



Ottawa, Monday, April 28, 2003

Expiry Review No. RR-2002-002

IN THE MATTER OF an expiry review, under subsection 76.03(3) of the *Special Import Measures Act*, of the finding made by the Canadian International Trade Tribunal on April 29, 1998, in Inquiry No. NQ-97-002, concerning:

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

ORDER

The Canadian International Trade Tribunal, under the provisions of subsection 76.03(3) of the *Special Import Measures Act*, has conducted an expiry review of its finding made on April 29, 1998, in Inquiry No. NQ-97-002, concerning certain prepared baby foods originating in or exported from the United States of America.

Pursuant to subparagraph 76.03(12)(a)(ii) of the *Special Import Measures Act*, the Canadian International Trade Tribunal hereby rescinds the finding concerning the above-mentioned goods.

Patricia M. Close
Patricia M. Close
Presiding Member

Zdenek Kvarda
Zdenek Kvarda
Member

Ellen Fry
Ellen Fry
Member

Susanne Grimes
Susanne Grimes
Acting Secretary

Ottawa, Monday, April 28, 2003

Expiry Review No. RR-2002-002

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

Special Import Measures Act—Whether to rescind or continue, with or without amendment, the finding made by the Canadian International Trade Tribunal on April 29, 1998, in Inquiry No. NQ-97-002.

Place of Hearing: Ottawa, Ontario
Dates of Hearing: March 3 to 6, 2003
Date of Order and Reasons: April 28, 2003

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Zdenek Kvarda, Member
Ellen Fry, Member

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Josephine A.L. Palumbo
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(Exporter/Importer/Other Party)

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Ottawa, Monday, April 28, 2003

Expiry Review No. RR-2002-002

IN THE MATTER OF an expiry review, under subsection 76.03(3) of the *Special Import Measures Act*, of the finding made by the Canadian International Trade Tribunal on April 29, 1998, in Inquiry No. NQ-97-002, concerning:

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

TRIBUNAL: PATRICIA M. CLOSE, Presiding Member
ZDENEK KVARDA, Member
ELLEN FRY, Member

STATEMENT OF REASONS

BACKGROUND

This is an expiry review, under subsection 76.03(3) of the *Special Import Measures Act*,¹ of the finding made by the Canadian International Trade Tribunal (the Tribunal) on April 29, 1998, in Inquiry No. NQ-97-002, concerning 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.

On June 28, 2002, pursuant to subsection 76.03(2) of *SIMA*, the Tribunal issued a notice of expiry² informing interested parties that its finding made on April 29, 1998, in Inquiry No. NQ-97-002, was scheduled to expire on April 28, 2003. Based on the submissions received, the Tribunal determined that an expiry review was warranted and, on August 19, 2002, pursuant to subsection 76.03(6) of *SIMA*, the Tribunal issued a notice of expiry review.³ This notice was forwarded to all known interested parties. As part of the expiry review, the Tribunal and the Canada Customs and Revenue Agency (CCRA) sent questionnaires to Canadian producers, importers and exporters/foreign producers of prepared baby foods. These questionnaires and the replies thereto formed part of the records of both the CCRA and the Tribunal.

On August 20, 2002, the Commissioner of the CCRA (the Commissioner) commenced an investigation to determine whether the expiry of the aforementioned finding was likely to result in the continuation or resumption of dumping of the subject goods. On December 17, 2002, the Commissioner determined that the expiry of the finding was likely to result in the continuation or resumption of dumping of the subject goods.

On December 18, 2002, the Tribunal began its inquiry, pursuant to subsection 76.03(10) of *SIMA*, to determine whether the expiry of the finding was likely to result in material injury to the domestic

1. R.S.C. 1985, c. S-15 [*SIMA*].
2. C. Gaz. 2002.I.2112.
3. C. Gaz. 2002.I.2763.

industry. As part of this process, the Tribunal sent questionnaires on market characteristics to H.J. Heinz Company of Canada Ltd. (Heinz Canada), Novartis Consumer Health Canada Inc. (Novartis) and purchasers of prepared baby foods. From the replies to the questionnaires sent by the Tribunal and the CCRA and information from other sources, the Tribunal's research staff prepared public and protected pre-hearing staff reports. The record of this expiry review consists of all relevant documents, including these staff reports, the original finding, the notice of expiry, the CCRA index of background information and related documents, and the public and confidential replies to the questionnaires. The record also includes replies to requests for information provided by the parties in accordance with directions from the Tribunal, as well as expert reports and rebuttals thereto filed by the parties. All public exhibits were made available to interested parties, while protected exhibits were provided only to independent counsel and experts who had filed a declaration and confidentiality undertaking with the Tribunal.

A public hearing was held in Ottawa, Ontario, from March 3 to 6, 2003.

The sole domestic producer, Heinz Canada, was represented by counsel at the hearing. Heinz Canada submitted evidence and made arguments in support of a continuation of the finding.

A foreign producer, Gerber Products Company (Gerber U.S.), a related importer, Novartis, and an interested party, the Commissioner of Competition, were also represented by counsel at the hearing. They submitted evidence and made arguments in support of a rescission of the finding.

The Tribunal also heard witnesses for three major retailers of prepared baby foods, i.e. Loblaw Companies Limited (Loblaw), Shoppers Drug Mart and Wal-Mart Canada Corp. (Wal-Mart).

PRODUCT

Product Definition and Description

The prepared baby foods subject to this inquiry are defined as certain 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. These goods are hereinafter referred to as CPBF.

CPBF are packed in hermetically sealed containers or glass jars and are commonly referred to in the trade as "jarred baby foods". They are prepared from a variety of ingredients and in different consistencies to be suitable for infants of different ages. They include various single ingredient preparations and combinations of ingredients, such as multiple vegetable or fruit mixtures and meat with vegetable preparations. These preparations may include other ingredients, such as rice, pasta or cereal, in addition to vegetables, fruit and/or meat. The foods meant as beginner foods, that is, for infants less than six months old, are generally single ingredient preparations, like carrots or peas, which are strained and puréed so they do not need to be chewed before being swallowed. Multiple ingredient preparations allow for the introduction of greater variety to the diet of growing infants, generally around the age of six months. The foods formulated for infants who are old enough to begin chewing solid foods, usually around the age of eight months, contain small pieces of fruit, vegetable or meat, not more than 6.5 mm in size, so they are still easy to swallow. Strained infant juices and junior juices are made in a number of varieties, such as orange and apple.

Certain kinds of commercially prepared baby foods are not subject to the inquiry. These include organic baby foods, frozen prepared baby foods, dry cereal mixes and “toddler” foods. Toddler foods are preparations intended for older children, typically 12 months of age and older, and contain larger pieces to challenge the child’s teeth.

Production Process

Ingredients, consistency and jar size distinguish each variety of CPBF. With some variations in cooking procedures due to differences in ingredients, all varieties of CPBF packed in glass jars are made according to the same basic procedures. The following steps describe Heinz Canada’s basic procedure for the production of CPBF:

- (1) raw materials are put in an initial tank for mixing/blending;
- (2) the mixture is passed through a series of screens and put into the final tank;
- (3) other meats and garnishes are added to the mixture in the final tank;
- (4) the mixture passes through a steam injector or votator to heat to fill temperature;
- (5) the mixture is passed through a screen and a line magnet for food safety purposes;
- (6) a de-aerator (vacuum) is used to remove bubbles;
- (7) the mixture is put into jars and capped;
- (8) the filled jars are sterilized and/or sealed and then passed through retorts;
- (9) the filled jars are x-rayed for quality control to detect air pockets, oversized particles or foreign matter;
- (10) the tamper-evident band is applied (in the case of the “Heinz” brand);
- (11) the jars are labelled, put in cases and warehoused for distribution.

DOMESTIC INDUSTRY

Heinz Canada, the only producer of CPBF in Canada, is wholly owned, directly or indirectly, by H.J. Heinz Company (Heinz U.S.) of Pittsburgh, Pennsylvania. It produces prepared baby foods for the Canadian market in its Leamington, Ontario, facility, where it also produces infant cereals, beans, pasta, ketchup and other tomato-based products. Heinz Canada has expanded through a number of acquisitions, including Omstead Foods Ltd. (Omstead) in 1991, Pablum Infant Cereals in 1995, Martin Pet Foods in 1996 (sold in 2002), the Libby canned bean and pasta business in 1996, and certain pasta lines from Borden in 2001. Omstead, which is a major supplier of ingredients for the production of CPBF in Canada, was sold in 2002 to Snowcrest Packers Ltd. However, Omstead continues to supply ingredients for CPBF to Heinz Canada.

Heinz Canada’s Leamington plant was established in 1909. The production of CPBF at this plant started in 1934. The Leamington plant has the capacity to produce 10.5 million case equivalents⁴ of baby food. The bulk of the plant’s production of CPBF is sold in the Canadian market. The Leamington plant also exports CPBF to Heinz Canada affiliates in certain export markets, such as the United States, the Russian Federation, the Middle East, Asia and the Caribbean.

4. A case equivalent is defined as 24 x 128-ml jars.

Heinz Canada produces a full line of CPBF. In October 2002, it introduced a discount brand of CPBF under the brand name of "Pablum".

