CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Monday, November 25, 1991

Opinion No.: PI-91-001

IN THE MATTER OF an opinion of the Canadian International Trade Tribunal, under section 45 of the *Special Import Measures Act*, resulting from the section 42 Inquiry No. NQ-91-002;

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

O P I N I O N

The Canadian International Trade Tribunal is of the opinion that it would not be in the public interest for anti-dumping duties in the full amount of the margin of dumping to be imposed on all of the imports of the above-mentioned subject goods. The Tribunal is of the view that any portions of the anti-dumping duties that are superfluous from the standpoint of removing injury are unnecessary. (Member Blouin dissenting).

Charles A. Gracey
Charles A. Gracey
Presiding Member

Sidney A. Fraleigh
Sidney A. Fraleigh
Member

Robert J. Martin
Robert J. Martin
Secretary

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Tribunal Members:	*Charles A. Gracey, Presiding Member* *Sidney A. Fraleigh, Member* *Michèle Blouin, Member*
Director of Research:	*J.A. (Sandy) Greig*
Research Manager:	*Douglas Cuffley*
Research Officers:	*Ihn Ho Uhm* *Peter Rakowski*
Counsel for the Tribunal:	*Debra P. Steger* *Robert Desjardins*

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R E P O R T

This is a public interest opinion resulting from the section 42 inquiry involving the above-mentioned goods. At the outset of that case, representations were made by several parties that the case involved a public interest dimension that the Canadian International Trade Tribunal (the Tribunal) should consider pursuant to section 45 of the *Special Import Measures Act* (SIMA).

The relevant legislation provides that where the Tribunal, having made an order or finding pursuant to subsection 43(1) of SIMA, is of the opinion that the imposition of the anti-dumping duties, in whole or in part, is not or might not be in the public interest, it shall report its opinion to the Minister of Finance (the Minister) with the facts and reasons that gave rise to that opinion.

After having received preliminary submissions, the Tribunal decided that there were reasonable grounds to entertain the views of interested persons on the question of the public interest and so informed such persons. The Tribunal announced that it would receive final submissions on the question of the public interest and hear oral argument on September 23, 1991. Several interested persons made written representations to the Tribunal, and some appeared before the Tribunal to argue their positions. On this basis, the Tribunal formed its opinion.

ARGUMENTS

The arguments advanced in favour of not imposing the anti-dumping duties or not imposing them in the full amount may be summarized as follows:

It was argued by the Director of Investigation and Research, *Competition Act* (the Director), that the economic welfare of British Columbia would be damaged by the imposition of the anti-dumping duties. Consumers would lose because prices would rise. Producers would gain about half as much as consumers would lose, while governments would gain marginally. The Director argued that the two major B.C. producers, Labatt Breweries of British Columbia (Labatt) and Molson Brewery B.C., Ltd. (Molson), are a regulated oligopoly and can use their considerable market power to keep prices higher and output lower than would occur in a more competitive market. Dumping, he argued, would have the effect of moving the B.C. industry toward a more efficient competitive structure.

The Director argued further that sufficient non-tariff barriers already existed to provide ample protection to the B.C. industry. He contended that the non-tariff barriers on imported beer were the calculated equivalent of a tariff of 50 percent *ad valorem*. His reference was to the restrictions associated with listings, pricing, distribution and access to retail outlets and the newly imposed cost of service. Given these restrictions, he submitted that the only way the U.S. exporters could compete in the market was to dump.

Haida Trading Inc., a Canadian agent of G. Heileman Brewing Company Inc. (Heileman), argued that the B.C. industry could not benefit from the full imposition of the duty. Its argument was that, above a certain level of duty, the imported brand was no longer remotely competitive, and a duty above that level was therefore superfluous

and not necessary to redress the injury caused to B.C. manufacturers by the imports of the dumped products.

The Stroh Brewery Company (Stroh) submitted that the imposition of anti-dumping duties would seriously undermine competition in the B.C. market given that Labatt and Molson were duopolists and that the regulatory environment clearly favoured them. Roger Mutimer of Westwick Consultants also expressed concern about using SIMA to protect a duopoly in a regulated marketplace.

