CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Friday, December 2, 1994

Review No.: RR-94-001

IN THE MATTER OF a review, under subsection 76(2) of the *Special Import Measures Act*, of the finding of material injury made by the Canadian International Trade Tribunal on October 2, 1991, in Inquiry No. NQ-91-002, concerning:

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

O R D E R

The Canadian International Trade Tribunal, under the provisions of subsection 76(2) of the *Special Import Measures Act*, has conducted a review of its finding of material injury made on October 2, 1991, in Inquiry No. NQ-91-002.

Pursuant to subsection 76(4) of the *Special Import Measures Act*, the Canadian International Trade Tribunal hereby rescinds the above-mentioned finding.

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

Charles A. Gracey
Charles A. Gracey
Member

Lyle M. Russell
Lyle M. Russell
Member

Michel P. Granger
Michel P. Granger
Secretary

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Special Import Measures Act - Whether to rescind or continue, with or without amendment, the finding of material injury made by the Canadian International Trade Tribunal on October 2, 1991, in Inquiry No. NQ-91-002.

Place of Hearing:	Ottawa, Ontario
Dates of Hearing:	September 26 to 28, 1994
Date of Order and Reasons:	December 2, 1994
Tribunal Members:	Robert C. Coates, Q.C., Presiding Member Charles A. Gracey, Member Lyle M. Russell, Member
Director of Research:	Marcel J.W. Brazeau
Research Manager:	Ken Campbell
Researchers:	W. Douglas Kemp Peter Rakowski
Director of Economics:	Dennis Featherstone
Statistical Officers:	Margaret Saumweber Joanne Halliday
Counsel for the Tribunal:	John L. Syme
Registration and Distribution Officer:	Joël Joyal
Participants:	Peter Clark C.J. Michael Flavell, Q.C. for Molson Breweries, Western Division Labatt Breweries of British Columbia Pacific Western Brewing Company, A Division of Pacific Pinnacle Investments Ltd. Brewers Association of Canada **(Producers/Other)**

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for	G. Heileman Brewing Company Inc.
	Paul D. Burns Allan H. Turnbull
for	The Stroh Brewery Company
	P. John Landry, Esq. Greg A. Tereposky
for	Pabst Brewing Company
	James L. Shields Graham E.S. Jones
for	Director of Investigation and Research, *Competition Act*

(Exporters/Other)

Witnesses:

Gordon Hall
Manager, Corporate Policy and Research
Liquor Distribution Branch
B.C. Ministry of the Attorney General

Barry Seims
Consultant
Pacific Western Brewing Company,
A Division of Pacific Pinnacle Investments Ltd.

A.L. (LeRoy) Peterson
Controller
Molson Breweries, Western Division

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

STATEMENT OF REASONS

BACKGROUND

This is a review, under subsection 76(2) of the *Special Import Measures Act*[1] (SIMA), of the finding of material injury made by the Canadian International Trade Tribunal (the Tribunal) on October 2, 1991, in Inquiry No. NQ-91-002, concerning 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.

Pursuant to subsection 76(2) of SIMA, the Tribunal initiated a review of the finding and issued a notice of review[2] on May 25, 1994. This notice was forwarded to all known interested parties.

As part of this review, the Tribunal sent questionnaires to the Brewers Association of Canada (the Association), B.C. producers, exporters and the Liquor Distribution Branch

1. R.S.C. 1985, c. S-15.
2. Canada Gazette Part I, Vol. 128, No. 23, June 4, 1994, at 2863-64.

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(the LDB) of the B.C. Ministry of the Attorney General, the importer of the subject goods. From the replies to these questionnaires and other sources, the Tribunal's research staff prepared public and protected pre-hearing staff reports. As part of its research activities, the Tribunal's research staff met with domestic producers in British Columbia, as well as with the LDB, in order to answer any questions pertaining to the questionnaires. In addition, the record of this review consists of all relevant documents, including the finding, the notice of review and public and confidential parts of replies to the questionnaires. All public exhibits were made available to interested parties, while protected exhibits were provided only to independent counsel who had filed a declaration and undertaking with the Tribunal.

Public and *in camera* hearings were held in Ottawa, Ontario, on September 26, 27 and 28, 1994.

The producers, Molson Breweries, Western Division (Molson), Labatt Breweries of British Columbia (Labatt) and Pacific Western Brewing Company, A Division of Pacific Pinnacle Investments Ltd. (PWB), were represented by counsel at the hearing, submitted evidence and made argument in support of continuing the finding. The Association was represented by counsel, but did not attend the hearing.

G. Heileman Brewing Company Inc. (Heileman), The Stroh Brewery Company (Stroh) and Pabst Brewing Company (Pabst), three U.S. exporters, were represented by counsel at the hearing. They made argument in support of rescinding the finding.

The Director of Investigation and Research, *Competition Act* (the Director), was represented by counsel at the hearing and made argument in support of rescinding the finding.

PRODUCT

The products, which are the subject of this review, are defined as 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.

The product definition includes ale, lager, stout and porter. Beer in kegs or containers with a capacity in excess of 1,180 mL, normally referred to in the trade as draft beer, is not included in the product definition. Non-pasteurized or cold-filtered beer, which may be labelled draft, in packages of 1,180 mL or less is included in the definition. Beer coolers and shandies are excluded from this definition.

The main ingredients of beer are: (1) water; (2) adjuncts, such as hops, corn or rice to provide flavour and starch; and (3) yeast for the fermentation process. In the brewing process, malt is mixed with purified water and heated under carefully controlled conditions, such that the starches in the malt are converted into sugars. Starch from other adjunct grains is added depending on the type of beer being produced. The thick mash mixture is filtered, and the resultant amber fluid, known as wort, is then moved to copper or stainless steel brew kettles where it is boiled and then rapidly cooled. During this process, hops are added to contribute to the flavour and aroma of the brew.

When cooled, the wort is moved to the fermentation tanks, at which time the yeast is added. The yeast breaks down the sugar in the wort, turning it into carbon dioxide and alcohol. After about seven days of fermentation, the yeast and residue are removed, and the beer is cooled to near freezing. It is then stored in aging tanks. The aging process lasts from one to several weeks, during which time the beer is filtered a number of times and is carbonated.