Heinz Canada's primary distribution channels for CPBF are either directly or indirectly, through wholesalers/buying groups, to grocery retailers, drugstore chains and mass merchandisers. Since the finding, there has been a significant change in the relative importance of distribution channels, with a decline in the market share of drugstore retailers and an increase in the market share of mass merchandisers. The shift has, in large part, been due to the entrance of Wal-Mart as a retailer of CPBF.

In July 1998, the Commissioner of Competition commenced an investigation with respect to baby food. In July 2000, Heinz Canada executed an undertaking, which precludes it from engaging in certain anti-competitive marketing practices, such as exclusive or preferential supplier agreements and supply contracts for periods greater than one year. These practices were a feature of the aggressive competition between Heinz Canada and Gerber Canada Inc. (Gerber Canada) with respect to sales of CPBF during the 1995-97 period. The undertaking is for a period of 10 years, or 3 years after the rescission of the Tribunal's finding, and may be amended under certain circumstances.

IMPORTER AND EXPORTER

While the final determination of dumping in 1998 applied to all imports from the United States, the documentation named only one company, Gerber Canada, as an importer of CPBF. Until 1998, Gerber Canada imported prepared baby foods from its parent company, Gerber U.S. Since the finding in 1998, however, Gerber Canada has ceased to exist as a separate business operation and its exports of CPBF have ceased. Novartis assumed all responsibilities for the marketing of Gerber U.S.'s non-CPBF products in Canada. Novartis is related to Gerber U.S.'s parent company, Novartis AG Switzerland.

Prior to June 1990, Gerber Canada produced CPBF in Canada at a plant located in Niagara Falls, Ontario. However, it closed this plant in June 1990 and, subsequently, CPBF for the Canadian market were imported from Gerber U.S.'s Fremont, Michigan, plant. Gerber U.S. has a second plant in Fort Smith, Arizona. In April 1998, Gerber U.S. permanently closed its third plant in Asheville, North Carolina. At the same time, it disposed of all the equipment used in the Fremont plant to produce CPBF that met Canadian requirements for jar size. Gerber U.S. is currently the largest baby food producer in North America, with an estimated 70 percent share of the U.S. market. Heinz U.S. and Beech-Nut Nutrition Corp. (Beech-Nut) account for most of the remaining market share.

Gerber U.S. produces a full line of CPBF, with approximately 120 stock-keeping units (SKUs), many of which are packaged in plastic containers.

In late 2002, Heinz U.S.'s CPBF operations were spun off and merged with Del Monte Corporation, a subsidiary of Del Monte Foods Company (Del Monte), which will continue to produce and sell CPBF in the United States under the "Heinz" label until 2005. Thereafter, CPBF will be sold under the Del Monte label. Conditions of this transaction stipulated that Del Monte would not compete with Heinz U.S. and its affiliates with respect to designated products, including CPBF, in certain markets, including Canada, for a period of three years, effective on December 20, 2002. Similarly, Heinz U.S. and its affiliates are precluded from competing in Del Monte markets, including the United States, for four years.

Beech-Nut, the other major U.S. producer, has not sold CPBF in Canada since 1995, at least.

SUMMARY OF PAST FINDING

In coming to its conclusion that dumping by Gerber U.S. had caused material injury to Heinz Canada, the Tribunal found that Heinz Canada had been able to maintain its market share, in a shrinking market, by dropping its net net prices significantly. More particularly, the evidence showed how quickly and dramatically market shares could swing from retailer to retailer and from grocery channel to drugstore channel, depending on feature price initiatives by one distribution channel or another. In these circumstances, Heinz Canada had the option of losing volume and market share to Gerber Canada or suffering price erosion.

The Tribunal also noted that Heinz Canada's performance had been affected by, among other things, declining demand for commercially prepared baby foods and negative publicity arising from a then recent study that questioned the quality and nutritional value of Heinz Canada's commercially prepared baby foods. However, after accounting for all these factors, the Tribunal found that the residual effects attributable to dumping by Gerber U.S. still caused injury that was material in magnitude.

SUMMARY OF PUBLIC INTEREST INQUIRY

Based on the numerous submissions received by the Tribunal regarding the public interest, an inquiry under section 45 of *SIMA* was initiated to determine whether the full amount of anti-dumping duties (that the CCRA had determined to be about 60 percent of the normal value) or some lesser amount should be applied. Issues before the Tribunal included whether the anti-dumping duties were excessive, having regard to the market realities and the effects of the duty on competition and the consumer. On November 30, 1998, the Tribunal recommended in its report to the Minister of Finance that the anti-dumping duties on CPBF from the United States be reduced by approximately two thirds. On June 23, 1999, the Governor in Council, on the recommendation of the Minister of Finance, made the *Prepared Baby Food Anti-dumping Remission Order*.⁵ This order became effective on July 1, 1999, reducing the level of applicable anti-dumping duties on CPBF as recommended by the Tribunal.

POSITIONS OF PARTIES

Heinz Canada

Heinz Canada submitted that, if the finding were rescinded, the domestic industry would be materially injured through price undercutting, erosion or suppression, and through lost sales because of the presence of dumped imports. Heinz Canada also argued that recent changes in circumstances make it more vulnerable to injury now than it was at the time of the finding. Of particular note were the following facts: falling or flattening birth rates; longer maternity leave benefits, inducing a shift to more home-made baby foods; the increased presence of mass merchandisers in the market; and a greater concentration of grocery retailers. All these facts affect Heinz Canada's leverage in the marketplace. As well, Heinz Canada's undertaking to the Commissioner of Competition prevents it from entering into long-term or exclusive supply arrangements with customers, a situation which would not be faced by other CPBF competitors if they entered the Canadian market.

5. Canada Customs and Revenue Agency, *Statement of Reasons*, Tribunal Exhibit RR-2002-002-03A, Administrative Record, Vol. 1 at 28.

In addressing the expiry review factors enumerated in subsection 37.2(2) of the *Special Import Measures Regulations*,⁶ Heinz Canada identified four predominant factors: the likely volume of dumped imports; the likely prices of dumped imports; the likely performance of the domestic industry; and the likely impact of the dumped goods on the domestic industry.

In discussing the likely volume of dumped imports, Heinz Canada argued that there is no reason for the Tribunal to conclude that the volume will be any lower than it was prior to the finding. Heinz Canada also submitted that the evidence shows that not only Gerber U.S., but other U.S. producers have production facilities within efficient shipping distance to the Canadian market, the capability and interest to manufacture private-label CPBF and sufficient surplus production to supply a significant portion of the Canadian market. Moreover, given that some retailers have indicated that they only have shelf space to stock one brand, Heinz Canada might lose whole accounts. The volume shortfall for Heinz Canada, resulting from competition with dumped goods, would lead to a decline in net sales, gross profit and operating income in the millions of dollars.

As to the likely prices of dumped imports, Heinz Canada submitted that there was no evidence to support Gerber U.S.'s position that it could obtain a premium price for CPBF based on its plastic containers or long-standing consumer support for the "Gerber" name, and hence brand value, in the Canadian market. Heinz Canada further argued that retailer competition is still a factor in the marketplace and, therefore, as found by the Tribunal in 1998, Gerber U.S. will continue to counterbid Heinz Canada's price down, causing price erosion. As a result, Heinz Canada would have to reduce its prices to compete, which would reduce net sales, gross profit and operating income for Heinz Canada, again in a material fashion.

As regards the likely performance of the domestic industry, Heinz Canada submitted that Canadian sales of CPBF have declined and that home-made baby foods may further shrink the market for CPBF. Heinz Canada argued that its product development and marketing initiatives have not been able to overcome the underlying trend of declining demand.

With respect to the imminence of the injury, Heinz Canada argued that, beginning in the last half of the 2003-2004 fiscal year and over the first two years of resumed dumping, the decline in net revenues would be in the millions of dollars and would be even greater in the third year. There would be comparable declines in operating income. According to Heinz Canada, the evidence clearly establishes that it will experience material injury within the near term and that, beyond any reasonable doubt, it will experience material injury within the medium term if the finding is rescinded.

With respect to its conduct as a monopoly, Heinz Canada submitted that its alleged exploitation of its monopolistic power is irrelevant to the Tribunal's mandate in an expiry review. Heinz Canada argued that its estimates of injury flow directly from the dumping that would attend the entry by Gerber U.S. or other suppliers of CPBF. Heinz Canada further submitted that its export performance and any toll manufacturing of private-label CPBF are also irrelevant to this expiry review.

Gerber U.S.

Gerber U.S. submitted that the finding has sufficiently compensated the domestic industry for the injury due to dumping and that it should be rescinded in order to avoid producing a counter-productive effect that would further harm the market in which Heinz Canada operates as the sole supplier.

6. S.O.R./84-927 [*Regulations*].

With respect to the likelihood of injury, Gerber U.S. submitted that weight should be given to the performance of the domestic industry, which has been profitable in recent years and is now in a position to consider its strategic options from a position of security.

