accompanied by a recommendation for the retroactive reduction of the duties. He submitted that this conclusion goes to the integrity of the anti-dumping system and the system “falls into disrepute in the absence of such a corollary.”¹⁰⁸ The Director further stated that the Government of Canada should not keep a penalty which it has subsequently determined is contrary to the public interest to continue to collect.

Heinz is opposed to a retroactive reduction in duties. Heinz argued that a refund of duties after a decision by the Minister to reduce anti-dumping duties would not benefit the public interest and would only serve Gerber’s own commercial interest. It submitted that a refund would not increase competition or consumer choice, nor would it reduce any effects on lower-income families or minimize health problems in babies. Heinz argued that, since a refund would not serve the public interest, the Tribunal has no basis under section 45 of SIMA to recommend a retroactive reduction and, for this reason, has never done so.

108. *Transcript of Public Argument*, September 18, 1998, at 45.

It is not clear that the Tribunal has the jurisdiction under SIMA to recommend that duty relief be made retroactive to the time when either provisional duties or final duties were first imposed, nor is it clear that the Tribunal has the jurisdiction to recommend that duties paid during that period be remitted in whole or in part. Section 45 of SIMA merely mandates the Tribunal to report to the Minister if it is of the opinion that the imposition of the duties in the full amount on the imports in respect of which the Tribunal has made an order or finding “would not or might not be in the public interest.” Consequently, the Tribunal will not make a recommendation to the Minister on this issue.

PART VII**SUMMARY OF RECOMMENDATIONS**

Following its finding of April 29, 1998, that imports of CPBF from the United States had caused material injury to the domestic industry, and in accordance with section 45 of SIMA, the Tribunal conducted an investigation into whether there was a sufficiently compelling public interest for a recommendation to the Minister to reduce or eliminate the amount of duties provided for by SIMA. Having conducted its investigation into this matter, the Tribunal herewith reports to the Minister under section 45 of SIMA that it is of the opinion that the imposition of the duties in the full amount, in respect of CPBF, is not in the public interest and further recommends as follows:

- that the anti-dumping duties on CPBF imported from the United States be reduced;
- that a minimum domestic market resale price for imports of CPBF from the United States be used for the implementation of an anti-dumping duty reduction;
- that the specific minimum domestic market resale prices for imports be kept confidential;
- that a specific minimum domestic market resale price for each category of CPBF imported from the United States be established as presented in the confidential appendix;
- that, when the minimum domestic market resale price for imports exceeds the actual resale price, penalties be set equal to the difference between the two; and
- that the minimum domestic market resale prices for imports be indexed on an annual basis, using the “Food Purchased from Stores” component of the CPI.

Patricia M. Close

Patricia M. Close
Presiding Member

Raynald Guay

Raynald Guay
Member

Anita Szlajak

Anita Szlajak
Member

APPENDIX

RECOMMENDED MINIMUM DOMESTIC MARKET RESALE PRICES FOR IMPORTS OF CERTAIN PREPARED BABY FOOD FROM THE UNITED STATES

The minimum domestic market resale prices for imports of Gerber CPBF are:

Product Category	Price Per Actual Case (CAN\$)	Case Size
1 st Foods	XX	24 jars of 128 ml
2 nd Foods	XX	24 jars of 128 ml
2 nd Foods - Tropical Desserts	XX	24 jars of 128 ml
2 nd Foods - Veggie Recipe Dinners	XX	24 jars of 128 ml
2 nd Foods - Meats	XX	12 jars of 68 ml
2 nd Foods - Simple Recipe Dinners	XX	24 jars of 128 ml
Juices	XX	24 jars of 128 ml
3 rd Foods	XX	12 jars of 213 ml

The minimum domestic market resale prices for imports of other brands of CPBF from the United States are:

Product Category	Price per Case Equivalent (CAN\$)
Infant Foods and Juices	XX
Junior Foods	XX
Strained Meats	XX
Meat Dinners	XX

The above prices are expressed in Canadian dollars per case equivalent (24 jars of 128 ml each, or a total of 3,072 ml) for Heinz CPBF product categories. The products of other US producers would need to be matched to these categories and the recommended prices adjusted to match the actual case and jar size configurations of the US exporter.

Minimum Domestic Market Resale Price Defined

A minimum domestic market resale price is defined as the delivered price of the first arm's length sale to a customer in Canada of CPBF imported from the United States. It would be a net-net price exclusive of all discounts, allowances, rebates and other trade spending, regardless of whether the discounts, allowances, rebates and other trade spending programs are granted at the time of sale or on a periodic basis or are related to purchase volumes.