After undergoing quality control checks, the beer is ready for bottling, canning or "racking" into kegs. The filled bottles or cans are then pasteurized to prolong shelf life. The labelled bottles and cans are electronically inspected and then packaged in cartons for storage and shipment to warehouses and, subsequently, to retail outlets.

B.C. INDUSTRY

There are three major breweries in British Columbia which produce the subject beer. These are Labatt, Molson and PWB. These three companies account for 97 percent of production in British Columbia. The balance of production is accounted for by a number of micro-breweries and brew pubs.

Labatt is an operating division of Labatt Breweries of Canada, which is, in turn, a division of Labatt Brewing Company Limited, which is wholly owned by John Labatt Limited of London, Ontario. Labatt, which has its headquarters in Vancouver, British Columbia, operates two breweries in that province, one in New Westminster and one in Creston.

Molson is a wholly owned subsidiary of Molson Breweries. Molson Breweries is an Ontario general partnership involving The Molson Companies Limited, a Canadian public company, Carling O'Keefe Breweries of Canada Limited (Carling O'Keefe), a wholly owned subsidiary of Foster's Brewing Group Limited (formerly Elders IXL Limited of Australia) and Miller Brewing of Canada Ltd.

PWB, the smallest of the three producers, operates one brewery in Prince George, British Columbia. PWB was an operating division of International Potter Distilling Corporation (Potter) of Vancouver. However, on February 28, 1991, Potter sold the Prince George operation to Pacific Pinnacle Investments Ltd., a Vancouver-based company.

PRODUCT DISTRIBUTION

The LDB is the sole importer of the subject goods into British Columbia. It is responsible for the importation, distribution and retailing of imported beer in the province. While the LDB is the importer of all the subject goods, other companies or agents, acting on behalf of the exporters, are responsible for their own administrative and promotional activities relating to the importation and resale of the subject goods.

The LDB operates 2 warehouses and approximately 220 government liquor stores located throughout the province. The main warehouse is located in Vancouver, and the other is located in Kamloops. In addition to the liquor stores, the government authorizes 135 private retail outlets (rural agency stores) to act as agents of the LDB. There are over 6,400 establishments licensed to sell beer for consumption on the premises, of which 740 are also permitted to make over-the-counter off-premise sales of packaged beer (licensees). In 1985, these licensees were allowed to apply for a licence to operate a retail

outlet attached to the establishment. There are currently 270 of these licensee retail outlets, commonly referred to as cold beer and wine stores.

B.C. brewers deliver directly from their plants to all retail outlets. Molson and Labatt use the fleet of their joint venture, Pacific Brewers Distributors Limited.

Prior to September 1993, imported beer was delivered solely from the two LDB warehouses to government liquor stores. The LDB has its own fleet for deliveries within the greater Vancouver area and hires common carriers for shipments to all other localities in the province. The LDB also operates a store at the Vancouver warehouse that exclusively supplies licensees. A second such store for licensees is operated in Victoria.

On September 26, 1993, export breweries were afforded the option to self-deliver beer and, thereby, opt out of the LDB distribution system. Companies that self-deliver no longer pay the $0.20/L cost of service, before markup, which had been applied to cover LDB distribution costs. As well, export breweries that self-deliver are rebated $0.09/L cost of service, after markup, to cover retail handling charges previously incurred by the LDB. Pabst and Stroh have opted to self-deliver within the province, while Heileman has opted to stay in the LDB distribution system.

SUMMARY OF THE 1991 FINDING

On October 2, 1991, the Tribunal found that the dumping of the subject beer originating in or exported from the United States by or on behalf of the three named U.S. companies, for use or consumption in the province of British Columbia, had caused, was causing and was likely to cause material injury to the production in British Columbia of like goods.

In 1990, the overall value of the B.C. market for the subject goods was estimated to be about $500 million. The three complainants, Molson, Labatt and PWB, represented 99 percent of total B.C. production. They claimed material injury in the form of price suppression, margin suppression, reduced profitability and reduced investment.

In reaching its decision in that case, the Tribunal had to determine whether the B.C. producers constituted a separate regional industry within the meaning of the GATT Anti-Dumping Code[3] (the Code). It found that the B.C. market was an isolated market and that the B.C. producers of beer could be regarded as a separate regional industry.

The evidence indicated that, from April 1, 1990, to March 31, 1991, the combined sales of packaged beer by Labatt and Molson in British Columbia accounted for 95 percent of their total domestic sales of packaged beer. No information on PWB's sales to other provinces was available. Therefore, the Tribunal was satisfied that B.C. producers sold all, or almost all, of their production in British Columbia. Furthermore, the evidence indicated that the penetration into the B.C. market of beer produced in other provinces was minimal. Less than 1 percent of the packaged beer consumed in British Columbia in the years 1987 through 1990 was supplied by producers located in other provinces. The Tribunal, therefore, considered that the demand in British Columbia for packaged

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3. *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade*, signed in Geneva, Switzerland, on December 17, 1979, GATT BISD 171 (1980).

beer was not supplied to any substantial degree by producers located elsewhere in Canada.

Having found British Columbia to be an isolated market, the Tribunal went on to consider whether there was a concentration of dumped imports into that market. The Tribunal applied the "distribution test," which compares the volume of imports into a regional market to the volume of imports into the national territory as a whole. The Tribunal found that, in the years 1988, 1989 and 1990, 37 percent, 20 percent and 29 percent, respectively, of the total subject imports into Canada were imported into British Columbia. Moreover, the share of total subject imports into British Columbia was 2.9 times higher than British Columbia's share of total Canadian consumption of the subject goods in 1990. On the basis of the foregoing, the Tribunal concluded that the subject goods did constitute a concentration of imports into the B.C. market.

The evidence showed a significant increase in import market share and the existence of price suppression in the marketplace during the period under review. The price suppression was responsible, in large measure, for the steady erosion in gross profits and net income before taxes for the B.C. industry. The erosion in gross profits was exacerbated by cost increases associated with the switch from the use of bottles to cans. The Tribunal was of the view that the magnitude of the injury to the B.C. industry was material.