Gerber U.S. further argued that the likelihood of injury must be assessed in the context of the changes that have occurred in the Canadian market over the past five years. These changes include: Heinz Canada's status as a monopoly that holds 100 percent of the market and shelf space; retailers that are no longer bound by exclusivity agreements and long-term contracts; Heinz Canada's considerably better financial health; Heinz Canada's potential for exports; consumer interest in Gerber U.S.'s new convenient packaging and plastic formats; the stabilization of the number of births in Canada and more promising forecasts of a rise in the birth rate; and, finally, prices that have reached the point of elasticity in the market. Gerber U.S. also made reference to some of the factors that existed in the marketplace five years ago and that are still present, such as competition between retailers and the absence of private-label CPBF.

In considering likely volumes and likely prices of CPBF, Gerber U.S. submitted that it has reduced its capacity by closing one of its three plants and that it does not have an inventory of CPBF that can be sold in the Canadian market because of the regulated requirements for jar size in Canada. Gerber U.S. further submitted that, according to the evidence, it does not presently have any capacity to produce CPBF for the Canadian market. As for its export orientation, Gerber U.S. argued that it is not export driven and that, according to the evidence, its exports have remained a small and stable share of its total sales of CPBF. Also, it has a considerable number of export and investment opportunities other than in Canada.

Turning to the question of whether injury is likely to be caused by factors other than dumping, Gerber U.S. argued that the Tribunal must consider the impact of renewed competition in a monopolistic situation. Gerber U.S. submitted that the Tribunal must distinguish between the injury likely to be caused by resumed competition in the market and the injury that the domestic industry is likely to suffer because of resumed dumping. Gerber U.S. argued that Heinz Canada's monopolistic behaviour is highly relevant, as is shown by the lack of product innovations and plant improvements on the part of the domestic industry, Heinz Canada's reduced spending on research and development, the lack of variety of CPBF offered by Heinz Canada, and consumer preference for "Gerber" products. Moreover, even without competition, Heinz Canada has lost sales to organic and frozen baby foods.

Gerber U.S. submitted that these other factors are evidence of a lack of a causal nexus between the potential dumped imports and the alleged injury. Any vulnerability of the domestic industry is significantly reduced by the existence of regulatory barriers concerning jar sizes and formulations of the actual baby food and by monopoly rents earned over the past five years and should not be attributed to imports.

With respect to the imminence of the injury alleged by Heinz Canada, Gerber U.S. submitted that it has not made a corporate decision to re-enter the Canadian market. Furthermore, no marketing studies or research has been carried out to assess the financial viability of re-entry, and Gerber U.S. has no capacity to produce CPBF for the Canadian market. Gerber U.S. further argued that, if it does decide to re-enter the Canadian market and face all the constraints of that choice, such as the regulatory barriers, it would be absent from the market for at least 12 months. Thereafter, its entry would be gradual over the subsequent 18 to 24 months from the rescission of the finding.

The Commissioner of Competition

The Commissioner of Competition submitted that the finding should be rescinded and that any likelihood of injury alleged by Heinz Canada would not be material and would not be the result of any prospective dumping into Canada.

The Commissioner of Competition argued that the evidence does not indicate a direct causal link between material injury and the effects of dumping. Injury, if any, should be attributed to other factors, such as competition, self-imposed injury resulting from corporate agreements that exclude Heinz Canada from selling CPBF in the United States and the lack of product innovation on the part of the domestic industry.

In addressing Heinz Canada's alleged increased vulnerability to imports because of its undertaking to the Competition Bureau, the Commissioner of Competition argued that Heinz Canada has never lost any retail customers as a result of the undertaking. Moreover, the Commissioner of Competition noted that the undertaking could be varied or rescinded upon Heinz Canada's request in the event of a change in circumstances, such as Gerber U.S.'s re-entry into the Canadian market for CPBF. At any rate, the undertaking would automatically expire three years after the rescission of the finding.

With respect to the imminence of the injury alleged by Heinz Canada, the Commissioner of Competition submitted that, should Gerber U.S. decide to re-enter the Canadian market, it would be at a disadvantage to Heinz Canada until its products conformed to Canadian standards and gained customer support. Any market re-entry would take a considerable amount of time to become significant.

ANALYSIS

Subsection 37.2(2) of the *Regulations* lists several factors that the Tribunal may consider in addressing the question of likelihood of injury in cases where the Commissioner has determined that there is a likelihood of resumed dumping if the finding is allowed to expire. The Tribunal reviewed these factors and considered several to be relevant. The evidence before the Tribunal and a consideration of these factors lead the Tribunal to begin its analysis with an assessment of key developments in the markets for CPBF in both Canada and the United States since the finding. This assessment sets the context for assessing the factors considered by the Tribunal to be relevant. In assessing the relevant factors, the Tribunal first assesses the likely volumes and likely prices of dumped imports from the United States. The Tribunal then assesses other factors that are likely to affect the market for CPBF. The Tribunal concludes its analysis by an assessment of the likely effects of the dumped imports on the domestic industry.

In making its assessment of the likelihood of injury, consistent with previous cases, the Tribunal is of the view that the focus must be on circumstances that can reasonably be expected to exist in the near and medium terms as opposed to more remote circumstances. The period chosen by the Tribunal normally takes account of the particular circumstances and facts of the case. In this case, where there is little likelihood of dumped imports immediately after the expiry of the finding, the Tribunal considers that it is appropriate to examine a period of up to 24 months from the expiration of the finding.

Key Developments in the Market for CPBF

Canada

The most striking feature that emerges from the Tribunal's analysis of developments since the finding is that the apparent market for CPBF in Canada declined by almost 25 percent between 1998⁷ and 2003.⁸ Also, CPBF consumption per capita in Canada (defined as consumption per birth) is among the lowest of key developed country markets and approximately 17 percent below that of the United States.⁹

A major factor determining trends in the demand for CPBF in Canada is changes each year in the number of children between the ages of 4 and 18 months, which the industry typically tracks using data on the number of births per year.¹⁰ Between 1998¹¹ and 2003, the number of births in Canada, which approximates the number of children between the ages of 4 and 18 months, declined by just over 5 percent.¹² Over the same period, per capita consumption of CPBF declined by just over 20 percent.¹³ Clearly, the market for CPBF has declined by a much greater volume than can be accounted for by the trend in the number of births. Had per capita consumption remained at 1998 levels, the apparent market for CPBF would have been almost 26 percent larger than in 2003.

The Tribunal notes that, prior to the finding, Heinz Canada's historical share of the market for CPBF ranged from 75 to 80 percent, with Gerber Canada accounting for the remainder.¹⁴ By 1999, when Gerber U.S. had fully exited the Canadian market, the apparent market for CPBF had declined by 10 percent.¹⁵ Thus, despite achieving 100 percent of the market for CPBF, Heinz Canada's sales for 1999 show that it only picked up about one half of the sales volume held by Gerber Canada prior to its exiting the market.¹⁶ The Tribunal notes that only about 2 percentage points of the market decline over this period can be accounted for by the reduction in the number of births. The other 8 percentage points were never regained by Heinz Canada, and its market volume has continued to decline. Moreover, Heinz Canada's forecast sales volume for 2003 is only marginally above its sales in 1997,¹⁷ the last year analyzed in the original inquiry.

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7. Market figures are on a fiscal year basis, which runs from May to April. The year cited is the year in which the fiscal year ends.
 8. Based on the apparent market in 1997, as reported in Tribunal Exhibit NQ-97-002-7D (protected), Administrative Record, Vol. 2.1 at 95 and the apparent market in 2003, as reported in Manufacturer's Exhibit A-23A (protected), Administrative Record, Vol. 12A.
 9. Tribunal Exhibit RR-2002-002-RI-01C (protected), Administrative Record, Vol. 10A at 87.
 10. Trends in the number of births per year are highly correlated with trends in changes in the number of infants under the age of 2 years. Although 4-18 months is the age group of infants that consume CPBF, infants under 2 years is the most similar age group for which data are available.
 11. Population data are based on the census year, which runs from July to June.
 12. Tribunal Exhibit RR-2002-002-05, Administrative Record, Vol. 1A at 54.
 13. Based on the apparent market figures as per note 8 and the number of births reported in Tribunal Exhibit RR-2002-02-05, Administrative Record, Vol. 1A at 54.
 14. Tribunal Exhibit RR-2002-002-10.03, Administrative Record, Vol. 1.2 at 98.
 15. *Supra* at 8.
 16. Tribunal Exhibit NQ-97-002-7D (protected), Administrative Record, Vol. 2.1 at 95; Tribunal Exhibit RR-2002-002-06 (protected), Administrative Record, Vol. 2A at 48.
 17. Manufacturer's Exhibit A-23A (protected), Administrative Record, Vol. 12A.

The Tribunal notes that sales of alternatives to CPBF, such as jarred organic baby food, including Heinz Canada's jarred organic baby food, toddler and frozen baby foods increased during the period,¹⁸ contributing to the cannibalization of Heinz Canada's sales volume of CPBF. However, notwithstanding increased sales of these alternatives to CPBF, their overall volumes remained small compared with sales of CPBF. According to Heinz Canada, increased maternity leave benefits since the beginning of 2002, which may have induced a shift toward more home-made baby food preparation, are likely to have accounted for part of the decline as well.

