CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Friday, July 26, 1996

Request for Review No.: RD-95-001

IN THE MATTER OF a request for review, under subsection 76(2) of the *Special Import Measures Act*, of the findings made by the Canadian International Trade Tribunal on November 6, 1995, in Inquiry No. NQ-95-002;

RESPECTING the dumping in Canada of refined sugar originating in or exported from the United States of America, Denmark, the Federal Republic of Germany, the Netherlands, the United Kingdom and the Republic of Korea, and the subsidizing of refined sugar originating in or exported from the European Union.

ORDER

The Tribunal is not satisfied that a review is warranted and, pursuant to subsection 76(3.1) of the *Special Import Measures Act*, has therefore decided not to initiate a review.

Lyle M. Russell
Lyle M. Russell
Presiding Member

Robert C. Coates, Q.C.
Robert C. Coates, Q.C.
Member

Charles A. Gracey
Charles A. Gracey
Member

Michel P. Granger
Michel P. Granger
Secretary

333 Laurier Avenue West
Ottawa, Ontario K1A 0G7
(613) 990-2452 Fax (613) 990-2439

333, avenue Laurier ouest
Ottawa (Ontario) K1A 0G7
(613) 990-2452 Téléc. (613) 990-2439

Request for Review No.: RD-95-001

Date of Order and Reasons:	July 26, 1996
Tribunal Members:	Lyle M. Russell, Presiding Member Robert C. Coates, Q.C., Member Charles A. Gracey, Member
Research Director:	Peter Welsh
Research Manager:	John O'Neill
Counsel for the Tribunal:	John L. Syme Heather A. Grant

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Ottawa, Friday, July 26, 1996

Request for Review No.: RD-95-001

IN THE MATTER OF a request for review under subsection 76(2) of the *Special Import Measures Act*, of the findings made by the Canadian International Trade Tribunal on November 6, 1995, in Inquiry No. NQ-95-002, respecting:

THE DUMPING IN CANADA OF REFINED SUGAR ORIGINATING IN OR EXPORTED FROM THE UNITED STATES OF AMERICA, DENMARK, THE FEDERAL REPUBLIC OF GERMANY, THE NETHERLANDS, THE UNITED KINGDOM AND THE REPUBLIC OF KOREA, AND THE SUBSIDIZING OF REFINED SUGAR ORIGINATING IN OR EXPORTED FROM THE EUROPEAN UNION

TRIBUNAL: LYLE M. RUSSELL, Presiding Member
ROBERT C. COATES, Q.C., Member
CHARLES A. GRACEY, Member

STATEMENT OF REASONS

BACKGROUND

The Canadian International Trade Tribunal (the Tribunal), under the provisions of section 42 of the *Special Import Measures Act*[1] (SIMA), conducted an inquiry[2] following the issuance by the Deputy Minister of National Revenue (the Deputy Minister) of a preliminary determination[3] dated July 7, 1995, and of a final determination[4] dated October 5, 1995, respecting the dumping in Canada 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, the United Kingdom and the Republic of Korea, and respecting the subsidizing of refined sugar, refined from sugar cane or sugar beets, in granulated, liquid and powdered form, originating in or exported from the European Union.

On November 6, 1995, the Tribunal issued its findings in Inquiry No. NQ-95-002 (the inquiry). The Tribunal found, among other things, that the dumping of refined sugar originating in or exported from the United States, Denmark, the Federal Republic of Germany, the Netherlands and the United Kingdom and that the subsidizing of refined sugar originating in or exported from the European Union were threatening to cause material injury to the domestic industry. The Tribunal found the domestic industry to be comprised of

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1. R.S.C. 1985, c. S-15, as amended by S.C. 1994, c. 47.
2. *The Dumping in Canada of Refined Sugar Originating in or Exported from the United States of America, Denmark, the Federal Republic of Germany, the Netherlands, the United Kingdom and the Republic of Korea, and the Subsidizing of Refined Sugar Originating in or Exported from the European Union*, Inquiry No. NQ-95-002, Findings, November 6, 1995, Statement of Reasons, November 21, 1995.
3. Canada Gazette Part I, Vol. 129, No. 29, July 22, 1995, at 2359.
4. *Ibid.* No. 43, October 28, 1995, at 3692.

333 Laurier Avenue West
Ottawa, Ontario K1A 0G7
(613) 990-2452 Fax (613) 990-2439

333, avenue Laurier ouest
Ottawa (Ontario) K1A 0G7
(613) 990-2452 Téléc. (613) 990-2439

Lantic Sugar Limited (Lantic), Redpath Sugars, a division of Redpath Industries Limited (Redpath) and Rogers Sugar Ltd. (Rogers). The domestic industry participated in all proceedings relating to these matters through its industry association, the Canadian Sugar Institute (CSI).

From January to April 1996, the Tribunal conducted a public interest investigation[5] under section 45 of SIMA in respect of the imposition of anti-dumping and countervailing duties on imports of refined sugar following the Tribunal's findings. On April 4, 1996, the Tribunal issued its consideration of the public interest question, in which it concluded that the public interest did not warrant the reduction or elimination of anti-dumping and countervailing duties on imports of refined sugar.

By submission dated March 12, 1996, United Sugars Corporation[6] (United) requested the Tribunal to review its threat of injury findings made in the inquiry pursuant to section 76 of SIMA. Pursuant to subrule 70(2) of the *Canadian International Trade Tribunal Rules*[7] (the Tribunal Rules), the Tribunal invited parties to the inquiry to make representations with respect to United's request. In support of United's request, the Tribunal received joint submissions from the Canadian Industrial Sweetener Users (CISU) and the National Dairy Council of Canada (the Dairy Council) and from Canadian Blending & Processing, Inc. (CBP) and E.D. & F. Man (Sugar) Ltd. (Man). Coca-Cola Beverages Ltd. (Coca-Cola) also filed a submission in support of United's request. The CSI and the Canadian Sugar Beet Producers' Association Inc. (the Association) filed submissions opposing United's request.

The grounds for review, on which United relies, are based almost exclusively on confidential information on the records in the inquiry and in Public Interest Investigation No. PB-95-002 (the public interest investigation). However, because of the nature of the allegations which have been made in this case, the Tribunal considered it imperative to issue a fully public statement of reasons. The Tribunal has, of course, sought to ensure that all the referenced confidential information remains protected.