With regard to the future, the Tribunal recognized that the recent imposition of the cost of service on imports by the LDB had led to a sharp increase in the display (retail) prices of the dumped imports, which, if maintained at those levels, could have allowed the B.C. industry to recover some of its financial losses. However, the Tribunal was of the opinion that, if the anti-dumping duties were not kept in place, the exporters would resume their dumping and could absorb some or all of the cost of service, if required, to restore their prices at the low end of the market and continue gaining market share at the expense of the B.C. industry. The Tribunal, therefore, found that the dumping of the subject beer by the subject exporters, Pabst, Heileman and Stroh, was likely to cause material injury to the production in British Columbia of like goods.

ECONOMIC INDICATORS

Data presented in the 1991 inquiry indicated that the B.C. market for the subject packaged beer had grown from 1.71 million hL in 1987 to 1.94 million hL in 1990, an overall increase of 13.4 percent. The major share of the market was held by the complainants whose 1990 sales from B.C. production accounted for 87.5 percent of all packaged beer consumed in British Columbia, down from the 92.7 percent share held in 1987. Sales of imports from the subject sources accounted for 4.1 percent of the total B.C. market in 1987. These sales had grown from 71,000 hL in 1987 to 156,000 hL in 1990 and accounted for 8.1 percent of the market.

Data presented in this review indicate that the B.C. packaged beer market has grown only marginally since 1990 and, in 1993, stood at 1.98 million hL, an increase of about 40,000 hL over the period. However, during the first quarter of 1994, it increased by 3 percent in comparison to the same quarter of 1993.

Sales from B.C. production in the B.C. market by the three major breweries (Labatt, Molson and PWB) fell steadily over the review period 1991 through the first quarter of 1994. However, this decline was offset by an increase in sales of packaged beer brought into British Columbia by Labatt and Molson from their other related

Canadian breweries. In total, sales by the three producers, as well as sales by micro-breweries and brew pubs, increased by 4 percent between 1991 and 1993, with a further 3 percent gain recorded in the first quarter of 1994 over the same period in 1993.

Sales of imports from Pabst, Heileman and Stroh declined after 1991, the year in which the injury finding was issued. Combined sales for the three companies fell by 76 percent between 1991 and 1993, while their market share declined from 4 percent to 1 percent over the same period. This downward sales trend continued into the first quarter of 1994.

During the period under review, the B.C. industry saw a significant improvement in its financial results after having incurred a large loss in net income in fiscal year 1991. Although the financial fortunes of PWB were less positive than those of Labatt and Molson, the industry generated a combined net profit before taxes in the 10 percent range over the fiscal years 1992 through 1994. This improved financial performance was the result of higher selling prices combined with a lowering of production costs, which resulted in higher year-over-year gross margins for all three producers. Moreover, industry data indicate an increasing success in penetrating export markets, particularly in fiscal year 1994.

For the most part, price competition emanating from exports by the three U.S. brewers had focused on the discount segment of the market and, in particular, on the six-pack can package configuration. In mid-1991, in response to the Department of National Revenue's preliminary determination of dumping, display prices of imported beer rose sharply from approximately $5.20/six-pack.

On April 1, 1992, a second major price increase occurred when the LDB instituted a minimum markup of $1.00/L. The application of the markup saw both imported and domestically produced discount beer increase in price. On April 1, 1993, the LDB established a minimum display price of $3.00/L ($6.40/six-pack), which again caused a price increase for both imported and domestically produced discount beer.

Largely as a result of these three events, the display price of discount beer rose by more than $1.00/six-pack of cans. The June 1991 display price of around $5.20 had risen to the $6.40 range by April 1993. Since the application of a minimum display price at that time, prices for discount beer have stabilized in the range of $6.40 to $6.75/six-pack.

SUMMARY OF POSITION OF PARTIES

Domestic Industry

Counsel for the domestic industry argued that, in the conduct of a review, it is appropriate for the Tribunal to look only at the propensity to dump and the vulnerability to renewed dumping, and not to consider the technical definition of the Code with respect to regional market. Regional market considerations should not be an issue in a review.

On the question of the propensity to dump, it was counsel's view that conditions in the United States for the subject breweries are such that, given the opportunity, they will sell at whatever price and wherever they can to obtain sales. They have been loosing market share in their domestic market, and their shipments are declining. They have

significant unused capacity and sell only on the basis of price. British Columbia is also a convenient outlet for two of the three breweries that have plants in nearby states.

As regards vulnerability, counsel relied on industry confidential exhibits[4] which purport to show the negative impact of renewed dumping on the sales volumes and revenues of B.C. producers. It was argued that, in the absence of the finding, the exporters would reenter the market with price cuts in the discount segment of the market, thereby causing losses in volume and value in that segment, as well as price erosion and volume losses in the non-discount segments of the market. Producers could not and should not rely on minimum display prices remaining in effect. This social measure is likely to be contested by U.S. authorities.

As regards the regional market situation, counsel urged the Tribunal to dismiss the issue on the basis of case law and a proper reading of Article 4 of the Code. Counsel contended that Article 4 is meant to deal with determinations of injury and, in *Microwave Ovens*,[5] the Canadian Import Tribunal (the CIT) ruled that, in a review proceeding, Article 4 did not apply.

Counsel also urged the Tribunal to consider that, logically, Article 4 of the Code cannot apply to a review because two of the four elements required in the establishment of a regional market, that is, concentration of dumped imports into the regional market and injury to domestic producers in that market, relate to the determination of injury. There cannot be concentration after a finding of injury nor can there be injury from dumping, as it is the purpose of the finding to eliminate injury.

Alternatively, counsel argued that, even if the regional market requirements had to be considered, the facts of the case show that a regional market still exists. Shipments into and out of British Columbia by Labatt and Molson were inter-company transfers which were of a transitory nature. Technological developments which required substantial capital investments and which led to the development of new beers (bottled draft and ice beer) should, in counsel's view, be excluded in determining whether or not there is still a regional market. Industry investment plans make it clear that B.C. producers intend to become self-sufficient in their own market. Moreover, according to counsel, *Reinforcing Bars*[6] (the only Canadian case) and U.S. case law suggest that movements into and out of a regional market in the range of 20 percent are acceptable levels in maintaining the purity of a regional market.

Counsel suggested that the finding is being reviewed in "midstream" while the producers were in a transition process and were expecting a full five-year period to complete this process. Counsel also noted the absence of witnesses for the three exporters at the hearing and their failure "to make their case" on the issues of propensity to dump and injury.

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4. Manufacturers' Exhibits A-10, A-10A, A-10B and B-7 (protected), Administrative Record, Vol. 8.