The Tribunal also heard submissions that some of the market decline could be attributed to Heinz Canada's own actions. In this regard, the Tribunal notes that Heinz Canada has reduced the number of SKUs offered by almost 25 percent.¹⁹ In addition, wholesale prices have increased on average by just over 6 percent per year since 1998.²⁰ The Tribunal is cognizant of the fact that CPBF is often used in retail promotions to increase store traffic, whether as a loss leader or otherwise, and, therefore, that wholesale price increases are not always immediately reflected at the retail level. However, increased wholesale costs must eventually be passed through in order to minimize retail losses. The Tribunal also notes that approximately 25 percent of the market for CPBF is price conscious. The Tribunal also heard testimony that Heinz Canada reduced its promotional activities during the period²¹ and spends considerably less, approximately one third less as a percentage of net sales, than Gerber U.S. spends in the United States.²² Finally, the Tribunal notes that Heinz Canada has not introduced any significant product innovations within the category of CPBF since the finding.²³ The only innovation referred to by Heinz Canada was its tamper-proof plastic seal, which was introduced prior to the finding.

Not only has there been a significant decline in the market for CPBF since 1998 but the Tribunal notes that the Canadian market for CPBF has also become more segmented. The share of all commercially prepared jarred baby food held by jarred organic baby food has increased since the 1998,²⁴ particularly following the introduction of Loblaw's President's Choice brand in late 2001. Frozen baby food was also introduced in 2001 and sold primarily in Quebec, where sales of CPBF are amongst the lowest per capita in Canada.²⁵ Both jarred organic baby food and frozen baby food sell at higher prices than does the Heinz brand of CPBF. Finally, in late 2002, Heinz Canada itself contributed further to this segmentation by introducing a discount brand of CPBF, under the Pablum label, designed to appeal to the more value-oriented consumer.

Other developments affecting the Canadian market for CPBF since the finding include the growth in importance of the mass merchandiser channel of distribution. During the Tribunal's period of inquiry for the finding, the grocery channel accounted for approximately three quarters of the market, with the

18. Manufacturer's Exhibit A-18A (protected)) at paras. 14, 16, Administrative Record, Vol. 12A.

19. Tribunal Exhibit NQ-97-002-9.1, Administrative Record, Vol. 3 at 59; Tribunal Exhibit RR-2002-002-13.1, Administrative Record, Vol. 3 at 55-56.

20. *Transcript of In Camera Hearing*, Vol. 1, 3 March 2003 at 155; Tribunal Exhibit RR-2002-002-RI-01G (protected), Administrative Record, Vol. 10K.

21. *Transcript of In Camera Hearing*, Vol. 1, 3 March 2003 at 57-58; Tribunal Exhibit RR-2002-002-34.01 (protected), Administrative Record, Vol. 2.01 at 134.

22. Exporter's Exhibit B-09 (protected), Administrative Record, Vol. 14 at para. 81.

23. *Transcript of Public Hearing*, Vol. 1, 3 March 2003 at 60-64, 192.

24. The Tribunal notes that, at the time of the original inquiry, Heinz Canada sold a jarred organic baby food imported from its parent in the United States. This brand was sold to Haine — Celestial Company in the United States in 2000. Subsequently, Heinz Canada relaunched its own brand of organic jarred baby food in October 2001, produced by Heinz U.S.

25. Tribunal Exhibit RR-2002-002-RI-01C, Administrative Record, Vol. 10A at 1010.

drugstore channel accounting for the remaining one quarter.²⁶ The share accounted for by mass merchandisers was minimal. Over the past five years, however, there has been a considerable shift in the sales volumes of CPBF from drugstore retailers to mass merchandisers, particularly since Wal-Mart began selling baby food in 1999.²⁷ However, the evidence does not suggest that the changes that occurred in distribution channels can be counted among the causes of the decline in the overall size of the market.

From Heinz Canada's perspective, another key development was the undertaking that it made to the Commissioner of Competition. While the conditions of the undertaking place restrictions on how Heinz Canada sells in the market, the Tribunal does not consider that it has contributed to the decline in the market for CPBF.

The Canadian regulatory framework continues to influence the Canadian market for CPBF. The *Processed Products Regulations*²⁸ prescribe the size of containers in which CPBF containing fruit and vegetables are sold and certain aspects of the content of the CPBF. Some aspects of labelling are also governed by these regulations, for example, the labelling of variety and brand and the common name of the product. The *Food and Drug Regulations*²⁹ also regulate certain elements of the composition of CPBF and the labelling of CPBF as it relates to composition (e.g. fortification with vitamin C). The sale and advertisement of all new food products, including cooking processes, are also subject to approval under the latter regulations.

Despite the decline in the apparent market for CPBF, Heinz Canada has significantly improved its financial performance through increased net unit sales values.³⁰ Heinz Canada described its financial performance on an operating income per case equivalent basis in 1995 as a "banner" year for its CPBF operation.³¹ Its performance in 2001 was more than 14 percent above this level.³² The Tribunal notes that operating income per case equivalent was down significantly in 2002; however, much of this decline was due to forward selling by Heinz Canada at the end of 2001.³³ Operating income per case equivalent in 2003 is forecast to return to the same level as that realized in 2001.

United States

Since the finding, the CPBF industry in the United States has experienced significant restructuring. Gerber U.S. rationalized its production by closing its Asheville, North Carolina, facility in 1998, thus reducing its capacity for the production of CPBF by about one third.³⁴ In December 2002, Heinz U.S. spun off its baby food business, which was subsequently merged with Del Monte. As part of the agreement, Del Monte will be licensed to use the Heinz brand name for two years, as it implements the transition to the Del Monte label.³⁵ In addition, Heinz U.S. and its affiliates, including Heinz Canada, must refrain from

26. Tribunal Exhibit RR-2002-02-01, Administrative Record, Vol. 1 at 23.

27. Manufacturer's Exhibit A-03 at para. 31, Administrative Record, Vol. 11; Manufacturer's Exhibit A-05 at para. 27, Administrative Record, Vol. 11.

28. C.R.C. c. 291.

29. C.R.C., c. 870.

30. Manufacturer's Exhibit A-23A (protected), Administrative Record, Vol. 12A.

31. *Transcript of In Camera Hearing*, Vol. 1, 3 March 2003 at 158-159.

32. Conclusions by the Tribunal regarding Heinz Canada's financial performance in fiscal year 2001 and fiscal year 2002 are based on the unadjusted income statements for the respective years.

33. Tribunal Exhibit RR-2002-002-RI-01F (protected), Administrative Record, Vol. 10K.

34. Exporter's Exhibit B-03 at para. 18, Administrative Record, Vol. 13.

35. Manufacturer's Exhibit A-01 at para. 27, Administrative Record, Vol. 11.

competing with Del Monte in the U.S. baby food market for four years, and Del Monte is precluded from competing in the Canadian baby food market and other Heinz U.S. territories for three years.³⁶

Trends in the market for CPBF in the United States over the last five years differ from those in Canada. According to the evidence, the size of the U.S. market for CPBF has remained stable³⁷ and, since 1997, the number of births in the United States has stabilized after almost a decade of declines.³⁸ Consequently, per capita consumption has also been relatively stable.³⁹ The stability of sales of CPBF has been maintained despite competition from alternative products, such as organic baby food, the popularity of home-prepared baby food and increased breastfeeding.⁴⁰

The evidence suggests that the health of the U.S. market for CPBF is attributable to a significant extent to Gerber U.S. It not only is the dominant supplier of baby food with approximately 70 percent of the market but Gerber U.S. is also the only supplier that has managed to significantly increase its market share over the past five years.⁴¹ The evidence indicates that Gerber U.S. has invested significantly in technology and research and development in order to provide new and innovative products, packaging and format options to consumers, as well as a new cooking process.⁴² In addition, Gerber U.S. has invested heavily in trade and consumer awareness programs through consumer coupons, direct mail and media advertising.⁴³ Furthermore, Gerber U.S. works closely with health care professionals in the development and marketing of their products.⁴⁴ As a result, Gerber U.S. has been able to increase its market share, maintain its premium brand status and increase prices annually, preserving a 10 to 30 percent retail price premium over other “value-priced” competitors, such as Heinz U.S.⁴⁵ Gerber U.S.’s pricing has thus assisted growth in the U.S. market for baby food in dollar terms over the 1997-2001 period, despite the relatively flat sales volume.⁴⁶

Likely Volumes of Dumped Imports

The Commissioner having determined that the expiry of the finding is likely to result in the resumption of dumping of CPBF from the United States, the Tribunal needs to assess the likely volume of dumped imports and when these volumes are likely to enter the Canadian market. In doing so, the Tribunal needs to first ascertain which U.S. companies are likely to export CPBF into Canada. Evidence before the

36. Tribunal Exhibit RR-2002-002-RI-01H, Administrative Record, Vol. 9 at 1101.

37. Exporter’s Exhibit 26.01 (protected), Administrative Record, Vol. 6.2A at 265.

38. Exporter’s Exhibit 26.01 (protected), Administrative Record, Vol. 6.2A at 264.

39. Exporter’s Exhibit 26.01 (protected), Administrative Record, Vol. 6.2A at 267.

40. Exporter Exhibit B-01 at paras. 145-146, Administrative Record, Vol. 13; Tribunal Exhibit RR-2002-002-05A, Administrative Record, Vol. 1 at 133.