SUBMISSIONS OF PARTIES

United's Request for Review

United submits that a review is warranted on three grounds. The first two grounds stem from certain documents produced by Redpath and placed on the record in the Tribunal's public interest investigation. These documents were not on the record in the Tribunal's inquiry. United's grounds are as follows.

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5. *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*, Public Interest Investigation No. PB-95-002, Tribunal's Consideration of the Public Interest Question, April 4, 1996.

6. United Sugars Corporation is a US sugar producer which, prior to the Deputy Minister's preliminary determination, was a major exporter of refined sugar to Canada. It was a party to both Inquiry No. NQ-95-002 and Public Interest Investigation No. PB-95-002.

7. SOR/91-499, August 14, 1991, Canada Gazette Part II, Vol. 125, No. 18 at 2912.

Ground 1 - Relevant Evidence

United submits that:

> *there was material information available to the Canadian industry at the time of the Tribunal's injury hearing which was not provided to the Tribunal and which was relevant to the Tribunal's inquiry in NQ-95-002 with respect to the issue of a threat of injury.*[8]

United submits that documents put on the record in the public interest investigation provide extensive evidence of Redpath's growth strategy for the Canadian market. The strategy included several elements. First, United submits that Redpath planned to target certain of its domestic competitors' key customer accounts.[9]

Second, the documents reveal that Redpath had a two-phase production capacity expansion plan. Phase I, approved in the spring of 1995, involved a substantial expenditure and would, among other things, increase Redpath's refining capacity and reduce its costs of production.[10] United notes that this expansion was not reported to the Tribunal by Redpath in its questionnaire response for the inquiry. Plans for Phase II, which would cost approximately 2.5 times the amount invested in Phase I and add additional refining capacity, were finalized and referred for approval to Redpath's parent company, Tate & Lyle Industries Limited (Tate & Lyle), just prior to the Tribunal's hearing in the inquiry.[11]

United submits that the "dumping case" was an integral part of Redpath's strategy and that Redpath used certain of the circumstances created by the case to the detriment of its domestic competitors.[12]

In United's submission, Redpath's strategy was directly relevant to the inquiry. United submits that "counsel should have had an opportunity to cross-examine on these documents and to argue about a threat of injury on the basis of Redpath's actual situation, and not the selective story provided to the Tribunal.[13]" United submits that, as counsel did not have that opportunity in the Tribunal's public interest investigation, the only means of addressing these issues is by way of a review.

Ground 2 - Inconsistencies Between the Record in the Inquiry and the Record in the Public Interest Investigation

United submits that:

> *the Tribunal must not allow parties to obtain injury findings by withholding relevant documents or providing misleading testimony.*[14]

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8. United's Confidential Request for Review at paragraph 2.
9. *Ibid.* at paragraphs 11 and 12.
10. *Ibid.* at paragraph 8.
11. *Ibid.* at paragraph 9.
12. *Ibid.* at paragraphs 12 and 13.
13. *Ibid.* at paragraph 15.
14. *Ibid.* at paragraph 2.

United submits that a number of inconsistencies exist between the record in the inquiry and the record in the public interest investigation. These inconsistencies are alleged to have resulted from the fact that, in the inquiry, Redpath, and in particular Mr. Andrew A. Ferrier, President of Redpath, was not forthcoming in responding to requests for information and in giving evidence at the hearing. The evidence in question relates to Redpath's marketing strategy, forecast returns in the event of an injury finding and plans for capacity expansion.

United submits that, in light of the "selective" manner in which Redpath chose to tender its evidence in the inquiry, to protect the integrity of the Tribunal's process, the Tribunal should conduct a review and rescind its threat of injury findings.

Ground 3 - Change in Circumstances

United submits that:

> *the circumstances of the Redpath expansion constitute a significant change in circumstances in the Canadian industry that warrants reconsideration of the need for the protection of a threat of injury finding.*[15]

United submits that the record in the public interest investigation shows that there has been a significant change in Redpath's circumstances over what was "reported" to the Tribunal in the inquiry. Since the Tribunal's findings in the inquiry, Redpath has undertaken a second capacity expansion program (Phase II) which, when completed,[16] will substantially reduce Redpath's costs of production. United notes that the expansion will reduce production costs significantly, making Redpath a low-cost producer that is able to compete in virtually any market scenario. United submits that evidence adduced in the inquiry suggests that Redpath may have been impacted more severely than its domestic competitors.[17] However, United notes that evidence adduced in the public interest investigation suggests that, even with the Tribunal's findings in place, in light of its lower production costs, Redpath could reduce its net margins, which may have implications for its domestic competitors.[18]

United submits that Redpath's added capacity and lower costs and their implications for Redpath's competitiveness provide sufficient grounds to warrant the initiation of a review.

United's request for review does not contain submissions regarding the legal standard that the Tribunal should apply in determining whether a review is warranted on the basis of changed circumstances. The submission also does not address what test or standard the Tribunal should employ in determining whether to initiate a review on the basis of facts which, while not on the record at the time of the inquiry, were in existence at that time.

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15. *Ibid.*
16. The CSI's submission in response to United's request for review indicates that Redpath's capacity expansion will be completed by January 1, 1997.
17. United's Confidential Request for Review at paragraphs 39 and 40.
18. *Ibid.* at paragraphs 13 and 37.

Submissions in Response to United's Request for Review

The submissions filed by the CISU and the Dairy Council and by CBP and Man cite the same grounds for review as United's and are substantially consistent with United's request. Both submissions stressed the view that parties appearing before the Tribunal have an obligation to provide all relevant information to the Tribunal. They also stressed that parties that withhold relevant information should not be rewarded by being granted the relief that they seek.

Coca-Cola filed a submission in support of United's request. Coca-Cola had argued in the inquiry that liquid sugar was a separate class of like goods. The Tribunal did not accept this argument. In its submission, Coca-Cola argues that, on the basis of documents put on the record in the public interest investigation, the Tribunal should review its decision not to treat liquid sugar as a separate class of like goods.