5. *Countertop Microwave Ovens Originating in or Exported from Japan, Singapore and the Republic of Korea* (1986), 12 C.E.R. 8, Canadian Import Tribunal, Review No. R-1-86, Review Finding, June 27, 1986, Statement of Reasons, July 4, 1986, at 3.

6. *Certain Hot Rolled Carbon Steel Concrete Reinforcing Bars, Bars and Structurals Originating in or Exported from Mexico and the United States of America for Use or Consumption in the Province of British Columbia* (1987), 15 C.E.R. 253, Canadian Import Tribunal, Inquiry No. CIT-8-87, Finding, December 22, 1987, Statement of Reasons, January 7, 1988.

Counsel concluded that, as a general proposition, "you make your beer where you sell your beer[7]" and that, on the basis of the law or logic, British Columbia is still a regional market.

Exporters

G. Heileman Brewing Company Inc.

Counsel for Heileman argued that, without a regional market, the material injury finding cannot be continued. In submissions as to whether or not a regional beer market continues to exist in British Columbia, counsel addressed two key propositions: whether B.C. producers sell all or almost all of their production in British Columbia and whether B.C. demand is supplied to any substantial degree by producers located elsewhere in Canada.

With respect to the first proposition, counsel argued that the data show a continuing increase in sales of beer brewed in British Columbia for consumption outside the province. What has facilitated this activity, in counsel's view, is the changing climate insofar as interprovincial trade is concerned. Trade barriers have been coming down and continue to do so, as evidenced by the changed attitude of the B.C. government since 1991. This factor has led to a situation, in counsel's submission, where B.C. brewers and their related companies no longer look upon British Columbia as an isolated market. Counsel argued that the brewers are taking a much broader view of the territory when it comes to decisions with respect to investments and marketing.

Concerning the second proposition, counsel noted the continual increase in movements of beer into British Columbia from other provinces since 1991. In counsel's submission, the increased sales into British Columbia are part of a broader marketing and production strategy by the industry to rationalize production as trade barriers come down. In counsel's view, these movements into and out of British Columbia are not temporary transitions, as suggested by the industry, but are rather a new way of doing business in Canada in the beer industry. Moreover, counsel argued that the recent Agreement on Internal Trade[8] will essentially eliminate any remaining trade barriers in Western Canada within the coming year.

With respect to the question of a concentration of dumped imports should the finding be rescinded, counsel argued that the B.C. minimum price regime prevents U.S. brewers from gaining any significant market share. In counsel's submission, this fact is evidenced by the inability of Pabst and Stroh to increase sales even through they have been selling at or near the minimum price level. If the finding were rescinded, counsel suggested that the only change which would occur would be their client's attempts to sell its Rainier brand at or near the minimum display price level.

Finally, counsel contended that there is no credible evidence that minimum pricing would not continue in the foreseeable future and to find otherwise would be pure speculation. Counsel argued that the evidence indicates that the B.C. government has resisted pressures to compromise minimum pricing. It is confident that its policy is

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7. Transcript of Argument, September 28, 1994, at 23.
8. Tribunal Exhibit RR-94-001-29, Administrative Record, Vol. 1 at 160.

consistent with GATT and conforms to the Canada-United States Memorandum of Understanding on Provincial Beer Marketing Practices[9] (the MOU).

The Stroh Brewery Company

In addressing the regional market question, counsel for Stroh argued that an isolated or regional market may be carved out of a national market in exceptional circumstances only if it meets two preconditions. These two preconditions are the "all or almost all" test and the "not to any substantial degree" test.

With respect to the "all or almost all" test, in counsel's view, regional market producers should sell at least 90 to 95 percent of their production in the regional market, as supported by the CIT's decision in *Yellow Onions.*[10] With respect to beer, counsel noted that, in 1992, the year after the Tribunal's material injury finding, the volume of B.C. beer production that was sold in other provinces increased by almost 350 percent. In that year, 24 percent of beer produced in British Columbia was sold in other provinces. Moreover, in 1993, the volume of beer sold in other provinces remained relatively stable, at 22 percent of B.C. production. Accordingly, counsel submitted that the "all or almost all" test had not been met.

With respect to the "not to any substantial degree" test, counsel stated that again, subsequent to the Tribunal's material injury finding, the percentage of B.C. demand supplied by producers located elsewhere in Canada increased dramatically and has continued unabated ever since. Citing the CIT's decision in *Solid Urea,*[11] counsel submitted that beer sold into the B.C. market from other provinces far exceeded the range of 5 percent determined in that case.

Counsel suggested that the magnitude of the change in interprovincial movements of packaged beer belies the notion that such movements are temporary or transitional, as argued by the industry. In counsel's view, these changes have occurred because the interprovincial barriers have come down, and the situation is enhanced by the prospect of the Agreement on Internal Trade that is to come into effect in July 1995. Decisions by domestic brewers to move beer interprovincially are normal business practice, in counsel's submission, and are not exceptional circumstances as contemplated by the Code.

With respect to the issue of concentration, counsel noted that, in 1991, the three U.S. brewers held 8 percent of the B.C. market. In 1993, they collectively held 1 percent of the market. Counsel argued that, with the minimum price regime in effect, it is impossible to conclude that there was a concentration of dumped imports. Moreover, counsel contended that there is no evidence to indicate that the minimum price regime is to be changed or discontinued, and any such suggestion defies the situation that exists in Ontario and Quebec, which also have minimum price regimes.

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9. Tribunal Exhibit RR-94-001-26, Administrative Record, Vol. 1 at 128.

10. *Fresh, Whole, Yellow Onions, Originating in or Exported from the United States of America, for Use or Consumption in the Province of British Columbia* (1987), 14 C.E.R. 108, Inquiry No. CIT-1-87, Finding and Statement of Reasons, April 30, 1987.

11. *Solid Urea Originating in or Exported from the German Democratic Republic and the Union of Soviet Socialist Republics for Use or Consumption in Eastern Canada (Canadian Territory East of the Ontario-Manitoba Border)* (1987), 15 C.E.R. 277, Inquiry No. CIT-9-87, Finding, December 24, 1987, Statement of Reasons, January 8, 1988.