41. Exporter Exhibit B-04 (protected) at para. 5, Administrative Record, Vol. 14.

42. These include juice in plastic 4-oz. bottles, 2nd foods in plastic 2-packs and Lil’ Entrees™, which are complete mini meals packaged in a two-part plastic tray. Tribunal Exhibit RR-2002-002-21, Administrative Record, Vol. 5.1 at 20. Also, Tribunal Exhibit RR-2002-002-21, Administrative Record, Vol. 5.1 at 20; *Transcript of Public Hearing*, Vol. 2, 4 March 2003 at 332.

43. Exporter’s Exhibit B-03 at para. 50-52, Administrative Record, Vol. 13; Tribunal Exhibit RR-2002-002-25.01, Administrative Record, Vol. 5.2 at 68.

44. Exporter’s Exhibit B-03 at para. 51, Administrative Record, Vol. 13.

45. Tribunal Exhibit 34.01 (protected), Administrative Record, Vol. 2.01 at para. 57, Appendix 23 at 220; Exporter’s Exhibit B-04 (protected) at para. 37, Administrative Record, Vol. 14.

46. Tribunal Exhibit RR-2002-002-26.01 (protected), Administrative Record, Vol. 6.2A at 265, 266.

Tribunal identified four potential suppliers of the subject goods from the United States.⁴⁷ They include Del Monte, Beech-Nut, Initiative Foods⁴⁸ and Gerber U.S.

Del Monte, as noted above, recently purchased Heinz U.S.'s baby food operations, making it the second largest baby food producer in the United States. Under the agreement between Heinz U.S. and Del Monte, Del Monte has undertaken not to compete in Canada for three years. This is a period of time that goes beyond the 24-month period that the Tribunal is considering in this case.

Beech-Nut is the third largest producer of prepared baby food in the United States. Its products are sold at wholesale prices that are similar to those of Gerber U.S.⁴⁹ There is no evidence before the Tribunal to suggest that Beech-Nut, who has not exported CPBF to Canada since at least 1995,⁵⁰ has any intentions of entering the Canadian market in the foreseeable future.

Initiative Foods, on the other hand, might well enter the Canadian market for CPBF. It is, at present, a private label packer of organic baby food for Loblaw's President's Choice Organics brand. As noted above, organic baby food accounts for a relatively small but growing share of the overall jarred baby food market.⁵¹ In light of the successful launch of the President's Choice Organics brand, which indicates that Initiative Foods is already able to meet Canadian requirements for jar size and other regulatory requirements, it would, in the Tribunal's opinion, be well positioned to supply Loblaw with private label CPBF. The evidence before the Tribunal suggests that Loblaw may well pursue this opportunity.⁵²

However, the Tribunal is of the view that, notwithstanding Loblaw being Canada's largest grocery retailer, representing about one third of the market for CPBF,⁵³ private label sales of CPBF by Loblaw would not in the near and medium terms account for a significant portion of the total market for CPBF. Taking into account the evidence on the record, including assumptions made by Heinz Canada regarding the likely market penetration of private label CPBF, the most likely scenario is that total imported private label CPBF sold by Loblaw and any other retailers would account for only a relatively small share of the market for CPBF.⁵⁴ Furthermore, it is reasonable to expect that Loblaw will require at least several months following the Tribunal's decision before it is in a position to commence sales of private label CPBF and an additional period of time to build sales volume. A decision by Loblaw to commence selling private label CPBF could also be further delayed if Loblaw decides to wait and see when, if or how Gerber U.S. enters the Canadian market.

Therefore, based on the foregoing analysis, the volume of private label CPBF sold by Loblaw would, in the Tribunal's opinion, represent only a few percentage points of the total market for CPBF in the first 24 months.

Furthermore, it is by no means certain that Loblaw would use imported product, if it decided to develop private label CPBF, since Heinz Canada also has the potential to produce private label product for

47. Manufacturer's Exhibit A-03 at paras. 15-24, Administrative Record, Vol. 11.

48. Initiative Foods purchased the J.R. Woods baby food operation in September 2002.

49. Manufacturer's Exhibit A-03 at para. 21, Administrative Record, Vol. 11.

50. Manufacturer's Exhibit A-03 at para. 21, Administrative Record, Vol. 11.

51. Tribunal Exhibit RR-2002-002-RI-01B (protected), Appendix B, Administrative Record, Vol. 10C at 502.

52. *Transcript of Public Hearing*, Vol. 1, 3 March 2003 at 114.

53. Tribunal Exhibit RR-2002-002-RI-01C (protected), Administrative Record, Vol. 10G at 2124.

54. Manufacturer's Exhibit A-08 (protected) at paras. 16, 21, Administrative Record, Vol. 12.

Canadian retailers.⁵⁵ The Tribunal heard evidence to suggest that, as a domestic producer, Heinz Canada could well have a cost advantage in doing so.⁵⁶

Wal-Mart is the only other retailer identified by Heinz Canada as likely to import private label CPBF should the finding be allowed to expire. The witness for Wal-Mart testified that it does not have any current plans nor has it begun to investigate the possibility of marketing a private label of CPBF in Canada. However, the witness did note that Wal-Mart would consider the possibility of marketing a private label of CPBF if the product availability and pricing were correct.⁵⁷ The Tribunal also notes the testimony of the witness for Wal-Mart that its U.S. parent had investigated the possibility of marketing private label jarred baby food, but has decided not to pursue this option.⁵⁸ In addition, as discussed above, Wal-Mart could source private label CPBF from Canadian sources rather than from a U.S. supplier. Based on the foregoing, the Tribunal does not think that it is likely, as Heinz Canada has alleged, that Wal-Mart will enter the private label market with imported product in the next 24 months.

As noted above, Gerber U.S. is the largest producer of baby food in the United States, accounting for approximately 70 percent of the U.S. baby food market. While the vast majority of its sales of CPBF have been for the U.S. market, Gerber U.S. has maintained a small but stable volume of export business relative to its total production.⁵⁹ Although Gerber U.S.'s capacity utilization for CPBF has declined in recent years, it remains at very high levels overall,⁶⁰ and its capacity is being fully utilized for CPBF packaged in plastic containers.⁶¹ The reduction in overall capacity utilization for CPBF has been the result of a conscious effort by Gerber U.S. to meet new lower working capital requirements and inventory carrying costs.⁶² As these targets are met, production and capacity utilization can be expected to increase. In addition, as noted above, the decline in births has levelled off since 1997 and is now expected to show modest growth until at least 2005.⁶³ Consequently, there is potential for growth in the market for CPBF in the United States, which would further utilize the small amount of present available capacity.

As submitted by Heinz Canada, the Tribunal notes that Gerber U.S.'s remaining available capacity, although a small proportion of total capacity, represents a significant volume relative to the size of the Canadian market for CPBF. However, the evidence indicates that this capacity is not immediately available for export to Canada. Gerber U.S. identified a number of steps that would need to be taken before any shipments to Canada could begin.

First, Gerber U.S. must decide whether it will re-enter the Canadian market for CPBF. This decision has not yet been made, nor is it a foregone conclusion according to Gerber U.S.'s testimony, that it will re-enter the Canadian market should the finding be rescinded.⁶⁴ According to the evidence, re-entry into the Canadian market would have to be evaluated against other business and export opportunities⁶⁵ and the

55. Tribunal Exhibit RR-2002-002-RI-01C (protected), Appendix B, Administrative Record, Vol. 10C at 1077-02-1077-04.

56. *Transcript of In Camera Hearing*, Vol. 3, 5 March 2003 at 395-96.

57. *Transcript of Public Hearing*, Vol. 3, 5 March 2003 at 572.

58. *Transcript of Public Hearing*, Vol. 3, 5 March 2003 at 572.

59. Exporter's Exhibit B-03 at para. 24, Administrative Record, Vol. 13.

60. Tribunal Exhibit RR-2002-002-26.01C (protected), Administrative Record, Vol. 6.2 at 314.

61. *Transcript of In Camera Hearing*, Vol. 2, 4 March 2003 at 336-37.

