

IN THE MATTER OF:

CDA-91-1904-02

MEMORANDUM OPINION AND ORDER

C.J. Michael Flavell, of McCarthy Tétrault, Ottawa, Ontario, argued for Labatt Breweries

of British Columbia, Molson Breweries (B.C.) and Pacific Western Brewing Company. With him on the brief was Geoffrey C. Kubrick.

Clifford Sosnow, Counsel for the Investigating Authority, argued for the Canadian International Trade Tribunal.

MEMORANDUM OPINION AND ORDER

By Memorandum and Order dated August 26, 1992, this Binational Panel, acting pursuant to its authority under section 77.15 of the Special Import Measures Act ("SIMA"), remanded to the Canadian International Trade Tribunal ("Tribunal"), the Tribunal's determination in Inquiry No. NQ-91-002. The Tribunal had concluded in that inquiry that the dumping of certain beer originating in or exported from the United States by Pabst Brewing Company ("Pabst"), G. Heileman Brewing Company, Inc. ("Heileman"), and the Stroh Brewery Company ("Stroh") has caused, is causing and is likely to cause material injury to the production in British Columbia of like goods. In remanding the Tribunal's determination, this Panel instructed the Tribunal to determine

whether the dumping of beer originating in the United States, rather than the presence of dumped beer originating in the United States, has caused and is causing material injury to the producers of all or almost all beer production in British Columbia.

Panel Order at 39-40. The Panel further instructed the Tribunal to "state whether price suppression, or any other such price-based harm caused by the dumping of the subject imports," supports an affirmative determination of material injury. Id. at 40.

The Tribunal issued its Determination on Remand on November 9, 1992, finding

that the price suppression caused by the dumping of the subject imports supports a determination that the subject imports have caused, are causing and are likely to cause material injury to Labatt, Molson, and the PWB. These three producers represent all or almost all of the production of beer in the B.C. market.

Determination on Remand, at 5.

In making this determination, the Tribunal concluded that the price suppression manifested itself as reductions in the average revenues per hectolitre realized by the two largest B.C. brewers. Id. at 3. The Tribunal also considered the effect of an increase in the B.C. brewers' costs of goods sold on the financial condition of the brewers and stated that it "[did] not believe" that the increase in the average cost of goods sold "diminishes the significance" of the decline in average revenues. Id. at 3.

On November 24, 1992 Heileman and Stroh each filed timely motions asking this Panel to review the Tribunal's Determination on Remand. This Panel granted the motions on December 4, 1992. After interested parties filed initial briefs and responses, the Panel heard oral argument in Ottawa on January 7, 1993.

The scope of this Panel's inquiry in a review of the Determination on Remand is much narrower than was the scope of its review of the Tribunal's original Determination. Having affirmed the original Determination in all respects but the issue of whether the dumping of U.S.-origin beer rather than the presence of U.S.-origin beer was a cause of material injury, it is not open to the Panel to revisit the original Determination with respect to any other issue. The Panel's inquiry in reviewing the Determination on Remand is thus limited to deciding whether the Tribunal addressed the question that the Panel directed to it, followed the Panel's instructions, and in so doing reached a result that is not patently unreasonable and is supported by at least some evidence in the Tribunal's investigative record.

In its Determination on Remand, the Tribunal examined the effect of price suppression on the B.C. brewing industry. It articulated the means by which that price suppression manifested itself as material injury. In addition, it considered the impact on the B.C. brewing industry from other injurious economic factors (i.e., the rising cost of goods sold) and found such factors not to diminish the significance of price suppression. Having done so, the Tribunal concluded that "the degree of price

suppression caused by the dumping of the subject imports . . . by itself," supports a determination of material injury.

Determination on Remand at 2. The Tribunal's analysis in reaching this conclusion was not patently unreasonable and was squarely within its expertise. The Panel's review of the record of investigation confirms evidentiary support for the Tribunal's conclusions.

The arguments of Heileman, Stroh, and Pabst concerning the Determination on Remand are grounded in extensive, often complex, alternative analyses of the facts before the Tribunal. Ultimately, those arguments are merely an invitation to the Panel to reweigh those facts. Where as here, the Tribunal's Determination on Remand is reasonable and supported by evidence, the Panel cannot accept that invitation.