In conclusion, counsel argued that, with the presence of a minimum price regime, there is no basis whatsoever to conclude that there is a propensity to dump by their client and no basis to conclude that there is material injury. Accordingly, they contended that the material injury finding should be rescinded.

Pabst Brewing Company

Counsel for Pabst argued that, contrary to the industry's position, the Tribunal must determine whether a regional market continues to exist, even though this is a review under section 76 of SIMA. Counsel submitted that, if the Tribunal cannot revisit the issue now, it cannot do so at the five-year expiration, a result which is untenable. Counsel cited the *Whole Potatoes*[12] review as evidence of the Tribunal's concern as to whether a regional market continued to exist at the review stage. Further, counsel observed that the Code does not exclude such consideration upon review.

In addressing the regional market issue, counsel argued that provincial governments, as a result of GATT challenges and domestic and international agreements, have agreed to eliminate many of the interprovincial restrictions which had prevented the movement of beer. Counsel suggested that domestic brewers view the market from a national, rather than from a regional, perspective and make large capital investments accordingly. Counsel claimed that LDB practices have proven beneficial to Labatt and Molson because they have assisted in the rationalization of production while also preserving employment in British Columbia.

Counsel argued that, if the finding is continued, it should be amended to exclude Pabst. In counsel's submission, there is no likelihood of resumed dumping by their client and, even if dumping resumes, there is no likelihood of material injury therefrom. In counsel's view, as long as the minimum price regime remains in place, Pabst cannot possibly dump because it will be required to sell to the LDB at price levels which exceed the minimum export price determined by the Department of National Revenue.

Counsel finally argued that the evidence indicates that the minimum price regime would remain in place in the foreseeable future. Counsel noted that minimum prices have been in effect for alcoholic beverages in British Columbia since 1989 and have done nothing but increase since that time. Further, counsel submitted that the B.C. minimum price for beer has been in place for about 18 months, and yet no GATT challenge has been initiated by the U.S. government. Moreover, counsel argued that the B.C. government successfully negotiated a recent agreement with the United States respecting trade in beer, but the agreement did not require the elimination of or reduction to the minimum price.

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12. *Whole Potatoes with Netted or Russeted Skin, Excluding Seed Potatoes, in Non-Size A, also Commonly Known as Strippers, Originating in or Exported from the State of Washington, United States of America, for Use or Consumption in the Province of British Columbia; and Whole Potatoes, Originating in or Exported from the United States of America, for Use or Consumption in the Province of British Columbia, Excluding Seed Potatoes, and Excluding Whole Potatoes with Netted or Russeted Skin in Non-Size A, Originating in or Exported from the State of Washington*, Canadian International Trade Tribunal, Review No. RR-89-010, Order and Statement of Reasons, September 14, 1990.

Director of Investigation and Research, *Competition Act*

Counsel for the Director argued that there have been two substantial economic changes in the B.C. beer market which support the removal of anti-dumping duties. Firstly, the implementation of the minimum price regime by the B.C. government constrains the ability of U.S. brewers to price aggressively and to build market share to the level that had existed prior to 1991. Secondly, counsel submitted that the implementation of the Intergovernmental Agreement on Beer Marketing Practices[13] (the Intergovernmental Agreement) on January 1, 1991, resulted in the reduction of interprovincial trade barriers. Molson and Labatt, it was suggested, have successfully responded to these changes.

Counsel also argued that the removal of anti-dumping duties would not generate any substantial reduction in the profits of B.C. brewers. Counsel argued that the B.C. minimum price policy, as well as the high degree of market concentration by Molson and Labatt in British Columbia, would not be threatened by new entrants in that market.

Further, counsel urged the Tribunal to consider the high degree of brand loyalty for Labatt and Molson products, which leaves B.C. producers with a substantial degree of market power. Counsel suggested that the consumer would prefer those brands, and this, coupled with the constraint on the ability to reduce prices, would prevent U.S. brewers from gaining significant market share.

Finally, counsel submitted that the B.C. minimum price policy severely restricts the extent to which U.S. brewers can undercut domestic brewers' prices. In counsel's view, there is a limit to the extent to which U.S. brewers can convince consumers to switch from one brand to another on the basis of price alone. Accordingly, for the reasons stated above, counsel requested a rescission of the finding.

REASONS FOR DECISION

Regional Industry

The Tribunal conducted this review pursuant to subsection 76(2) of SIMA, which provides as follows:

> *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.*

Subsection 76(2) of SIMA empowers the Tribunal to initiate a review at any time after it makes a finding under sections 3 to 6 of SIMA. The Tribunal initiated the present review on the basis of its view that there was a reasonable indication of a change in the circumstances affecting the B.C. market for beer.

Counsel for the domestic industry argued that, as the present proceeding is a review under section 76 of SIMA, the Tribunal does not have the jurisdiction to review the issue of whether a regional industry for packaged beer continues to exist in

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13. Tribunal Exhibit RR-94-001-28, Administrative Record, Vol. 1 at 146.

British Columbia. In support of this proposition, counsel referred the Tribunal to paragraph 1 of Article 4 of the Code. Counsel argued that the last two elements of paragraph 1(ii) of Article 4 of the Code, specifically a concentration of dumped imports into an isolated market and injury to all or almost all of production, are illogical in the context of a review. They submitted that, given the fact that a finding in respect of beer[14] is in place, there would not be a concentration of dumped imports into British Columbia. Counsel also submitted that there is unlikely to be injury after the Tribunal's finding, as such injury is precisely what the finding and the subsequent imposition of anti-dumping duties are intended to remedy.

Counsel for the domestic industry also cited the CIT's decision in *Microwave Ovens*. In that case, the CIT denied a request by a domestic producer to have another domestic producer excluded from the domestic industry.[15] The Tribunal notes that, in that case, the issue was not whether a regional industry continued to exist, but rather whether the domestic producer in question, that was also an importer of the subject goods, should be excluded from the definition of domestic industry.

Subsection 42(3) of SIMA provides as follows:

> *The Tribunal, in considering any question relating to the production in Canada of any goods or the establishment in Canada of that production, shall take fully into account the provisions of*
> *(a) in a dumping case, paragraph 1 of Article 4 of the* [*Code*].