The arguments advanced in favour of imposing the duties in the full amount may be summarized as follows:

Pacific Western Brewing Company contended that without anti-dumping duties, the firm would be unable to compete in the B.C. beer market. Anti-dumping duties were required to ensure a strong regional brewery. Counsel for the B.C. breweries argued that there was nothing in the submissions that established that a waiver or reduction of the anti-dumping duties would be in the public interest. Moreover, any waiver or reduction of duties would be a direct expense to the B.C. breweries and could frustrate government objectives relating to revenue generation and social policy.

The Mayor of the Town of Creston and two labour unions (the Brewery, Winery and Distillery Workers, Local 300, and the Interior Brewery Workers, Local 308) argued that the anti-dumping duties were necessary to protect jobs in the brewing industry.

REASONS FOR THE MAJORITY OPINION

The Tribunal has considered carefully the submissions and the arguments of the interested persons made under section 45 of SIMA relative to the public interest. It has also relied on the facts established in the section 42 injury inquiry on matters relating to pricing in the B.C. market, the regulation of the market by the B.C. Liquor Distribution Branch and the financial position of the B.C. beer industry.

In considering the public interest question, the Tribunal makes the following observations. We place an emphasis on the material injury to the B.C. industry caused by the dumped imports. This is consistent with the objective of the anti-dumping law which is to protect domestic production from material injury caused by dumped imports. 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.

In the case of B.C. beer, we see no overriding public interest rationale relating to competition or consumer interests that would lead us to recommend that the Minister should set aside the full amount of the anti-dumping duties. In terms of the cost-benefit approach advocated by the Director, we are confident that there is a paramount obligation, under SIMA, to remove the material injury caused by dumped imports. For that reason, we weigh the interests of the B.C. industry, up to the point where material injury is removed, more heavily than any other consideration.

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

That said, we 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 and are consistent with Article 8 of the Anti-Dumping Code[1] that states in part:

> *... It is desirable ... that the duty be less than the margin, if such lesser duty would be adequate to remove the injury to the domestic industry.*

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.

Unnecessarily high anti-dumping duties shelter the B.C. industry from effective competitors. With the expectation of an increasingly competitive marketplace in British Columbia, as suggested by the Intergovernmental Agreement on Beer Marketing Practices and recent GATT developments, this may not be in the longer term interests of the B.C. beer industry itself.

In this case, we believe that some portion of the anti-dumping duties applied on some of the dumped beer imports are superfluous. We are of this opinion because, with the application of the anti-dumping duties in their full amount, these products will only be available in the B.C. market at prices well above the price levels necessary to remove the material injury to the B.C. industry. The Tribunal has not determined the exact price levels required for these products to remove the injury to the B.C. industry. Based on our observations on the pricing of B.C. products after the imposition of the anti-dumping duties, however, we believe that some of dumped imports are priced well in excess of what we expect to be the prevailing price in the relevant market segments.

Consider, for example, the pricing of Heileman's Rainier Lager in the B.C. market after the imposition of the provisional anti-dumping duties. The pricing after the application of the final anti-dumping duties is not expected to be greatly different. The post-duty price of $6.50 per six pack of cans of Rainier Lager is, in the Tribunal's view, above the price level needed by the B.C. industry in the discount market to ensure an adequate level of profitability. At a price of $6.50, Rainier is totally excluded from the discount segment, and probably from the regular segment as well. This reduces consumer choice and may eliminate the brand as an effective competitor in the marketplace.

The Tribunal is aware that determining the level of anti-dumping duties necessary to remove the material injury is a complex task given the price and brand characteristics of the individual products found to be dumped. Although the required calculations may be difficult, and the end result may be somewhat arbitrary, we are of the opinion that competition in the B.C. market and the consumer interest would be better served by reducing some of the anti-dumping duties from the full margin of dumping.