The CSI and the Association filed submissions opposing United's request. The CSI and the Association submit that, historically, the Tribunal has initiated interim reviews only where it is satisfied that there is a reasonable indication that there has been a change in the circumstances which underpinned a finding. Both parties submit that United's request for review fails to raise such an indication and that the Tribunal should, therefore, deny United's request on that ground alone.

With respect to the fact that, in the inquiry, the Tribunal was not made aware of Redpath's capacity expansion plan, the CSI submits that Redpath's plan was not relevant to the Tribunal's inquiry because:

- whereas the Tribunal's period of inquiry focused on what occurred in the Canadian market in the 4 1/2 years preceding the Deputy Minister's investigation, Redpath's plan was directed at what would have happened if the market conditions that prevailed after the Deputy Minister's preliminary determination had continued; and
- there would not have been any significant expansion if the domestic industry had not been successful in obtaining an injury finding (i.e. an expansion plan contingent on an injury finding was not relevant).

In addition, the CSI submits that, at the time of the inquiry, Redpath represented less than one third of domestic refining capacity. In the CSI's submission, United's allegations, even if accepted, do not undermine the preponderance of Redpath's evidence. Moreover, United's allegations do nothing to undermine the evidence of injury adduced by Rogers and Lantic, which together represent the remainder of the domestic industry. In the CSI's submission, Redpath's contingent expansion plan, when compared with all of Redpath's other evidence of injury and the "injury evidence" of Rogers and Lantic, is simply not material.

With respect to United's allegation that Mr. Ferrier misled the Tribunal in its inquiry regarding Redpath's plan to take accounts from its domestic competition, the CSI submits that there is considerable evidence on the record in the inquiry to indicate that Redpath was competing vigorously with other domestic producers for market share and that it had already secured a significant volume of future sales from one of its competitors' major accounts. It submits that Redpath intended to substantially increase its share, through replacing imports or obtaining existing domestic volumes; in short, the growth would come out of the

market. In other words, Mr. Ferrier never denied that at least part of Redpath's strategy could involve taking some accounts away from its competitors.

As noted, the Association submits that United has not raised a reasonable indication of a change in circumstances such as to warrant a review. The Association also supports the CSI's position regarding the relevance and materiality of the allegedly withheld evidence.

Finally, the Association suggests that United's request for review, at least insofar as it is underpinned by the allegation of misleading testimony and withheld documents, is analogous to an application to a court to set aside a judgement which has been obtained fraudulently. In such cases, the courts have applied a stringent nine-part test in deciding whether to overturn a judgement. The Association submits that United has not satisfied these requirements.

TRIBUNAL'S REVIEW POWER

Section 76 of SIMA provides the Tribunal with the power to conduct reviews. The provisions of section 76 relevant to this matter are as follows:

> *(2) At any time after the making of an order or finding described in any of sections 3 to 6, the Tribunal may, on its own initiative or at the request of the Deputy Minister or any other person or of any government, review the order or finding and, in the making of the review, may re-hear any matter before deciding it.*
>
> *(3) The Tribunal shall not initiate any review pursuant to subsection (2) or (2.1) at the request of any person or government unless the person or government satisfies the Tribunal that a review is warranted.*
>
> *(4) On completion of a review pursuant to subsection (2) of an order or finding, the Tribunal shall make an order rescinding the order or finding or continuing it with or without amendment, as the circumstances require, and give reasons for the decision.*

The Tribunal is of the view that section 76 of SIMA provides it with a broad discretion in deciding whether to initiate a review, in conducting a review and in disposing of a review. The Tribunal's review power has been subject to limited judicial consideration. However, similar review powers of other administrative tribunals have been characterized by the Supreme Court of Canada as a "plenary independent power.[19]"

The Tribunal conducts two types of reviews, "sunset" or expiry reviews and "interim" reviews. United's request is for an interim review. In its submission, the CSI states that, in deciding whether to initiate a review, the Tribunal must determine if there has been a significant change in circumstances such as to warrant a review. This submission reflects the fact that the Tribunal has historically conducted interim

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19. *Labour Relations Board of the Province of British Columbia and British Columbia Interior Fruit and Vegetable Workers Union, Local 1572 v. Oliver Co-Operative Growers Exchange*, [1963] S.C.R. 7 at 12; *Bakery and Confectionery Workers International Union of America Local No. 468 and Matti Salmi and Svend Nielsen v. White Lunch Limited*, [1966] S.C.R. 282 at 294; and *The Zeballos District Mine & Mill Workers Union, Local 851 v. The Labour Relations Board of British Columbia*, [1966] S.C.R. 465 at 473.

reviews where there was a reasonable indication that the circumstances which underpinned the making of a finding had materially changed.

However, the Tribunal notes that neither SIMA nor the *Special Import Measures Regulations*[20] (the Regulations) nor the Tribunal Rules specifies the grounds on which the Tribunal may initiate a review. In light of the broad review power provided by section 76 of SIMA, the Tribunal does not accept as a matter of law that, absent a material change in circumstances, it cannot, or should not, initiate an interim review.[21] In deciding whether to initiate a review, the Tribunal must, of course, exercise its discretion in a manner consistent with the objects of SIMA. In the Tribunal's view, the primary object of SIMA is to protect domestic industries from material injury or threat thereof caused by the dumping or subsidizing of imports.

The Tribunal has consistently maintained that subsection 76(3) of SIMA casts an initial onus on persons requesting a review to satisfy the Tribunal that a review is warranted. The Tribunal, in this case, agrees with that view. In Request for Review No. RD-93-001,[22] the Tribunal stated:

> *Subsection 76(3) of SIMA provides that the Tribunal shall only review a finding at the request of any person or government if that person or government requesting the review satisfies the Tribunal that such a review is warranted. Therefore, the information provided by that person or government has to be of a nature sufficient to meet this preliminary condition imposed by statute. The Tribunal must be satisfied, on the basis of the facts presented to it by the parties interested in the review, that a review is warranted.*[23]

REASONS FOR DECISION

Coca-Cola

Coca-Cola requested that the Tribunal review its decisions not to treat liquid sugar as a separate class of like goods and not to exclude liquid sugar from its threat of injury findings. In support of its request, Coca-Cola referred the Tribunal to certain confidential documents filed in the public interest investigation which, it argued, bolstered its contention that competition from high-fructose corn syrup (HFCS), and not imports of the subject goods, determines the sales volume and price of liquid sugar. The Tribunal has reviewed the referenced documents.