Pursuant to paragraph 1(ii) of Article 4 of the Code,[16] in *Beer*, the Tribunal heard evidence and argument regarding the existence of a regional industry for packaged beer

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14. *Certain Beer 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, Inquiry No. NQ-91-002, Finding, October 2, 1991, Statement of Reasons, October 17, 1991.
15. *Supra*, note 5.
16. Paragraph 1 of Article 4 of the Code provides, in part, as follows:

> *In determining injury the term "domestic industry" shall be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products, except that*
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> *(ii) in exceptional circumstances the territory of a Party may, for the production in question, be divided into two or more competitive markets and the producers within each market may be regarded as a separate industry if (a) the producers within such market sell all or almost all of their production of the product in question in that market, and (b) the demand in that market is not to any substantial degree supplied by producers of the product in question located elsewhere in the territory. In such circumstances, injury may be found to exist even where a major portion of the total domestic industry is not injured provided there is a concentration of dumped imports into such an isolated market and provided further that the dumped imports are causing injury to the producers of all or almost all of the production within such market.*

in British Columbia. The Tribunal found that there was such an industry in British Columbia. In its Statement of Reasons in *Beer*, the Tribunal contemplated the possibility that it might conduct a review of its finding in the future, if there was a change in the regulatory regime that affected the isolation of the beer market in British Columbia.[17]

Subsection 76(2) of SIMA provides that, in a review, the Tribunal "may re-hear any matter" that it heard in the original proceeding. As noted above, in *Beer*, the Tribunal found that there was a regional industry in British Columbia for packaged beer. As the regional industry issue was a fundamental one in the inquiry, the Tribunal is of the view that, pursuant to subsection 76(2) of SIMA, it has the discretion to "re-hear" that issue in the present review.

Subsection 42(3) of SIMA requires the Tribunal, in a dumping case, in considering any question relating to the production in Canada of any goods, to take into account paragraph 1 of Article 4 of the Code. In reviewing its decision in *Beer*, the Tribunal is considering a question relating to the production of goods and, thus, it is of the view that it is appropriate for it to take paragraph 1 of Article 4 of the Code into account in the present case.

The Tribunal's discretion under subsection 76(2) of SIMA must not, of course, be exercised in an arbitrary or capricious manner. Rather, it must be exercised in a manner which is consistent with the objects of SIMA. In the Tribunal's view, SIMA's primary object is the protection of a domestic industry, whether it be a national industry or, in exceptional circumstances, a regional industry, from material injury or threat thereof caused by dumped or subsidized imports. It follows that, in a dumping case, there must be a domestic industry, whether national or regional, with respect to which an analysis of whether the dumping is causing or threatening to cause material injury can be made. Simply put, without a domestic industry, there can be no finding of material injury. In the Tribunal's view, where a finding is made in favour of a domestic industry and, subsequent to the finding, where a question arises as to the continued existence of that industry, it is appropriate for the Tribunal to consider that question in the context of a review.

This view is supported by the Tribunal's decision in *Butt Welding Pipe Fittings*[18] where, in deciding not to continue a finding, the Tribunal stated:

> *As the purpose of the CIT finding ... was to protect Canadian production of the subject goods from injurious dumping, and as Macline, the sole domestic producer of the subject goods, no longer produces these goods, the Tribunal considers that continuation of the finding ... is not warranted.*[19]

Support can also be found in the Tribunal's decision in *Key Blanks*.[20] In that case, the Tribunal decided not to continue a finding on the basis of its view that the sole domestic producer was "a significantly different company [at the time of the review] than

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17. *Supra*, note 14 at 14.

18. *Certain Butt Welding Pipe Fittings Originating in or Exported from Japan*, Review No. RR-92-002, Order and Statement of Reasons, November 13, 1992.

19. *Ibid.* at 2.

20. *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*, Review No. RR-91-005, Order and Statement of Reasons, June 1, 1992.

it was at the time of the finding.[21]" The Tribunal found that the domestic producer had moved a substantial quantity of its production to the United States and had, for a time, entirely ceased production in Canada.

Additional support can be found in the Tribunal's decision in *Yellow Onions*.[22] In that case, which was a review of a CIT decision, the Tribunal first considered whether yellow onion producers in British Columbia still constituted a regional industry.[23]

Finally, it should be recalled that the present review was initiated by the Tribunal on the basis of its view that there was a reasonable indication of regulatory changes relating to the B.C. beer market.[24] It is apparent that these changes could have had an effect on the level of interprovincial and international trade in packaged beer and, thus, on the existence of a regional industry. It follows, therefore, that the Tribunal should first examine the issue upon which the review was initiated.

If the Tribunal were to find that, despite the changes in the market, there was still a regional industry in British Columbia, it could go on to consider whether there was a likelihood of a resumption of dumping and, if so, whether it was likely that such dumping would cause material injury to that industry. However, the Tribunal would not conduct the latter analysis unless it had found that a regional industry in British Columbia continued to exist. Any analysis of material injury in a regional industry case is predicated upon a finding that there is a regional industry. Without a regional industry, there is nothing against which to consider the likely impact of dumped imports.

The Tribunal is of the view that, pursuant to subsection 76(2) of SIMA, it has the jurisdiction to "re-hear" the regional industry issue in the context of the present review. Moreover, given the fundamental significance that the existence of a domestic industry has in the context of any dumping case under SIMA, it is incumbent upon the Tribunal to examine the regional industry issue in this proceeding.

Is British Columbia Still a Regional Market for Packaged Beer?

Paragraph 1(ii) of Article 4 of the Code provides that the Tribunal may find a regional industry to exist only in exceptional circumstances. To determine whether the B.C. packaged beer industry is still a regional industry, the Tribunal must consider the first two conditions in paragraph 1(ii) of Article 4 of the Code, namely, those relating to whether British Columbia is an isolated market for packaged beer. Specifically, the Tribunal must ask itself the following questions: Do B.C. packaged beer producers sell all or almost all of their production in British Columbia? And is the demand for packaged beer in British Columbia not to any substantial degree supplied by producers located elsewhere in Canada?

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21. *Ibid.* at 7.

22. *Fresh, Whole, Yellow Onions, Originating in or Exported from the United States of America, for Use or Consumption in the Province of British Columbia,* Review No. RR-91-004, Order and Statement of Reasons, May 22, 1992.

23. *Ibid.* at 8.