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1. Agreement on Implementation of Article V1 of the General Agreement on Tariffs and Trade, signed in Geneva, Switzerland, on December 17, 1979, GATT BISD 265 (1980).

CONCLUSION

In conclusion, the Tribunal is of the opinion that it would not be in the public interest for anti-dumping duties in the full amount of the margin of dumping to be imposed on all of the imports of the above-mentioned subject goods. The Tribunal is of the view that any portions of the anti-dumping duties that are superfluous from the standpoint of removing injury to the B.C. brewing industry are unnecessary.

DISSENTING OPINION OF MEMBER MICHÈLE BLOUIN

Where I differ from my colleagues is on the very fundamental question of whether there is a public interest at stake that overrides the requirement of imposing full anti-dumping duties following the injury finding by the Tribunal. I fail to recognize such a public interest in this particular case which would warrant a recommendation to the Minister to lower the level of duties. In the scheme of SIMA, the full imposition of anti-dumping duties is normal when an injury finding is made. In this case, the B.C. consumers will still continue to benefit from a variety of brands sold at discount prices. The only parties that would benefit from a lower anti-dumping duty would be the exporters themselves, and I fail to equate public interest, within the meaning of section 45 of SIMA, to be the interest of the exporters.

SIMA is, first and foremost, legislation adopted to protect Canadian producers against trade practices that cause material injury to the Canadian industry. In my opinion, it is only in exceptional circumstances that the Tribunal may exercise its discretion under section 45 of SIMA to make a report to the Minister as to whether the duty should be eliminated or reduced as a matter of public interest.

The first public interest report issued under section 45 of SIMA was made by the Canadian Import Tribunal (CIT) on October 20, 1987, with respect to subsidized grain corn originating in or exported from the United States. In the introduction of its report to the Minister, the CIT said that:

> *...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.*
>
> *The term "public interest" itself provides little guidance to the Tribunal, nor does Canadian jurisprudence offer a definition that is applicable in the context of SIMA, that is to say, within an international trading environment. Review of case law in the United States and the European Economic Community (EEC) was similarly of little assistance in providing any precise and operational meaning to this term. The Tribunal was not persuaded that price increases caused by the imposition of anti-dumping or countervailing duty would, in and by themselves, be a sufficient basis for it to initiate hearings and to submit a report to the Minister of Finance as contemplated by section 45. Such increases in price are an inevitable consequence and cost of having such a system, and one which the Tribunal must believe Parliament was aware of at the time the statute was enacted. Nor is the Tribunal of the view that consideration of the public interest necessarily requires the Tribunal to choose between the private interests of parties with opposing concerns, as for example the users or consumers on the one hand and the producers on the other; certainly, private interests may ultimately be affected and the private parties can be expected to defend these interests before the Tribunal and elsewhere. However, the Tribunal does not view the section 45 process as a contest between the parties. Rather, the Tribunal concluded that the*

> *responsibility imposed on it by section 45 requires it to analyze and evaluate the consequences flowing from the application of the countervailing duty, for all parties affected, and by weighting the relative merits of each, to form an opinion as to whether, and how, on balance, the public interest would best be served.*
>
> (Emphasis added)

The provisions of section 45 were introduced in SIMA in response to the recommendations of the Sub-committee on Import Policy of the Standing Committee on Finance, Trade and Economic Affairs that examined the proposed Act, and the "public interest" notion in section 45 is not synonymous with consumer's interest, as noted in the Minutes of Proceedings and Evidence of the Sub-committee on Import Policy of the Standing Committee on Finance, Trade and Economic Affairs, Issue No. 27, February 11, 1982.

Public interest in the present case is the interest of many parties related to the production, distribution, sale and consumption of beer. They are the B.C. brewers, the transportation companies, the retailers, the workers, the commercial establishments (hotels, restaurants, bars), the consumers of beer, the municipalities and the governments of British Columbia and Canada.