In its statement of reasons in the inquiry, the Tribunal concluded that liquid sugar should not be treated as a separate class of like goods on several grounds, including its view that "liquid sugar and other forms of the subject goods have the same end use functionally and compete with and, in many applications,

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20. SOR/95-26, Canada Gazette Part II, Vol. 129, No. 1, January 11, 1995, at 80.
21. *Re Commercial Union Assurance v. Ontario Human Rights Commission* (1987), 38 D.L.R. (4th) 405 (Ont. H.C.J. Div. Ct.), aff'd (1988), 47 D.L.R. (4th) 477 (Ont. C.A.); and *Re Merrens v. Municipality of Metropolitan Toronto* (1973), 33 D.L.R. (3d) 513 (Ont. H.C. Div. Ct.).
22. *Bicycles, Assembled or Unassembled, with Wheel Diameters of 16 Inches (40.64 cm) and Greater, and Frames Thereof, Originating in or Exported from Taiwan and the People's Republic of China*, Canadian International Trade Tribunal, Order and Statement of Reasons, September 17, 1993.
23. *Ibid.* at 2.

are substitutable for one another.[24]" The Tribunal also decided against granting a series of requested exclusions on the basis that all of the exclusions, including the exclusion for liquid sugar, were "in respect of, or related to, goods which the domestic industry currently produces and which are readily substitutable for, and compete directly with, domestically produced goods.[25]" The Tribunal noted that virtually all of the subject goods investigated by the Deputy Minister were found to have been dumped or both dumped and subsidized at significant weighted average margins of dumping and levels of subsidy. Competition from HFCS, and its impact on refining margins, was also addressed in the Tribunal's statement of reasons in the inquiry.[26]

The documents, to which Coca-Cola referred, do not alter the fact that most liquid sugar is simply granulated sugar with water added, nor do they add significantly to the Tribunal's knowledge of the competitive relationship between liquid sugar and HFCS. The Tribunal is, therefore, of the view that they do not serve to raise a doubt as to the continuing validity of the Tribunal's conclusions regarding liquid sugar or the continuing appropriateness of the Tribunal's findings as a whole. The Tribunal is not, therefore, satisfied that a review is warranted on the basis of the grounds cited by Coca-Cola.

United

As noted, United has raised three grounds for review. The Tribunal has elected to address United's "changed circumstances" first, following which it will address United's other two grounds. The Tribunal has chosen to address the grounds in this order as the factual summary required for considering United's "changed circumstances" ground is helpful in considering the remaining two grounds.

Changed Circumstances

As set out in the Tribunal's statement of reasons denying a request for review in Request for Review No. RD-89-009,[27] the Tribunal has maintained a relatively high threshold for the initiation of interim reviews. While not bound by its previous decisions, the Tribunal, in this case, finds its approach to date to be sound. In Request for Review No. RD-89-009, the Tribunal stated:

> *The Tribunal notes that the purpose of a review under section 76 of SIMA is to reexamine an existing finding of injury to domestic production to determine whether there are grounds for continuing, modifying or eliminating the finding. Such grounds would exist if the conditions which gave rise to the injury had changed materially so that the finding was no longer appropriate in whole or in part. Information relevant to such a review might include changes in industry structure, financial circumstances, product mix,*

24. *Supra* note 2, Statement of Reasons at 14-15.
25. *Ibid.* at 40.
26. *Ibid.* at 28.
27. *Subsidized Grain Corn in all Forms, Excluding Seed Corn, Sweet Corn and Popping Corn, Originating in or Exported from the United States of America, with the Exception of Grain Corn for Consumption in British Columbia and Certain Yellow and White Dent Corn*, Order and Statement of Reasons, April 9, 1990.

> *marketing or consumption patterns as well as, in countervail cases, significant changes of a permanent nature in subsidy levels.*[28]

The substance of the foregoing passage has been cited with approval by the Tribunal in several request for review cases.[29] The Tribunal has, from time to time, found that the circumstances underpinning a finding had changed sufficiently to warrant a review. However, consistent with the approach espoused in Request for Review No. RD-89-009, it has only done so where there was an indication of a fundamental change in circumstances. For example, in Review No. RR-91-005,[30] the Tribunal found that a review was warranted where there was evidence that "the sole Canadian producer ... no longer made the subject goods.[31]" In Review No. RR-94-001,[32] the Tribunal decided to initiate an interim review where it was of the view that there was a reasonable indication of changes in the BC market for beer, such as to raise a doubt as to whether British Columbia continued to be a regional market. The finding of a regional market underpinned the Tribunal's injury finding in that case.

The changed circumstances, on which United and those that support its request rely, are, in substance, as follows:

- Redpath has embarked on a capacity expansion program which, when fully implemented, will reduce its production costs substantially;
- Redpath has implemented a marketing strategy to obtain certain of its domestic competitors' key accounts; and
- with its new capacity in place and its marketing plan implemented, Redpath could reduce its net margins, which could, in turn, have implications for its domestic competitors.

As noted above, in assessing whether a change in circumstances is sufficient to warrant a review, the Tribunal considers whether circumstances appear to have changed so materially as to call into question the

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28. *Ibid.* at 4.

29. See *supra* note 22; and *Women's Leather Boots and Shoes Originating in or Exported from Brazil, the People's Republic of China and Taiwan; Women's Leather Boots Originating in or Exported from Poland, Romania and Yugoslavia; and Women's Non-Leather Boots and Shoes Originating in or Exported from the People's Republic of China and Taiwan*, Canadian International Trade Tribunal, Request for Review No. RD-93-004, Order and Statement of Reasons, March 8, 1994.

30. *Brass Replacement Key Blanks Originating in or Exported from Italy and Produced by or on Behalf of Silca S.p.A. of Italy, its Successors and Assigns*, Canadian International Trade Tribunal, Order and Statement of Reasons, June 1, 1992. See, also, *Certain Butt Welding Pipe Fittings Originating in or Exported from Japan*, Canadian International Trade Tribunal, Review No. RR-92-002, Order and Statement of Reasons, November 13, 1992.

31. *Key Blanks*, *ibid.* at 1.