The Panel therefore concludes that the Tribunal addressed precisely the question directed to it on remand, followed the Panel's instructions and reached a result which is not patently unreasonable and is supported by record evidence. That conclusion brings the Panel to the limits of its inquiry in reviewing a Determination on Remand.

For the foregoing reasons, and pursuant to its authority under section 77.15 of SIMA, this Binational Panel hereby ORDERS that the Tribunal's Determination on Remand, dated November 9, 1992, is AFFIRMED.

Signed in the original by:

(Date)

LAWRENCE J. BOGARD

(Date)

JEAN-GABRIEL CASTEL, Q.C.

(Date)

DARREL H. PEARSON

(Date)

ELIZABETH C. SEASTRUM

DISSENTING OPINION
OF
CHAIRMAN GREENBERG

I am constrained to dissent. In my view, the November 9, 1992 decision on remand ("DOR") of the Canadian International Trade Tribunal ("CITT" or "Tribunal") should not be affirmed. Rather, this proceeding should be remanded again to the Tribunal with instructions to render a negative decision on the issue of whether the dumped imports caused material injury to the British Columbia ("B.C.") beer industry.

It seems apparent to me that the Tribunal's DOR is tainted by precisely the same vice which led this Panel to remand the CITT's October 17, 1991 decision ("Original Decision") for further proceedings. We did so in our August 26, 1992 decision ("Panel Decision I") because the Tribunal took into account a factor extraneous to the effects of dumping, the costs of switching from bottles to cans, in finding a causal link between the dumped imports and material injury to the B.C. beer industry. Panel Decision I, pp. 32-34.

The Panel made reference to Article 3:4 of the International Antidumping Code ("Code") and an interpretative footnote. The article stated that, in determining whether the

dumped imports are causing injury, factors extraneous to those dumped imports should not be considered. The interpretative footnote to the GATT text lists first among such factors "the volume and prices of imports not sold at dumping prices." Panel Decision I, p.34.

Yet the Tribunal's DOR rests almost exclusively upon a finding of price suppression initiated not by the dumped imports but rather by "subject imports" which entered the B.C. market some two years before the period during which Revenue Canada found dumping. Thus, the Tribunal states:

. . . Fiscal 1988 was taken as the base year. This is the last completed fiscal year prior to the B.C. Industry's price reductions in response to the prices of the subject imports. Compared to fiscal 1988, the average revenue per hectoliter for Labatt fell in fiscal 1989 and then again in 1990. The average revenue per hectoliter rose in fiscal 1991, but did not recover to the fiscal 1988 level. DOR, p.3 [The same analysis is made for Molson, DOR, p.4] (Emphasis added)

The "subject imports" in question must be assumed to have been sold at "normal value" in the absence of any charge, let alone proof, that they were dumped. By ruling that the Tribunal is not legally entitled to use these imports to establish an injurious price suppression level, the Panel would not be denying

the Tribunal its indisputable right to investigate years prior to the period for which dumping was found. The Tribunal simply would be told it could not take into account extraneous factors, whether contemporaneous with, or prior to the dumped imports, on the issue of causality, just as the Tribunal was told in the case of the costs of the switch from bottles to cans, which also antedated the dumping period.

I do not take issue with the majority's view that the Tribunal is entitled to deference in its area of expertise. Indeed, as expressed in my concurrence in Panel Decision I, the "patently unreasonable" standard of review should apply on all but the most obviously jurisdictional issues. Nevertheless, as the CITT itself concedes, on a review of a factual determination such as the causality issue here under paragraph 28(a)(c) of the Federal Court Act, there must be "some evidence" to support the Tribunal's determination. CITT Brief, p.7.