My colleagues appear to have based their opinion largely on the consumer's interest, which is only one among many possible factors of the public interest. I do not see, in this case, how the relief provided to B.C. producers can cause substantial and possibly unnecessary burden to consumers of beer. The consumers in British Columbia are still being offered a wide variety of brands at discount prices.

As part of its section 42 inquiry, a notice was issued by the Tribunal on August 9, 1991, and published in Part 1 of the Canada Gazette on August 17, 1991, inviting any interested person in this inquiry who wished to make a public interest representation, to submit it in writing to the Tribunal before August 30, 1991. In response to the Tribunal's notice, public interest representations were received from Stroh, one of the exporters; Haida Trading Inc. (Haida), the Canadian agent of Heileman, an exporter in this case; and the Director. Subsequently, further public interest representations were received and produced as exhibits from a number of interested persons. They are:

1. Molson, Labatt and Pacific Western Brewing Company, the three B.C. brewers who had lodged the anti-dumping complaint;

2. Stroh;

3. Haida;

4. The Director;

5. Columbia Brewing Company, Interior Brewery Workers (Local 308);

6. Roger Mutimer, C.A., of Westwick Consultants;

7. The Brewery, Winery and Distillery Workers (Local 300); and

8. The Town of Creston.

There were no submissions made by consumers associations, or by commercial or retail associations (hotel, bar or restaurant owners), which groups would necessarily benefit from any reduction of anti-dumping duties.

The decision of the Tribunal to report to the Minister on the question of the public interest has to be based on the evidence before the Tribunal. In this case, the evidence was submitted in the form of written submissions. Oral arguments were made during the public hearing. No written responses were received by the Tribunal on any of the written submissions except for general comments made by counsel for the B.C. brewers.

I wish to summarize and provide short comments on the public interest written submissions:

- The B.C. brewer's comments were to the effect that there was nothing in the submissions of opposing parties to suggest that the waiver or reduction of the duties would be in the public interest, but that the waiver or reduction of duties would be a direct expense to the B.C. brewers.
    - I agree with the B.C. brewers that the public interest issue was never really dealt with; private interests of the parties were.
- Stroh and Haida argued for a reduction of anti-dumping duties in order to permit them to stay in the discount segment of the B.C. market.
    - Their arguments were not in the general public interest, but rather in their own private interest.
- The Director contended that when a domestic industry, such as the B.C. brewing industry, has market power, dumping, by forcing down domestic prices and increasing demand, actually moves the industry closer to an efficient outcome.
    - I cannot agree with that position because the dumping was causing material injury to the B.C. brewers. The industry could not have sustained its financial losses over an extended period of time and, therefore, in my view, the industry was not getting closer to an efficient outcome, but possibly closer to its disappearance. The Director also ignored the role that the Pacific Western Brewing Company is playing in the marketplace and considered the B.C. industry as being Labatt and Molson alone.
- Columbia Brewing Company, Interior Brewery Workers (Local 308) claims in its submission that it has lost in excess of 29,000 person-hours of employment in the Creston brewery and that Canadian companies that supply it with materials have also been affected. It claims that these losses are due to the dumped U.S. beer imported into British Columbia.
- Mr. Roger Mutimer of Westwick Consultants, who was hired by the U.S. government to analyze the new Cost of Service Differential policies implemented by the B.C. Liquor Distribution Branch, stated that his concerns with SIMA were "philosophical, ethical and methodological." He

claimed that the use of SIMA to protect a duopoly was inappropriate. He also claimed that the methodology used by Revenue Canada is contradictory and illogical.

- I believe that Mr. Mutimer was pleading the U.S. exporters' private interests, not the public interest.

- The Brewery, Winery and Distillery Workers (Local 300) made representations to the effect that it had lost jobs in the Brewing industry due to one significant factor, the shift from re-fillable bottles to aluminium cans. This shift according to it is due to "dumping of cheap American beer into the B.C. market."
- The Town of Creston is the home of Columbia Brewery Company, one of just three major employers in the area. This firm provides 100 full-time jobs. The Mayor of the Town of Creston contended that the dumping of U.S. canned beer has already resulted in the loss of 15 full-time jobs at the brewery over the past 5 years.