32. *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*, Canadian International Trade Tribunal, Order and Statement of Reasons, December 2, 1994.

continuing appropriateness of an order or a finding. In finding that the dumping and subsidizing of the subject sugar, in the inquiry, were threatening to cause material injury to the domestic industry, the Tribunal had regard to the factors set out in subsections 37(2) and (3) of the Regulations.

In the inquiry, with respect to the European Union, the Tribunal found that the subsidies in issue would continue to be available to producers and exporters in the foreseeable future, that the European Union had gone from being a net importer of sugar in the 1970s to being the largest exporter of sugar in the world and that excess sugar stocks in the European Union were almost twice the annual apparent market in Canada. While the Tribunal acknowledged that imports of refined sugar originating in the European Union into the Canadian market had declined in recent years, it attributed this fact to the entry of certain suppliers from the United States and the domestic industry's decision to defend its market share.[33] The Tribunal found that the United States has a sugar program which supports the domestic price of sugar in the United States at levels well above world prices. The Tribunal heard that the program, combined with the capital-intensive nature of the sugar refining industry which provides an incentive to increase economies of scale and maximize throughputs, has led to production in excess of domestic needs.[34]

The Tribunal notes that United does not allege that the circumstances vis-à-vis the European Union or the United States have changed. The only circumstances which are alleged to have changed relate to the domestic industry. Further, these alleged changes relate almost exclusively to Redpath. While certain of Redpath's "changes" may impact Lantic and Rogers, the Tribunal is of the view that they have, in no way, served to lessen those companies' vulnerability to the threat posed by dumped or subsidized imports of refined sugar from the United States and the European Union.

The Tribunal is, therefore, left to consider whether the changes in Redpath's circumstances alone are sufficient to warrant a review. In this regard, the Tribunal first notes that, at the time of the inquiry, Redpath represented less than one third of domestic production capacity. In its statement of reasons in the inquiry, the Tribunal examined the effect of dumping and subsidizing and found that the domestic industry had adopted a "zero tolerance" pricing strategy in order to retain market share. The Tribunal found that the primary cause of the decline in the industry's net margins were sales and offerings of dumped and subsidized sugar. In making its threat of injury findings, the Tribunal stated that, without the imposition of anti-dumping and countervailing duties, downward pressure on net margins would resume[35] and that the domestic industry could not continue its "zero tolerance" strategy indefinitely.

In light of the foregoing, the Tribunal does not consider it unusual that Redpath has embarked on a program to reduce costs and make itself more competitive, nor can it accept that increased competition between the domestic producers during and following the Tribunal's inquiry is grounds for a review of its findings. The Tribunal notes that Redpath's expansion will not be fully implemented until January 1997. It also notes that the savings that Redpath hopes to realize from the expansion are estimates, based on Redpath achieving a certain level of throughput. Whether Redpath ultimately achieves the cost savings estimated and, more particularly, whether it is able to secure all of the necessary throughput remain to be seen.

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33. *Supra* note 2, Statement of Reasons at 34-35.
34. *Ibid.* at 35-37.
35. Pressure had been temporarily alleviated because, following the Deputy Minister's preliminary determination, virtually all dumped and subsidized imports had disappeared from the market.

Moreover, the fact that Redpath may be willing to accept net margins at or near pre-investigation levels is not, by itself, evidence that the findings are no longer appropriate. If Redpath is able to reduce its costs of production in the order of magnitude estimated, it may be able to accept net margins comparable to pre-investigation levels on some of its accounts and still earn an acceptable level of profit.[36] However, the Tribunal finds no basis for believing that, if the findings were rescinded, imports of refined sugar from the United States and the European Union would not resume at dumped and subsidized prices. In the Tribunal's statement of reasons in the inquiry, it stated:

> *In summary, the sugar programs operating in the United States and the European Union provide incentives for sugar producers in those jurisdictions to produce refined sugar in excess of their respective needs. These surpluses must be sold on the export market or stored. Moreover, both jurisdictions have programs that encourage exports of refined sugar. Although the United States and Europe are among the largest markets for refined sugar in the world, these markets are all but closed to imports. Consequently, it is clear that the United States and Europe will not be exporting to each other's markets. With Canada being a large open market for sugar and being within a reasonable shipping distance, particularly from the United States, it is also clear to the Tribunal that exporters in the United States and the European Union will have a continuing incentive to sell in this market. Due to the very high level of price support in those jurisdictions, refined sugar exported to Canada will almost certainly be dumped and, in the case of exports from the European Union, dumped and subsidized*.[37]

As noted, United has not alleged that dynamics of the US and EU markets have changed, and the Tribunal can find no basis for concluding that sugar exporters in the United States and the European Union would not price their sugar at levels that would enable them to sell in the Canadian market. The Tribunal notes the evidence of United in the inquiry that, in the event the Tribunal had found no injury, United would likely have been right back in the Canadian market.[38]

For the foregoing reasons, the Tribunal is not satisfied that the changes in circumstances, on which United relies, warrant a review.

Relevant Material not Filed with the Tribunal in the Inquiry

United submits that documents relevant to the Tribunal's inquiry and available to the domestic industry at the time of that inquiry should have been put on the record and that counsel should have had an opportunity to cross-examine on those documents. The documents in question are the same documents discussed above, relating to Redpath's expansion strategy.

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36. Net margins represent the difference between the refiner's selling price to the customer and the refiner's cost of raw sugar. It is the amount of money that the refiner has left after paying for raw sugar with which it can cover its internal expenses (production, selling and administrative, transportation, etc.) and contribute to profits. Thus, as the costs of production are reduced through greater economies of scale, all other things being equal, the refiner can theoretically accept a lower net margin and still maintain an acceptable level of earnings.

37. *Supra* note 2, Statement of Reasons at 37.

38. *Ibid.*

The CSI submits that Redpath's capacity expansion plan was not relevant to the Tribunal's inquiry, as it was contingent upon Redpath obtaining an injury finding and because the Tribunal's period of inquiry focused on what occurred in the 4 1/2 years that preceded the Deputy Minister's investigation. The CSI submits that, even if the information in question was relevant, it was not "material."