Thus, the Panel should ask whether there is "some evidence" to support the Tribunal's conclusion that the fiscal 1988 price increases established a "normal" price level against which injuries price suppression and consequent lost revenues by the B.C. Brewers could be measured, absent the price effect of undumped "subject imports." As the CITT counsel graphically

demonstrates, B.C. prices trended down for most of calendar 1988 and 1989 and began to recover and trend upward during calendar 1990 and the first quarter of 1991. CITT Brief, Graph 2, following p.30. In other words, prices trended up (and import market share trended down from 8.1 to 6.6%) during most of the period for which dumping was found.

Rather than furnishing factual support for the Tribunal's conclusion, this pricing pattern appears totally inconsistent with it. Thus, during a two year period with respect to which dumping was not charged let alone proven, prices in the B.C. market stayed below the fiscal 1988 price increases which the B.C. Brewers apparently could not maintain in the competitive climate of the B.C. market. They turned up at the very time the Tribunal finds they were suppressed by dumped imports.

Apparently aware of just how tenuous was the factual basis for its conclusion, the Tribunal went on to state:

Having reaching its conclusion, the Tribunal believes that, in the absence of the dumping in the B.C. market the average revenue per hectoliter for beer in fiscal 1991 would have recovered to, at least, fiscal 1988 levels. The Tribunal considers, however, that this is a conservative expectation. In this regard, the Tribunal observes that in all provinces of Canada, where Labatt and Molson have operations, the average revenue

per hectoliter rose in fiscal 1991 compared to fiscal 1988. DOR. p.4 (Emphasis added)

That the CITT's "belief" is pure speculation lacking any factual support is demonstrated by the Tribunal's own Original Decision. In describing the B.C. market in that decision, the Tribunal observed:

. . . In British Columbia, pricing was deregulated in the early 1980's. This deregulation allowed producers and exporters to affect the ultimate consumer price: the lower the producer's or exporter's to the Liquor Distribution Branch, the lower the final consumer price. In British Columbia, the battle for market share is fought with price and is not limited largely to advertising and sales promotion competition as it is in some other provinces with more price regulation. There were considerable data on prices and volumes obtained during the inquiry that confirmed the price sensitivity of the market place. Original Decision, p.16 (Emphasis added)

The Tribunal has found that since the B.C. market was deregulated in the early 1980's, price levels are determined by competition as distinguished from other provinces where prices are fixed by government decree. This being the case, the Tribunal's reliance in the DOR on prices in other provinces to predict B.C. price levels is totally inconsistent with its prior factual finding. Thus, the Panel is left with an "unsupported theory" and should have concluded that the Tribunal's "theory

[was] needed because of an absence of evidence of causation."¹

In a recent decision, the U.S. Court of International Trade, discussing the U.S. standard of review in trade cases, made a comment which in my view is pertinent to this case. The court stated: "deference is not abdication" and "rational basis scrutiny is still scrutiny."² It has been suggested by some that the Canadian standard of review, particularly the "patently unreasonable" test, is more deferential to administering authorities than is that of the U.S.³ I do not believe this to be the case. Both standards require for affirmance that an administrative decision be one that a reasonable person could have reached on the evidence of record. Certainly Canadians are at least as reasonable persons as are Americans.⁴

¹ Cf. Fresh, Chilled, or Frozen Pork from Canada [1991] 4 TCT 7014 at 7025.

² Manifattura Emmepi S.p.A. v. U.S., ___ CIT ___, Slip Op. 92-115 (July 20, 1992).

³ See Holbein, Ranieri and Grebasch, Comparative Analysis of Specific Elements in United States and Canadian Unfair Trade Law, 26 INT'L LAWYER 873, 893-898 (1992).

⁴ As the majority in National Corn Growers Assn v. Canadian Import Tribunal [1990] 2 S.C.R. 1324 at 1383, observed (per Gonthier J.): "With respect, I do not understand how a conclusion can be reached as to the reasonableness of a tribunal's interpretation of its enabling statute without considering the reasoning underlying it...."

In this case, I am sorry to say that the majority, by giving excessive deference to the CITT, in my view has abdicated its appropriate role on this review. The Tribunal's DOR simply cannot withstand rational basis scrutiny, and, therefore, should not be affirmed.

(Date)

MICHAEL H. GREENBERG, CHAIRMAN