24. The Tribunal's notice of review dated May 25, 1994, referred to the Intergovernmental Agreement and the MOU.

In considering paragraph 1(ii) of Article 4 of the Code in *Reinforcing Bars*, the CIT stated:

> *It appears that the Article contemplates the division of a national territory into separate regional markets only under conditions of market isolation, namely, where there is little or no movement of territorial production between those regional markets, in either direction. In other words, the hole in the regional pail must be very small.*[25]

Regarding the first two conditions in paragraph 1(ii) of Article 4 of the Code, in *Solid Urea*, the CIT stated:

> *The first two conditions describe a situation in a territory where the supply and demand at prevailing or equilibrium price in a region are independent from the supply and demand for the same product in other regions of the territory. This independence translates into little or no movement of goods across the regional boundary.*[26]

In the present case, the evidence on the record indicates that the B.C. beer industry sold 24 and 22 percent of its packaged beer production in other provinces in 1992 and 1993, respectively.[27] By comparison, the B.C. industry sold 5 and 7 percent of its production in other provinces in 1990 and 1991, respectively.[28] In the first quarter of 1994, the industry sold 16 percent of its packaged beer production in provinces other than British Columbia. That represents a 23 percent increase in the percentage of outbound production, as compared to the first quarter of 1993.[29]

With respect to B.C. sales of packaged beer produced by Canadian breweries located outside British Columbia, the evidence indicates that, subsequent to 1991, such sales have made significant year-over-year increases in both volume and percentage share of the B.C. market.[30] This trend continued in the first quarter of 1994, when the increase in the percentage of sales by producers located in other provinces grew sharply, as compared to the first quarter of 1993.[31]

In argument, counsel for the domestic industry referred the Tribunal to the CIT's decision in *Reinforcing Bars* as authority for the proposition that an isolated market could be found to exist even where there were 20 percent inflows and outflows of the goods in question. In the Tribunal's view, the decision in *Reinforcing Bars* does not assist the domestic industry. In that case, the CIT found that an isolated market did not exist, on the basis that between 20 and 27 percent of the B.C. market for the goods in question

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25. *Supra*, note 6, 15 C.E.R. 253 at 261, Statement of Reasons at 6.
26. *Supra*, note 11, 15 C.E.R. 277 at 287, Statement of Reasons at 9.
27. Public Pre-Hearing Staff Report, August 5, 1994, Tribunal Exhibit RR-94-001-5, Administrative Record, Vol. 1 at 82.18.
28. *Ibid.*
29. Tribunal Exhibit RR-94-001-9.1A (protected), Administrative Record, Vol. 4 at 43; and Tribunal Exhibit RR-94-001-9.2 (protected), Administrative Record, Vol. 4 at 68-69.
30. Protected Pre-Hearing Staff Report, August 5, 1994, Tribunal Exhibit RR-94-001-6 (protected), Administrative Record, Vol. 2 at 23.
31. Tribunal Exhibit RR-94-001-9.1A (protected), Administrative Record, Vol. 4 at 42; Tribunal Exhibit RR-94-001-9.2 (protected), Administrative Record, Vol. 4 at 56; and Tribunal Exhibit RR-94-001-12.1A (protected), Administrative Record, Vol. 6 at 5.

was supplied by production from other provinces.[32] The CIT noted that B.C. producers sold 80 percent or more of their production in British Columbia. However, as the CIT had already concluded that there was not an isolated market on the basis of the inflow of goods from other provinces into British Columbia, it did not decide whether B.C. producers sold "all or almost all" of their production in British Columbia.[33] Also, in *Solid Urea*, in circumstances where the sole producer in the alleged regional market made no sales outside that market,[34] the CIT found that a regional market did not exist, on the ground that there was an 11.5 percent inflow of solid urea into the market from other provinces.[35]

Counsel for the domestic industry also referred the Tribunal to several decisions of the U.S. International Trade Commission, which he submitted supported the view that a regional market could be found to exist where there were 20 percent inflows and outflows from that market. Counsel argued that these authorities should be considered by the Tribunal, in light of the dearth of Canadian decisions on point. However, the Tribunal does not find counsel's argument to be persuasive, given the fact that the Tribunal and its predecessors have considered the regional industry issue in several cases.[36]

Finally, counsel for the domestic industry submitted that the increased level of trade in packaged beer should be viewed as a temporary phenomenon. Counsel submitted that this phenomenon had largely resulted from the introduction of new beers, such as "genuine draft" and "ice beer," which required the use of new brewing technologies. For economic reasons, these technologies are often introduced in one province before another. Counsel submitted that, as new beers gain market

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32. *Supra*, note 6, 15 C.E.R. 253 at 261, Statement of Reasons at 6.
33. *Supra*, note 6, 15 C.E.R. 253 at 262, Statement of Reasons at 7.
34. *Supra*, note 11, 15 C.E.R. 277 at 288, Statement of Reasons at 9.
35. *Ibid.*
36. In addition to the cases referenced in this Statement of Reasons, see, for example, *Fresh Cauliflower Originating in or Exported from the United States of America*, Canadian International Trade Tribunal, Inquiry No. NQ-92-003, Finding, January 4, 1993, Statement of Reasons, January 19, 1993; *Fresh Iceberg (Head) Lettuce Originating in or Exported from the United States of America*, Canadian International Trade Tribunal, Inquiry No. NQ-92-001, Finding, November 30, 1992, Statement of Reasons, December 15, 1992; *Recreational Vehicle Entrance Doors, Produced or Exported by, or on Behalf of, Elixir Industries, Gardena, California, United States of America, for Use or Consumption in the Provinces of Alberta and British Columbia* (1988), 16 C.E.R. 174, Canadian Import Tribunal, Inquiry No. CIT-12-87, Finding, March 18, 1988, Statement of Reasons, March 31, 1988; *Fertilizer Blending, Weighing, Handling and Conveyor Equipment, Produced or Exported by or on Behalf of Speed King Industries, Inc., Dodge City, Kansas, United States of America, for Use West of the Manitoba/Ontario Border, Imported Either Individually or as Part of a Fertilizer Blending System or Unit, in a Complete or Incomplete Condition, Either Assembled or Knocked Down* (1987), 14 C.E.R. 290, Canadian Import Tribunal, Inquiry No. CIT-3-87, Finding, September 30, 1987, Statement of Reasons, October 15, 1987; and *Whole Potatoes With Netted or Russeted Skin, Excluding Seed Potatoes, Originating in or Exported from the United States of America, for Use or Consumption in the Province of British Columbia* (1984), 7 C.E.R. 284, Anti-dumping Tribunal, Inquiry No. ADT-4-84, Finding and Statement of Reasons, June 4, 1984.

acceptance, the brewers may invest the capital necessary to establish production in other provinces, thus eliminating the need to ship that product across provincial borders. Counsel argued that, given the temporary nature of some of the interprovincial flows of packaged beer into and out of British Columbia, the Tribunal should remove, from the aggregate data, those flows of packaged beer attributable to the introduction of these new brewing technologies.