The Tribunal is of the view that, in assessing the relevance of Redpath's expansion plan, Phase I of Redpath's plan must be considered independently of Phase II. The CSI's argument regarding relevance, at least insofar as it relates to Phase I, is flawed. First, the Tribunal notes that Phase I was unconditionally approved in the spring of 1995. Second, the Tribunal cannot accept the argument that, because an event occurs after the period of inquiry chosen by the Tribunal, it is not relevant to an inquiry. It must be recalled that Phase I of Redpath's capacity expansion plan was implemented largely to allow Redpath to gain market share in certain higher margin sectors of the market. It would also result in a modest reduction in Redpath's cost of goods sold. As such, it was relevant to the issue of threat of injury and perhaps injury.

In the Tribunal's view, Phase II of Redpath's capacity expansion plan was of little or no relevance to the Tribunal's inquiry. This view is based on the fact that Phase II was contingent upon the domestic industry securing an injury finding. Whether Redpath would have gone back to Tate & Lyle if the industry had not secured an injury finding and, more importantly, whether Tate & Lyle would have then approved Phase II are, in the Tribunal's view, within the realm of speculation.

In the Tribunal's view, Redpath's plan to target its competitors' accounts was of marginal relevance to the inquiry. Redpath's plan was not implemented until after the issuance of the Deputy Minister's preliminary determination. The Tribunal notes that, in the inquiry, the Tribunal did hear testimony concerning one large account that moved to Redpath from another domestic producer in September 1995. However, following the preliminary determination, provisional duties were imposed, and virtually all dumped and subsidized imports disappeared from the market. In the Tribunal's view, the intra-industry competition which occurred in this post-preliminary determination market, in the absence of dumped and subsidized goods, is of little assistance in understanding the dynamics of the marketplace and, in particular, in determining whether dumping or subsidizing is causing injury or threat of injury. The Tribunal notes that all lost accounts which formed the basis of Lantic's portion of the injury case had been lost in the period before Redpath initiated its strategy. In other words, the lost accounts that the Tribunal considered in reaching its findings cannot be attributed to Redpath's strategy.

United's "relevant evidence" ground is, in substance, a request for the Tribunal to review its findings on the basis that there was relevant evidence in existence at the time of the inquiry which was not put before the Tribunal. The Tribunal is of the view that its review power is sufficiently broad to allow it to initiate a review on this basis, if it considers that the circumstances warrant such a review.[39] The Tribunal is not aware of having previously considered a request for review based on "fresh evidence." In considering this question, the Tribunal, therefore, found it helpful to consider the approaches taken by other tribunals in like circumstances. In *Re Jordan v. York University Faculty Association*,[40] the High Court of Justice for Ontario considered a decision of the Ontario Labour Relations Board (LRB) not to review a matter. The request for review had been based, in part, on information which was in existence at the time of the LRB's original

39. See *Re Commercial Union Assurance v. Ontario Human Rights Commission*, *supra* note 21.
40. (1977), 19 O.R. (2d) 226 (Ont. H.C.J. Div. Ct.).

proceeding, but not put into evidence. In deciding not to initiate a review, the LRB stated that the party seeking a review had to demonstrate:

- that the alleged new evidence proposed to be addressed could not have been obtained by reasonable diligence and presented at the original hearing; and
- that there was a strong probability that the new evidence would have had a material and determining effect on the decision sought to be set aside.

In upholding the LRB's decision, the High Court of Justice for Ontario noted that the test employed by the LRB was similar to that employed by the courts in deciding whether to receive "fresh evidence after a judgment has been pronounced.[41]" It observed that the LRB had authority to determine its own practice and procedure. It then concluded that the LRB had done nothing improper in adopting the two-part test.

Notwithstanding the fact that the LRB's test was upheld in *Re Jordan*, the Tribunal is of the view that, for its purposes, the second part of the LRB's test may be too stringent. Although not a "fresh evidence" case, the Tribunal prefers the approach advocated by the Federal Court of Appeal in *Wilson Reinerio Castro v. The Minister of Employment and Immigration.*[42] In that case, the Federal Court of Appeal considered the Immigration Appeal Board's (IAB) authority to reopen an appeal decision. The IAB had declined to reopen its decision on the basis that the evidence in question was not such as to "probably, if not almost conclusively, change the results of the previous hearing.[43]" Noting that the underlying purpose of the IAB's jurisdiction is equitable, the Federal Court of Appeal overturned the IAB's decision on the ground that the IAB had applied too stringent a test. The Federal Court of Appeal stated:

> *In order to justify reopening, it seems to me the [proffered] evidence need only be such as to support a conclusion that there is a reasonable possibility as opposed to probability that it could lead the [IAB] to change its original decision.*[44]

As noted above, the Tribunal is of the view that Phase I of Redpath's expansion plan was of relevance to the inquiry. However, while directionally the expansion could make Redpath less susceptible to the threat of injury posed by dumped or subsidized goods, in terms of materiality, the Tribunal is not satisfied that, had it been made aware of Phase I at the time of its inquiry, there was a reasonable possibility that it would have altered the findings. In coming to this view, the Tribunal is mindful of the fact that none of the evidence regarding the United States, the European Union, Rogers or Lantic has been impugned and that the preponderance of Redpath's evidence remains intact. Finally, the Tribunal does not believe that, because Phase I of Redpath's plan was not known to parties in the inquiry, lines of inquiry which could reasonably have been expected to affect the ultimate findings were foreclosed or averted. In this regard, the Tribunal

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41. *Ibid.* at 236. See, also, *Royal Trust Co. v. E.M. Jones*, [1962] S.C.R. 132; and *Northwest Territories (Commissioner) v. Simpson Air (1981) Ltd.*, unreported, [1994] N.W.T.J. No. 27, June 2, 1994, (N.W.T.S.C.).
42. Unreported, [1988] F.C.J. No. 532, Court File No. A-149-87, June 3, 1988 (F.C.A.).
43. *Ibid.* at 5.
44. *Ibid.*

notes that the question of intra-industry competition was addressed at length in the inquiry and dealt with in the Tribunal's findings.[45]

The Tribunal is of the view that the Federal Court of Appeal's approach in *Castro* parallels its approach with respect to "changed circumstances" reviews. The "changed circumstances" approach contemplates the Tribunal looking at all of the circumstances of the case and assessing whether the finding remains appropriate. The approach presumes that, in the absence of a reasonable indication of such changed circumstances, the finding should not be reviewed. The Federal Court of Appeal's test requires the IAB to ask whether there is a reasonable possibility that the new evidence could change its decision. Both tests focus on whether or not the new information or evidence serves to raise a doubt as to the continuing appropriateness or correctness of the original decision.