62. Exporter's Exhibit B-03 at para. 20, Administrative Record, Vol. 13.

63. Tribunal Exhibit RR-2002-002-RI-02A (protected), Administrative Record, Vol. 10.1 at 227.

64. Exporters Exhibit B-03 at para. 16, Administrative Record, Vol. 13.

65. *Transcript of Public Hearing*, Vol. 2, 4 March 2003 at 408.

resources available to undertake each of these projects. Gerber U.S.'s evidence was that this decision would take a number of months.⁶⁶

Although Gerber U.S. did not provide evidence on whether, if it decided to re-enter the Canadian market, it would do so with glass or plastic product, or both, the steps that would need to be taken before shipments could begin would apply in either case. Most significant amongst these steps would be meeting Canadian regulations for jar size for SKUs containing fruit and vegetables.⁶⁷ In the case of glass jars, moulds that meet Canadian regulatory requirements for size in Gerber U.S.'s proprietary jar design would have to be developed, requiring four to five months of lead time.⁶⁸ If plastic packaging were to be used, punches for containers meeting Canadian requirements would need to be developed as well.⁶⁹ Gerber U.S. would also have to purchase and install the equipment necessary for changes to their production lines required to accommodate Canadian requirements for container sizes.⁷⁰ Re-entry into the Canadian market for CPBF would also entail the development of container labelling and cardboard cases specifically for the Canadian market.⁷¹

Gerber U.S. also identified several other issues that would need to be addressed before it could re-enter the Canadian market. For example, the Tribunal heard evidence that exports of CPBF containing fruit prepared under the NatureLock™ process would require the development of new recipes for the Canadian market due to differences in Canadian and U.S. regulatory requirements concerning fortification standards.⁷² In addition, Gerber U.S.'s NatureLock™ cooking process could potentially require regulatory approval under the novel food requirements of the *Food and Drugs Act*. Furthermore, Gerber U.S. testified that, although it would have some advantage over a company that had not done business in Canada previously, it would still require time to conduct consumer research to best understand the appropriate positioning of the Gerber brand, given its five-year absence from the market for CPBF.⁷³ Gerber U.S. also noted that it would need to hire additional staff to service the Canadian market,⁷⁴ as well as to negotiate listings with retailers.⁷⁵

Gerber U.S. testified that all the preparatory work necessary to re-enter the Canadian market would be expected to take anywhere from 6 to 12 months after the decision to re-enter was made. In the Tribunal's opinion, the latter time is more likely, especially if Gerber U.S. were to re-enter the Canadian market with only its plastic packaging of CPBF. In this regard, the Tribunal notes Gerber U.S.'s testimony that additional capacity for export of their products in plastic packaging would not be available for some time.⁷⁶ The Tribunal also notes that entry by Gerber U.S. before 6 months is highly unlikely, not only given the fact that there is no product ready to enter the Canadian market but also because of the fact that, from mid-October

66. *Transcript of Public Hearing*, Vol. 2, 4 March 2003 at 415.

67. Canadian regulations require fruit and vegetable baby foods to be packaged in either 4.5-oz or 7.5-oz containers. Gerber U.S. currently sells jarred baby food in the United States in 2.5-oz, 4.0-oz and 6.0-oz containers. See Exporter's Exhibit B-03, at para. 13, Administrative Record, Vol. 13.

68. *Transcript of Public Hearing*, Vol. 2, 4 March 2003 at 414.

69. *Transcript of Public Hearing*, Vol. 2, 4 March 2003 at 390.

70. *Transcript of Public Hearing*, Vol. 2, 4 March 2003 at 389.

71. Exporters Exhibit B-03 at para. 13, Administrative Record, Vol. 13.

72. *Transcript of Public Hearing*, Vol. 2, 4 March 2003 at 350.

73. *Transcript of Public Hearing*, Vol. 2, 4 March 2003 at 351.

74. Exporter's Exhibit B-03 at para. 15, Administrative Record, Vol. 13.

75. Exporter's Exhibit B-03 at para. 13, Administrative Record, Vol. 13.

76. *Transcript of In Camera Hearing*, Vol. 2, 4 March 2003 at 337.

until after the Christmas holidays, there is a blackout period maintained by Canadian retailers for new product listings.⁷⁷

Should Gerber U.S. re-enter the Canadian market initially with product in glass containers, it will find itself in a much more crowded market in Canada than existed prior to the finding. Retailers' shelf space will have filled up with glass jarred baby food in several new or increased segments since the finding, including organic product, Pablum brand CPBF and possibly some private label CPBF.⁷⁸ On that basis alone, the increased competitive environment will detract from the attractiveness of re-entry with product in glass containers and limit the market share that could be captured. Moreover, the testimony of retailers supported the conclusion that Gerber U.S.'s competitive position could be enhanced if it entered the market with product not in the traditional glass format. The testimony of one retailer appearing before the Tribunal suggested that, should the finding be rescinded, it would expect Gerber U.S.'s sales in Canada to focus on premium priced products such as CPBF in plastic containers not currently available in Canada.⁷⁹ Similarly, according to the testimony of another retailer, in order to carry a second brand, or replace an existing brand that was performing well, the retailer would be seeking a product that would help differentiate that retailer in the marketplace.⁸⁰ As a result, the Tribunal thinks that early entry with product in glass containers is not likely, or, if it occurs, the volume will be small.

Heinz Canada submitted that Gerber U.S. would be able to exploit its links with the drugstore channel of distribution through Novartis's sales of other baby products to quickly recapture volume in Canada. However, the Tribunal heard evidence that purchases of CPBF is handled separately from purchases of other baby products within the drugstore channel.⁸¹ Moreover, the witness for Shoppers Drug Mart testified that it would not break existing contracts simply to replace an existing supplier.⁸² As tenders were put out for new contracts, generally on an annual basis, new suppliers would be considered along with incumbents.⁸³ The witnesses for Loblaw and Wal-Mart reported similar purchasing practices.⁸⁴ Accordingly, based on the evidence before it, the Tribunal is not convinced that Gerber U.S.'s links with drugstore retailers through Novartis provide it with any significant advantage in recapturing volume quickly.

Similarly, Heinz Canada submitted that Gerber U.S. would be able to leverage its relationships with its multinational customers in the United States to gain access to Canadian retailers. In this regard, the Tribunal notes evidence from the Tribunal's witness for Wal-Mart, who indicated that Wal-Mart's Canadian and U.S. operations function independently.⁸⁵ The Tribunal is of the view that the evidence does not support the conclusion that Gerber U.S.'s business relationships with multinational retailers in the United States will provide it significant leverage with related Canadian retailers.

Based on the foregoing analysis, the Tribunal considers that Gerber U.S. is the only U.S. producer that is likely to export a significant volume of dumped goods to Canada over the near and medium terms. In light of the evidence, the Tribunal considers that it is reasonable to expect that it will take at least 12 months for Gerber U.S. to decide to re-enter the Canadian market and export its first product to Canada. After this, it

77. *Transcript of Public Hearing*, Vol. 1, 3 March 2003 at 119.

78. Manufacturer's Exhibit A-18A (protected) at paras. 14-16, Administrative Record, Vol. 12A.

79. *Transcript of In Camera Hearing*, Vol. 3, 5 March 2003 at 361.

80. *Transcript of Public Hearing*, Vol. 3, 5 March 2003 at 555.

81. *Transcript of In Camera Hearing*, Vol. 3, 5 March 2003 at 458.

82. *Transcript of Public Hearing*, Vol. 3, 5 March 2003 at 554; *Transcript of In Camera Hearing*, Vol. 3, 5 March 2003 at 436, 455.

83. *Transcript of In Camera Hearing*, Vol. 3, 5 March 2003 at 453.

84. *Transcript of In Camera Hearing*, Vol. 3, 5 March 2003 at 366, 371, 476.

85. *Transcript of In Camera Hearing*, Vol. 3, 5 March 2003 at 468-69.

would take a period of months to build up its sales volume. In this regard, the Tribunal notes that retailers are generally under one-year contracts for the supply of CPBF.⁸⁶ Only as these contracts come up for renewal will Gerber U.S. have the opportunity to gain access to retail shelf space.⁸⁷ In addition, the Tribunal notes that retailers testified that they would need to be satisfied with the economics of contract proposals.⁸⁸ While the Tribunal is of the view that Gerber U.S. will eventually reach its previous market share levels of about 20 percent, it is unlikely to do this within 24 months of the finding being rescinded. In addition, the Tribunal considers that, over the near and medium terms, should Loblaw import U.S. product for the private label market, the volume would not be significant, amounting to only a few percentage points of the market.

Likely Prices of Dumped Imports

As noted above, Gerber U.S.'s prepared baby food commands a significant price premium in the United States, based on its perceived quality, variety, innovation, packaging and format options available to consumers.⁸⁹ The Tribunal notes that Gerber U.S.'s innovations, particularly its hot-filled plastic juice containers, have been recognized internationally as such by its competitors in foreign markets.⁹⁰ Evidence before the Tribunal also indicates that Gerber U.S.'s baby food is sold as a premium product in export markets and is not sold at a discount to other baby food suppliers.⁹¹ In this regard, the Tribunal notes that there is no evidence of any anti-dumping findings against Gerber U.S. or any other U.S. producer of CPBF in countries other than Canada. Furthermore, Gerber U.S. indicated to the Tribunal that Gerber U.S.'s CPBF would be sold into the Canadian market at a premium price.⁹²

The Tribunal is of the opinion that Gerber U.S. could command a premium price in the Canadian market, based on factors similar to those that support its premium price in the U.S. market. As Heinz Canada's own market research indicates, Gerber U.S. is still a well-recognized brand in Canada.⁹³ Furthermore, Heinz Canada's market research indicates that 73 percent of consumers that use some CPBF do so primarily on the basis of non-price factors.⁹⁴ Indeed, the fact that higher-priced organic and frozen baby foods have cannibalized sales of CPBF confirms that some Canadian consumers are currently choosing to pay a higher price based on perceived quality and/or convenience considerations. Indeed, Canadian retailers testified that Gerber U.S.'s recent innovations, especially that of plastic containers and its Lil' EntreesTM, could be the basis for a premium price.⁹⁵

This view is further supported by the experience of Heinz Canada in its limited test marketing of CPBF in plastic containers. Despite the significant retail premium price charged for these products, almost

86. *Transcript of Public Hearing*, Vol. 1, 3 March 2003 at 107.