With respect to the alleged temporary nature of certain interprovincial flows of packaged beer, the Tribunal notes that the data for 1992, 1993 and the first quarter of 1994 show a sustained pattern of interprovincial trade over the entire period. In the face of the significant level of these flows over a prolonged period, the Tribunal is unable to conclude that the phenomenon is temporary. The Tribunal heard evidence that the introduction of new products is a "way of life[37]" in the beer industry and that there are various costs associated with the introduction of new products, only some of which are related to the use of new technologies.[38] Given these costs, production of new products is introduced at a single plant, so as to allow the brewer to gauge whether the new products will gain market acceptance, before making the capital investment necessary to brew the new products at other locations. Until production is established at other locations, the new products are "outsource[d][39]" from the single brewery. The fact that new products are a way of life in the brewing industry, together with the manner in which production of new products is established, suggests that the trend in interprovincial trade in beer is likely to continue.

In the Tribunal's view, the increased flow of packaged beer into and out of British Columbia is also attributable, in part, to the changes in the regulatory environment in Canada generally, and in British Columbia in particular. In 1991, the federal and provincial governments concluded the Intergovernmental Agreement. It contained a number of provisions pursuant to which certain provinces, including British Columbia, agreed to eliminate certain practices which discriminated against beer on the basis of its province of origin. The province of British Columbia acceded to the Intergovernmental Agreement late in 1991.

Moreover, the governments of Canada and the United States have entered into two agreements which relate to trade in packaged beer, an agreement in principle[40] concluded on April 25, 1992, and the MOU concluded on August 5, 1993. Pursuant to the agreement in principle, Canada agreed, among other things, that certain provincial policies applicable to imported beer would be eliminated. These policies related to such things as access to points of sale, warehousing and delivery, and cost of service markups. On May 26, 1992, the LDB amended the cost of service component of its pricing formula for imported beer to bring it into conformity with the agreement in principle.

In the MOU, the parties agreed, among other things, to immediately implement certain terms of the agreement in principle that had yet to be implemented. Shortly after the conclusion of the MOU, the LDB amended its policies to allow imported beer to be

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37. Transcript of Public Hearing, September 26 and 27, 1994, at 168.
38. *Ibid.*
39. *Ibid.* at 169.
40. Tribunal Exhibit RR-94-001-25, Administrative Record, Vol. 1 at 124.

privately distributed and to provide imported beer access to certain points of sale, formerly available only to domestic beer brewed in British Columbia.[41]

Finally, the Tribunal notes that, on July 18, 1994, the federal and provincial governments entered into the Agreement on Internal Trade, which will come into force on July 1, 1995. Chapter Ten of that agreement obligates the provinces to eliminate measures which operate as obstacles to interprovincial trade in alcoholic beverages, including beer.

The Tribunal heard evidence that the LDB changed some of its policies with respect to imported beer as a result of the agreement in principle and the MOU. New policies applicable to imported beer were extended by the LDB to apply to beer brewed in provinces other than British Columbia.[42] The Tribunal also heard evidence that the LDB's policy regarding interprovincial shipments of packaged beer is quite different now than it was in 1991.[43]

The Tribunal is of the view that the conclusion of the various referenced interprovincial and international agreements relating to trade in beer has contributed substantially to the LDB's relaxation of restrictions on interprovincial and international trade in beer.[44] This, in turn, has led to increased interprovincial trade in packaged beer, both into and out of British Columbia. In this regard, the Tribunal notes that, in the period from April 1, 1990, to March 31, 1991, B.C. producers sold 95 percent of their production of packaged beer in British Columbia.[45] However, in 1992 and 1993, such sales accounted for only 76 and 78 percent, respectively, of the B.C. market. With respect to sales of packaged beer in British Columbia by producers located in other provinces, the evidence on the record indicates that, in the period from 1987 through 1990, less than 1 percent of the B.C. market was supplied by beer produced in other provinces.[46] However, the evidence adduced in this proceeding indicates that the situation had changed considerably by 1992 and 1993.[47]

The Tribunal has reviewed the regional industry cases heard by it and its predecessors since the enactment of SIMA. In no case, where flows into and out of a market were of the magnitude of the flows in the present case, has a regional industry been found to exist. In the present case, given the consistent pattern of a significant movement of packaged beer both into and out of British Columbia, the Tribunal is of the view that there is no longer a regional industry in packaged beer in British Columbia. On the basis of the evidence regarding the economic and regulatory environment for packaged beer, the Tribunal is of the view that the pattern is likely to continue.

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41. Tribunal Exhibit RR-94-001-32, Administrative Record, Vol. 1 at 240; and Tribunal Exhibit RR-94-001-11.1, Administrative Record, Vol. 5B at 199.
42. Transcript of Public Hearing, September 26 and 27, 1994, at 19.
43. Transcript of *In Camera* Hearing, September 26 and 27, 1994, at 40.
44. Transcript of Public Hearing, September 26 and 27, 1994, at 72-74 and 96.
45. *Supra*, note 27.
46. *Ibid.* at 82.19.
47. *Supra*, note 30.

CONCLUSION

The evidence on the record shows that, since the Tribunal's finding in *Beer*, there has been a consistent pattern of significant trade in packaged beer between British Columbia and other provinces. The Tribunal finds that the level of trade is such that B.C. packaged beer producers no longer constitute a regional industry. In light of this conclusion, the Tribunal finds it unnecessary to consider the question of continuing material injury or threat thereof in this case.

Based on these conclusions, the Tribunal is of the view that its finding of October 2, 1991, must be rescinded.

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

Charles A. Gracey
Charles A. Gracey
Member

Lyle M. Russell
Lyle M. Russell
Member