In the Tribunal's view, whether a request for review is based on post-finding changes in circumstances or fresh evidence, the fundamental question remains the same: in light of the changed circumstances or the fresh evidence, does the Tribunal's finding continue to be appropriate? Put another way, should the Tribunal initiate a review of a finding, even if it concludes that neither the changed circumstances nor the fresh evidence provides a reasonable indication that the finding is no longer appropriate?

There is a substantial overlap between United's "changed circumstances" ground and its "fresh evidence" ground; the former relies on Redpath's expansion strategy as changed circumstances warranting a review, while the latter cites the fact that evidence regarding those same matters was not placed before the Tribunal in the inquiry. Given this overlap and the Tribunal's view that the fundamental question is the same, regardless of whether it is dealing with a request based on changed circumstances or fresh evidence, for the reasons set out above and in the preceding section, the Tribunal is not satisfied that a review is warranted on the basis of United's "relevant evidence" ground.

Integrity of the Tribunal's Inquiry Process

United submits that a number of inconsistencies exist between the record in the inquiry and the record in the public interest investigation. The evidence in question relates to Redpath's marketing strategy, forecast returns in the event of an injury finding and plans for capacity expansion. United submits that, in light of the "selective" manner in which Redpath chose to tender its evidence in the inquiry, the Tribunal should conduct a review and rescind its threat of injury findings to protect the integrity of the Tribunal's process.

With respect to United's allegation that the Tribunal was misled regarding Redpath's plan to take accounts away from its domestic competition, the CSI submits that there is considerable evidence on the record in the inquiry to indicate that Redpath was competing vigorously with other domestic producers for market share. The CSI submits that, with respect to capacity expansion, the Tribunal was not misled, as Redpath's plan for expansion was not relevant to the Tribunal's inquiry.

The Tribunal has not previously been confronted with a request for review based on grounds of "integrity." There are relatively few cases in which similar issues have been canvassed. The Tribunal has considered several cases involving decisions or judgements allegedly obtained by fraud and one case in

45. *Supra* note 2, Statement of Reasons at 29.

which a court addressed a tribunal's power to review its decision purely to uphold the integrity of its process. These two types of cases are discussed in turn below.

- Fraud

The cases in which administrative tribunals have set aside their decisions on the basis of fraud or misrepresentation typically involve instances where a successful party has misled a tribunal in respect of some fundamental aspect of a case.[46] The cases dealing with the setting aside of trial judgements obtained by fraud are similar in this respect. In *100 Main Street East Ltd. v. Sakas*,[47] the Ontario Court of Appeal upheld a lower court ruling setting aside a trial judgement obtained by fraud. In that case, the appellant, who had agreed to sell some land to the respondent, refused to close the sale, and the respondent brought an action. The appellant maintained that he could not close because his partner would not provide a deed for the purchaser. However, he neglected to tell the Ontario High Court that, after signing the agreement of purchase and sale with the respondent, he entered into a second agreement pursuant to which he agreed to sell the same land to his partner, albeit at a higher price. After discussing a number of previous cases, the Ontario Court of Appeal stated:

> *These authorities make it clear that the new evidence of fraud must relate to the "foundation" of the decision or be "material" to the claim or defence, but need not necessarily amount to a "determining factor in the result."*[48]

There are two common elements in the foregoing cases. First, of course, there must have been fraud. Most commonly, the fraud takes the form of a party or witness misleading the court concerning some matter at issue in the proceeding. Second, the fraud must be in respect of a matter which goes to the foundation of or is material to the decision. The Tribunal considers this general approach to be sound and has applied it in respect of those areas where it is alleged that the Tribunal was misled.

- Redpath's Capacity Expansion

The CSI contends that, as Redpath's capacity expansion plan was not approved until after the period covered by the Tribunal's questionnaires, which ended on March 31, 1995, Redpath was not obligated to provide this information. In the strictest technical sense, this response may be true, but it is less than candid, as it would have been very apparent to Redpath that Phase I of its expansion plan would have been of interest to the Tribunal and to other parties. The admitted fact that Phase I of the expansion plan was approved shortly after the Tribunal's period of inquiry strongly supports the notion that it would have been well developed in the latter part of that period. Moreover, the fact that an event occurs after the period selected for review does not render it irrelevant.

However, for the reasons set out above, the Tribunal is not satisfied that Phase I of the expansion plan was "material." Moreover, as Redpath was not specifically asked about its capital investment plans for the period after March 31, 1995, it is difficult to characterize Redpath's omission as fraudulent. The Tribunal

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46. For example, see *Messier v. Canada (Solicitor General)*, unreported, [1985] F.C.J. No. 227, Appeal No. A-648-84, March 20, 1985 (F.C.A.).
47. (1975), 58 D.L.R. (3d) 161 (Ont. C.A.).
48. *Ibid.* at 165.

has already indicated that, in its view, Phase II of Redpath's expansion plan was of little or no relevance to the inquiry and, for that reason, the Tribunal does not view it as "material."

- Redpath's Plan to Target Other Domestic Producers

Mr. Ferrier was asked directly, on several occasions, whether or not Redpath had a plan to target accounts held by its domestic competitors.[49] He responded consistently by saying that Redpath intended to obtain additional volume out of the market and that this could include some volumes from its domestic competitors. However, in the Tribunal's view, documents filed in the Tribunal's public interest investigation indicate that Redpath did have a strategy to pursue certain of its competitors' accounts.[50] The Tribunal has already concluded that the plan was of marginal relevance to the inquiry. Notwithstanding its view regarding relevance, the Tribunal is troubled by what it sees as Mr. Ferrier's lack of candor in responding to this question. The Tribunal expects all parties and witnesses who appear before it to respond to questions in a way which is both truthful and complete.