87. Also, the Tribunal notes that based on the timing of contract tenders, access to shelf space would not be likely before June 2004, for one major retailer of CPBF; *Transcript of In Camera Hearing*, Vol. 3, 5 March 2003 at 437.

88. *Transcript of In Camera Hearing*, Vol. 3, 5 March 2003 at 366.

89. Exporter's Exhibit B-03 at para. 38, Administrative Record, Vol. 13.

90. *Transcript of Public Hearing*, Vol. 2, 4 March 2003 at 326.

91. Exporter's Exhibit B-03 at para. 30, Administrative Record, Vol. 13.

92. Exporter's Exhibit B-03 at paras. 35-38, Administrative Record, Vol. 13; *Transcript of Public Hearing*, Vol. 2, 4 March 2003 at 344, 396.

93. Manufacturer's Exhibit A-11, Administrative Record, Vol. 11.

94. *Transcript of Public Hearing*, Vol. 1, 3 March 2003 at 36-37, 88-89.

95. *Transcript of In Camera Hearing*, Vol. 3, 5 March 2003 at 361, 383, 487-88.

double the retail premium charged for Gerber U.S. product in plastic containers in the United States,⁹⁶ Heinz Canada was able to increase the market share of these products within a relatively short period of time.⁹⁷

Whether Gerber U.S. decides to enter with plastic, with glass or with a combination of both, the Tribunal is convinced that it will be able to enter the Canadian market and retain premium pricing, given its greater orientation toward consumer advertising and healthcare professional education.⁹⁸ In this regard, the Tribunal notes that Gerber U.S.'s CPBF was a premium priced product in the United States prior to the introduction of its plastic packaging and other recent innovations.

Moreover, the Canadian marketplace is now a segmented market, as discussed above, with the entry of the discount priced Pablum brand of CPBF, as well as at least two brands of jarred organic baby food and frozen baby food, each of which is sold at premium prices to Heinz Canada's CPBF.⁹⁹ To a much greater extent than during the last inquiry, the segmentation in the marketplace allows for a range of prices. In the Tribunal's opinion, this increased segmentation of the Canadian market for CPBF will create room not only for the acceptance of premium priced CPBF but also for a private label product. Evidence before the Tribunal indicated that private label CPBF could retail at prices somewhere between current Heinz Canada and Pablum brand prices or at prices as high as the Heinz brand CPBF.¹⁰⁰

As well, the Canadian market for CPBF today is no longer characterized by exclusive listing arrangements and long-term supply contracts, which limited the scope for competition to aggressive price discounting during the 1995-97 period. The Tribunal is also of the view that there are other reasons for which Gerber U.S. has limited incentive to engage in the type of aggressive pricing in which both Heinz Canada and Gerber Canada engaged during the 1995-97 period. Evidence before the Tribunal is that any decision by Gerber U.S. to re-enter the Canadian market would need to be based on the expectation of a return on investment in the Canadian market comparable to or better than the return earned in other export markets.¹⁰¹ If Gerber U.S. is to realize a return on investment necessary to justify its presence in the Canadian market, it is unlikely to try and do so through an attempt to gain market share by undercutting Heinz Canada. The last time that the companies engaged in a price war, Gerber Canada was only able to retain about 20 percent of the market. To justify entry into the Canadian market at this level of market share, in the Tribunal's view, Gerber U.S. will need to enter the market with, and retain, premium pricing. It is also the Tribunal's view that premium pricing by Gerber U.S. should not be an impediment to regaining its historical Canadian market share. Indeed, Heinz Canada's own analysis indicates that a price war is unlikely. Its modelling indicates only a modest initial competitive decrease in its prices, should Gerber U.S. enter the market at a premium price with no additional price reductions through 2006.¹⁰²

Based on the foregoing analysis, the Tribunal is convinced that, if Gerber U.S. re-enters the Canadian market, it will do so at a premium, albeit dumped, price and will maintain this premium price position. To the extent that Canadian food retailers market a private label brand of CPBF, these products would be in competition with, but not significantly undercut, the prices of Heinz Canada's two brands.

96. *Transcript of Public Hearing*, Vol. 1, 3 March 2003 at 67-68.

97. Manufacturer's Exhibit A-16 (protected) at para. 36, Administrative Record, Vol. 12.

98. Exporter's Exhibit B-01 at paras. 97-99, Administrative Record, Vol. 13; Exporter's Exhibit B-09 (protected) at para. 81, Administrative Record, Vol. 14.

99. *Transcript of Public Hearing*, Vol. 3, 5 March 2003 at 549.

100. *Transcript of In Camera Hearing*, Vol. 3, 5 March 2003 at 427-29.

101. *Transcript of In Camera Hearing*, Vol. 3, 5 March 2003 at 327-28.

102. Manufacturer's Exhibit A-18 (protected) at para. 31, Administrative Record, Vol. 12A.

Likely Effects of Other Factors

Paragraph 37.2(2)(k) of the *Regulations* indicates that, in an expiry review, the Tribunal may consider “any other factors relevant in the circumstances.” Not only do such other factors include those that may contribute to the analysis of injury caused by dumping but also other factors unrelated to dumping. The Tribunal needs to review such other factors in order not to attribute to dumping any likelihood of injury to the domestic industry caused by such factors.

In this case, the Tribunal has considered the effect of the entry of a new supplier into a monopolized market. The Tribunal notes that this case is somewhat unique, in that, following the finding in 1998, Heinz Canada became the only supplier of CPBF in the Canadian market. Any new and successful entrant into this market, be it a domestic or foreign supplier, would gain some market share from Heinz Canada solely because renewed competition would end Heinz Canada’s monopoly. In light of this, the Tribunal needs to differentiate the injury caused by the entry of renewed competition into the market from the injury caused by resumed dumping. In its analysis, the Tribunal must consider the nature of competition posed by the new supplier and determine to what extent that competition is based on non-dumping factors.

The Tribunal notes that, since the first inquiry, the apparent market for CPBF has declined steadily and significantly, both in aggregate and on a per capita consumption basis, while prices have increased annually. Heinz Canada has forecast an arrest in this declining trend, beginning in 2004 and continuing until at least 2006.¹⁰³ According to Heinz Canada, this stability in the market for CPBF will be achieved despite the continuing influence of factors such as the increased use of home-prepared baby food and competing baby food products, which affect per capita consumption and which Heinz Canada has identified as factors that will continue to contribute to the downward pressure on demand. The Tribunal is not convinced that Heinz Canada has presented any plans or strategies that would enable it to stem this declining trend in any significant way. It is the Tribunal’s view that the steady decline in the market for CPBF is likely to continue should the finding be continued.

Heinz Canada’s modelling also indicates that, if Gerber U.S. re-entered the market, it would, within 24 months of the expiry of the finding, gain a market share of approximately 20 percent, consistent with the market share that Gerber U.S. had before it exited the market. The Tribunal considers that it is reasonable to forecast a market share of this size, but not within the 24-month time frame from the date of a rescission of the finding.

Moreover, in the Tribunal’s opinion, the re-entry of Gerber U.S. into the Canadian marketplace has the potential to impact the size of the market for CPBF. One important indication of the growth potential of the Canadian market is the relatively low level of per capita consumption of CPBF in Canada compared with other developed country markets, including the United States. Another important indication of the growth potential is Heinz Canada’s evidence that the decline in the market is attributable, in part, to the growth of products such as jarred organic baby food, toddler baby food and frozen baby food, and the growth in popularity of home-made baby food.¹⁰⁴ It is reasonable to consider that, if these commercial products and home-made food are capable of decreasing the sales of CPBF, a new product is also capable of regaining this part of the market. The Tribunal is also of the opinion that Gerber U.S. in particular would be well positioned to take advantage of the growth potential in the Canadian market.

103. Manufacturer’s Exhibit A-18 at para. 36, Administrative Record, Vol. 12A.

104. Manufacturer’s Exhibit 16.01, Administrative Record, Vol. 3.1 at 27.

Product choice, as the Tribunal heard from the retailers appearing before it, stimulates demand.¹⁰⁵ Indeed, Heinz Canada's own evidence indicates that product choice has the potential to increase demand for CPBF.¹⁰⁶ The Tribunal notes that the variety of products available to consumers has declined significantly over the last five years, not only as a result of the loss of the Gerber U.S. brand but also through the reduction of SKUs offered by Heinz Canada.¹⁰⁷ The Tribunal observes that, as noted above, following Gerber Canada's exit from the market, Heinz Canada picked up only a portion of Gerber Canada's existing business, even after accounting for the declining number of births. In the Tribunal's opinion, the volume of CPBF lost immediately after the exit of Gerber Canada is indicative of the degree to which product choice, in and of itself, can expand the market.