In my view, I do not believe that the B.C. producers will be able to unduly increase their prices, because there are too many other sources for this product and also because of the existing price competition among the three B.C. producers.

Also, in the present case, as compared to the grain corn case, there are no Canadian intermediary users of the product to which undue harm would be caused by the full imposition of the anti-dumping duties. Furthermore, I do not believe that section 45 of SIMA should be invoked simply to promote competition or provide consumer benefits. As I mentioned before, SIMA exists first and foremost for the protection of producers. It is only under exceptional circumstances that the good of the public may override the protection that is due to producers when dumped or subsidized goods have been found to be causing material injury to their production.

My colleagues' decision appears to be based largely on the interest of consumers, more precisely on the consumer's right to the choice of more brands of U.S. imported beer at discount prices. As well, they conclude that any duty over and above the amount that is required to negate the injurious effects of dumping should not be imposed. This is a plausible argument. However, in most anti-dumping or countervailing duty cases that come before the Tribunal, public interest representations are not made. For these cases or in such circumstances, SIMA does not allow the Tribunal to recommend a lower level of protection when it finds injury to the producers caused by the dumping or the subsidizing. Therefore, in my view, for any case where public interest representations are made such as in the present case, one must first be satisfied that there are special circumstances to be considered, and also be convinced that there is a public interest at stake that warrants a lowering of duties.

The anti-dumping duties put in place affect five different beer brands that are sold in the discount segment of the B.C. market from three different exporters:

1.	Heileman:	Rainier Lager Beer Rainier Light Beer Rainier Special Dry

2.	Pabst Brewing Company (Pabst):	Olympia Lager
3.	Stroh:	Old Milwaukee

Since the imposition of provisional anti-dumping duties on June 4, 1991, Pabst's Olympia Lager brand is priced in the low- to medium-end of the discount segment of the B.C. market and, therefore, is still quite competitive with other Canadian brands sold in that segment of the market. Stroh's Old Milwaukee brand is now priced at the high end of the discount segment but below regular brand prices. Heileman's Rainier Lager brand is, however, no longer priced in the discount segment, as a result if its high margin of dumping. That high margin of dumping resulted from the fact that Rainier Lager is sold as a premium beer in Washington state and, therefore, had to be sold at a substantial margin of dumping to the B.C. Liquor Distribution Branch in order to be positioned in the discount segment of the B.C. market. In order to offset the margin of dumping, Heileman had to increase substantially its price to the B.C. Liquor Distribution Branch, which ultimately, because of the fixed mark-ups, duties and taxes, caused the display price of this brand to be in the price range of B.C. premium beers, such as John Labatt Classic and Molson Special Dry.

If the B.C. consumer wishes to buy Rainier beer, he or she can still do it, but not at dumped prices that cause material injury to the B.C. industry. If the consumer wants to buy discount beer at low prices, he or she can buy it from the U.S. exporter, Pabst (Olympia Lager) or from any other B.C. producers that sell discount beer, such as Molson's Old Style, Labatt's Lucky Lager, Pacific Western's Pilsner, Traditional Lager or Traditional Malt.

The reduction of anti-dumping duties would benefit Heileman and Stroh. It would enable these two exporters to take market share away from B.C. producers and especially form Pabst. Pabst was successful, because of the low normal value and margin of dumping of its Olympia Lager brand, in having the lowest display price of the three U.S. exporters in the discount segment of the B.C. market. In my view, Pabst being conscious of its privileged place in the discount segment of the market did not make any representations on the public interest issue.

In my view, for the Minister to reduce anti-dumping duties would be to interfere unduly in the U.S. import market share.

For these reasons, I see no need to report to the Minister pursuant to section 45 of SIMA, as I am of the opinion that the imposition of anti-dumping duties in the full amount would not be contrary to the public interest in this case.

Michèle Blouin
Michèle Blouin
Member