- Calculations Regarding Return on Capital Employed (ROCE)

As United points out, Mr. Ferrier was asked what ROCE Redpath would achieve in 1996 if it obtained an injury finding. He responded that it would depend on the marketplace.[51] That response, while not untrue, could well lead to the conclusion that Redpath had not performed any such projections. However, documents filed in the public interest investigation indicate that, at the time of the inquiry, Redpath had made detailed rate of return projections. While projections of what a company might earn if it obtains an injury finding are of marginal relevance to the questions of injury and threat thereof, Mr. Ferrier was asked the question and gave an answer which could have misled the Tribunal. Again, notwithstanding its view regarding the relevance of this evidence, the lack of candor displayed by Mr. Ferrier is of concern to the Tribunal.

- Integrity

In *Re Canadian Pacific Express Ltd. v. Ontario Highway Transport Board*,[52] the question of whether the Ontario Highway Transport Board (the Board) had jurisdiction to rehear certain applications was referred to the High Court of Justice for Ontario by way of stated case. The Board had decided, on its own initiative, to rehear a matter after it was alleged by an unsuccessful applicant that its reasons for decision rejecting the application were written by counsel for one of the parties that had opposed the application. The Board had a broad review power and the High Court of Justice for Ontario found that the Board did

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49. See, for example, Inquiry No. NQ-95-002, Transcript of *In Camera* Hearing, Vol. 2, October 4, 1995, at 432.
50. See Public Interest Investigation No. PB-95-002, Tribunal Exhibit PB-95-002-7.1, Administrative Record, Vol. 4A at 32, 185-86 and 189-92.
51. Inquiry No. NQ-95-002, Transcript of *In Camera* Hearing, Vol. 1, October 3, 1995, at 76-77 and Vol. 2, October 4, 1995, at 423-24.
52. (1979), 102 D.L.R. (3d) 288 (Ont. H.C.J. Div. Ct.).

have the power to rehear the application.[53] In the course of its ruling, it observed that the Board had a duty to maintain the integrity of its process. It stated:

> *When allegations are raised calling into question the integrity of the decisional process, whether they are proved in a Court of law or not, the Board, if it concludes they cast a significant doubt on the integrity of its proceedings, may take steps to remove the doubt by exercising the jurisdiction [to initiate a review].*[54]

The Tribunal is troubled by the lack of candor alluded to above. However, when viewed in the overall context of the subject proceedings and the large body of evidence that has not been called into question, the Tribunal does not consider the transgressions to be such as to cast a shadow over the Tribunal's integrity as an institution or the fundamental integrity of its decision-making process in this case.

The Tribunal is not satisfied that a review is warranted and, pursuant to subsection 76(3.1) of SIMA, has therefore decided not to initiate a review.

Lyle M. Russell
Lyle M. Russell
Presiding Member

Charles A. Gracey
Charles A. Gracey
Member

53. Section 17 of the Transport Board's enabling legislation provides that it "may at any time and from time to time rehear any application and may review, amend or revoke its decisions, orders."
54. *Supra* note 52 at 297.

DISSENTING OPINION OF MEMBER COATES

I have read the majority's summary of the facts and agree that they accurately reflect, in substance, the history of this matter. However, in contrast with the conclusion reached by my colleagues, I am of the opinion, based on the facts, that a review of the Tribunal's findings is warranted in this case.

In my view, when a party forming part of the domestic industry appears before the Tribunal, it bears the onus of providing full disclosure, with respect to both its activities to the date of the hearing and its plans for the future. Anything less misleads the Tribunal as to the true circumstances in which the domestic industry finds itself. While I do not consider that the evidence withheld by Redpath in respect of its capacity expansion or of its intention to target certain of its competitors' accounts amounts to fraud, I do believe that the Tribunal's findings were tainted by the non-disclosure of that information. Even if a review of the Tribunal's findings might lead to the same result as in the inquiry, it is crucial to the integrity of the Tribunal's process that a review be conducted to ensure that all the facts relevant to the findings be disclosed and that both the parties and the Tribunal have an opportunity to consider them.

With respect to the Tribunal's duty to maintain the integrity of its process, I find the following excerpts from the decision in *Re Canadian Pacific*[55] to be directly on point:

> *The respondents argue that the allegations have not been proven and, on the material before this Court, that is so. But there can be no question that the allegations throw serious doubt on the Board's decision, and, in my opinion, it may remove that doubt and clear the air by initiating a rehearing under s. 17. Whether the allegations are established is not the real issue. What is at stake is the integrity of the Board's process and, in my view, it is for the Board to determine in its judgment whether the charges warrant ordering the matter reheard.*
>
> ...
>
> *Indeed, it is the respondents' position, as I understand their argument, that a hearing by the Board on the rehearing question would serve no useful purpose in this particular situation. They contend that the Board erred, in any event, "in taking into account an alleged 'shadow' cast on the writing of the reasons", and that an inquiry into the facts was required but such an inquiry, the argument runs, is beyond the statutory power of the Board and could be conducted only by the Courts.*
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> ...
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> *For reasons already indicated, I think that position untenable. The Board has a duty to maintain the integrity of its administrative responsibility. When allegations are raised calling into question the integrity of the decisional process, whether they are proved in a Court of law or not, the Board, if it concludes they cast a significant doubt on the integrity of its proceedings, may take steps to remove the doubt by exercising the jurisdiction conferred on it by s. 17.*

55. *Ibid.* at 296 and 297.

In my view, in deciding whether a significant doubt has been cast on the integrity of the Tribunal's process such as to warrant a review, what is relevant is that, irrespective of the Tribunal's views as to the materiality of the information, Redpath considered the information to be material to the Tribunal's findings and deliberately withheld the information for fear of the negative impact that it might have on the Tribunal's findings.

Although it might be contended that, as Redpath represents less than one third of the domestic industry, the information is of marginal consequence to the Tribunal's threat of injury findings, Redpath is nevertheless a substantial player in the marketplace. Redpath's capacity expansion, moreover, will make it an even more significant player, which position is further enhanced by virtue of the protection afforded to it by the Tribunal's findings.

Because counsel for the exporters and for the importers did not have an opportunity to test the evidence during the inquiry, it is impossible to say, with any certainty, what would have flowed from disclosure of such information at that time. Accordingly, in my view, the evidence withheld by Redpath casts a "shadow" on the Tribunal's findings and, as such, calls into question the integrity of the Tribunal's process. Under the circumstances, it is my view that a review of the Tribunal's findings is warranted.

Robert C. Coates, Q.C.
Robert C. Coates, Q.C.
Member