The Tribunal believes, in addition, that the introduction of product innovation by Gerber U.S., such as plastic containers and Lil' EntreesTM, into the Canadian market will help reverse the steady decline in per capita consumption. The Tribunal notes that the potential for market expansion through innovation is significant. As the evidence from Heinz Canada suggests, over 90 percent of households in Canada with children in the target market consume some commercially prepared baby food.¹⁰⁸ Of these households, almost three quarters have indicated that the main reasons that they do not consume more CPBF are due to non-price factors, such as safety, taste and convenience. If, for example, the increased convenience of plastic packaging or the Lil' EntreesTM format increased sales only marginally to each of the households already purchasing some CPBF, the total incremental volume would be significant.

In addition, the Tribunal is of the view that the entry of a new supplier such as Gerber U.S., actively promoting CPBF not only to parents but also to the medical community, offers the potential of helping to reverse the decline in per capita consumption. Similarly, Gerber U.S.'s presence in the market can be expected to strengthen the position of CPBF in its competition with the alternative premium products, such as organic baby food, whose share of the market, while small, has been growing and has been projected to continue to grow.

Taking into account the way in which the market has evolved since the finding, the Tribunal considers that the sales volume that would be obtained by Gerber U.S. re-entering the market is primarily volume that Heinz Canada would not be likely to gain even if it retained its monopoly. Nevertheless, given the structure of the market, the Tribunal cannot exclude the possibility that, overall, Heinz Canada might incur some loss of sales. However, the Tribunal does not consider any such volume likely to be captured by Gerber U.S. to be injury to Heinz caused by dumped imports. Rather, the Tribunal considers this impact on sales volume to be caused by the renewal of competition in the market.

As to the price effects on Heinz Canada of Gerber U.S.'s re-entry, Heinz Canada's evidence is that, notwithstanding Gerber U.S.'s intention to price above Heinz Canada's current wholesale price, it would be forced to respond with a competitive price reduction.¹⁰⁹ The Tribunal notes that this is only one of a range of possible strategies that could be adopted when a new supplier enters a market. For example, Heinz Canada might choose to hold its prices pending an assessment of how successful the higher-priced Gerber U.S. product was in the market. Assuming, however, that Heinz Canada reduces its price, the Tribunal notes that

105. *Transcript of Public Hearing*, Vol. 3, 5 March 2003 at 572; *Transcript of In Camera Hearing*, Vol. 3, 5 March 2003 at 368, 488.

106. Manufacturer's Exhibit A-16 (protected) at para. 40, Administrative Record, Vol. 12A.

107. *Transcript of Public Hearing*, Vol. 1, 3 March 2003 at 187-88; Vol. 10C at 990; Manufacturer's Exhibit (protected), Vol. 4 at 65-66.

108. *Transcript of Public Hearing*, Vol. 1, 3 March 2003 at 18.

109. Manufacturer's Exhibit A-18 (protected) at para. 31, Administrative Record, Vol. 12A.

the reduction envisaged by Heinz Canada is a relatively small one-time reduction.¹¹⁰ The Tribunal recognizes that such a price reduction could, nonetheless, have an impact on Heinz Canada's net revenues, albeit a relatively small one. The Tribunal does not consider that this impact can be attributed to dumping, taking into consideration that Gerber U.S.'s price would be at a premium to Heinz Canada. In addition, the effect of such a price reduction on Heinz Canada could be mitigated to the extent that lower prices provide an additional source of market expansion that would help offset lower unit sales values to Heinz Canada. In this regard, the Tribunal notes that the introduction of the Pablum brand of CPBF by Heinz Canada was largely motivated by the understanding that 27 percent of those purchasing CPBF were price sensitive and would purchase more of the products if they were less expensive.¹¹¹

The expiry of the finding may also result in higher costs for Heinz Canada due to the need for increased promotional activity and product development to meet the renewed competition from Gerber U.S. and any private label brand. This would have an impact on Heinz Canada's operating income and other financial results. However, this injury, in the Tribunal's opinion, would primarily be a result of the renewed competition, rather than the result of dumping.

With respect to the competition that Heinz Canada will face in the market if the finding is rescinded, the Tribunal also notes that, during the hearing, it became clear that the Commissioner of Competition would consider a request by Heinz Canada to review its undertaking on the grounds of changed circumstances. This would provide a means for Heinz Canada to address the problems that it submitted it would face in competing, if the finding were rescinded.

In summary, it is the Tribunal's view that Heinz Canada will lose market share and possibly lose small volumes of sales, suffer some price erosion and incur additional costs as the result of imports from the United States entering the market. These effects, however, are the result of introducing competition into the market; they are not, in the Tribunal's view, due to dumping. Moreover, the Tribunal does not foresee that the re-entry of Gerber U.S. will have a significant impact on Heinz Canada in the near or medium term, as the Tribunal expects Gerber U.S.'s entry, for the most part, not to take sales from Heinz Canada, but rather to increase the market.

Likely Effects of Dumped Imports on Domestic Industry

Although the Tribunal is of the opinion that most of the injury caused to Heinz Canada by the re-entry of Gerber U.S. and others into the Canadian market would be due to competition and not to dumping, the Tribunal recognizes that there may be some injury caused by dumping.

First, the Tribunal considers that, as Heinz Canada has argued, the resumption of dumping could result in price suppression. The Tribunal considers that the annual price increases that Heinz Canada has achieved since the finding will become more difficult in a market with competition from a premium priced alternative offered by Gerber U.S. The Tribunal notes, however, that 2004 is the first year since the finding that Heinz Canada is not planning to implement a price increase. Therefore, the Tribunal is not convinced that any such price suppression would be due to dumping or that further price increases by Heinz Canada would have the same revenue-increasing effects that have been observed since the finding has been in place (that is, Heinz Canada's pricing would be approaching the elastic portion of the demand curve). Nor is the

110. Manufacturer's Exhibit A-18 (protected) at para. 31, Administrative Record, Vol. 12A; *Transcript of In Camera Hearing*, Vol. 1, 3 March 2003 at 204.

111. *Transcript of Public Hearing*, Vol. 1, 3 March 2003 at 31-32; Manufacturer's Exhibit 17.01 (protected) at 45, 222, Administrative Record, Vol. 4.1A.

Tribunal convinced that any injury to Heinz Canada in the form of price suppression is likely to be significant, given that, with declining demand and the likelihood of further declines, the magnitude of any price increases that Heinz Canada might achieve, with the finding being continued, would likely be significantly smaller than those in the last five years.

Secondly, the Tribunal has noted above Heinz Canada's response to dumping by Gerber U.S. could involve a small price reduction. Even if the Tribunal considered this reduction to be price erosion attributable to dumping, it is of the view, as it noted above, that the impact on Heinz Canada would be small and might even be mitigated, at least in part, by increased sales.

With respect to the likely entry of private label product, the Tribunal notes that its timing and the likelihood of any importation are far from certain. However, to the extent that it occurs in the near and medium terms, the Tribunal is of the view that the volume will be small. Given that the prices of private label product are expected to be somewhere above those of the Pablum brand and below those of the Gerber brand, the Tribunal is of the opinion that the volume captured by private labels will be at the expense of both Heinz Canada and Gerber U.S.'s Canadian sales. The entry of private label product may also be expected to limit Heinz Canada's ability to achieve price increases. The Tribunal considers that this loss of volume and price suppression as a result of the entry of private label product would be injury attributable to dumping, given the lower prices, but is not convinced that the impact on Heinz Canada's sales performance is likely to be significant.

The likely impact of dumping also needs to take into account Heinz Canada's recent performance and its likely performance, if the finding were to be continued. The Tribunal notes that, notwithstanding the declines in the apparent market for CPBF, Heinz Canada's financial performance has improved significantly since the finding. Indeed, Heinz Canada is performing significantly better today in terms of operating income and net unit sales values. Its financial performance in 2003 is expected to be more than 14 percent above what it achieved in 1995, which Heinz Canada described as a "banner" year for its CPBF operation.¹¹² This improved performance occurred despite a period of decreasing volumes, due at least in part to annual price increases. The Tribunal notes, however, that the scope for the continuation of price increases is much more limited, even without Gerber U.S. in the market. It is the view of the Tribunal, therefore, that Heinz Canada's performance is unlikely to continue to improve to the extent that it has in the past, with or without the presence of dumped imports from the United States.

Accordingly, the Tribunal is of the view that the combined effects of price suppression, any price erosion and lost sales volume due to the dumping of CPBF are likely to have some impact on Heinz Canada's performance, if the finding is rescinded. In the Tribunal's view, however, the likely magnitude of these effects taken together is not sufficient to be characterized as material injury.

CONCLUSION

In summary, the Tribunal concludes that Heinz Canada is unlikely to suffer material injury in the near and medium terms, if the finding is rescinded. Any injury that it does suffer would be due, for the most part, to the effects of the entry of renewed competition into the market, not to dumping. In light of the foregoing, and pursuant to subparagraph 76.03(12)(a)(ii) of *SIMA*, the Tribunal hereby rescinds the finding made on April 29, 1998, in Inquiry No. NQ-97-002, concerning certain prepared baby foods, containing finely homogenized vegetables, fruit and/or meat which may include some visible pieces of not more than

112. Manufacturer's Exhibit A-23A (protected), Administrative Record, Vol. 12A; Tribunal Exhibit NQ-97-002-70 (protected), Vol. 2.1 at 95.

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.

Patricia M. Close
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Presiding Member

Zdenek Kvarda
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Ellen Fry
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