IN THE MATTER OF:

Certain Beer Originating in or Exported
from The United States of America
by G. Heileman Brewing Company, Inc.,
Pabst Company, and the Stroh Brewery
Company for Use or Consumption in
The Province of British Columbia

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ARTICLE 1904
BINATIONAL PANEL REVIEW
UNDER THE UNITED STATES-CANADA FREE TRADE AGREEMENT

IN THE MATTER OF: **CERTAIN BEER ORIGINATING IN OR EXPORTED FROM THE UNITED STATES OF AMERICA BY G. HEILEMAN BREWING COMPANY, INC., PABST COMPANY, AND THE STROH BREWERY COMPANY FOR USE OR CONSUMPTION IN THE PROVINCE OF BRITISH COLUMBIA**	**CDA-91-1904-01**

Before: Joseph F. Dennin (Chairman)
David E. Birenbaum
Ivan R. Feltham
Dennis James, Jr.
Wilhelmina K. Tyler

MEMORANDUM OPINION AND ORDER

August 6, 1992

John T. Morin, Q.C., of Fasken Campbell Godfrey, Toronto, Ontario, argued for G. Heileman Brewing Company, Inc. With him on the brief was Michael J.W. Round

Allan H. Turnbull, of Baker & McKenzie, Toronto, Ontario, argued for the Stroh Brewery Company. With him on the brief was Paul D. Burns.

P. John Landry, of Davis & Company, Vancouver, B.C., argued for the Pabst Brewing Company.

C.J. Michael Flavell, of McCarthy Tetrault, 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.

Donald J. Rennie, of the Department of Justice of Canada, argued for the Minister of National Revenue for Customs and Excise.

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MEMORANDUM OPINION

I. INTRODUCTION

This panel review was requested and complaints were filed by G. Heileman Brewing Company, Inc. ("Heileman"), The Stroh Brewery Company ("Stroh"), and Labatt Breweries of British Columbia, Molson Breweries (B.C.), and Pacific Western Brewing Companies ("B.C. Brewers") to contest the final determination of dumping issued by the Deputy Minister of National Revenue for Customs and Excise ("Revenue Canada") in the matter of Certain Beer Originating In Or Exported From the United States of America by G. Heileman Brewing Company, Inc., Pabst Brewing Company and The Stroh Brewery Company For Use or Consumption in the Province of British Columbia.[1/] This Panel has jurisdiction over this action pursuant to Article 1904(2) of the Canada-United States Free Trade Agreement and Section 77.15 of the Special Import Measures Act, Revised Statutes of Canada 1985, Chapter S-15, as amended ("SIMA").

The products at issue in this review are imports of beer[2/]

1/ Published in No. 38, Vol. 125, Canada Gazette, Part I, at 3096 (September 21, 1991) ("Final Statement of Reasons").

2/ For purposes of its investigation, Revenue Canada defined beer as "Malt beverages, commonly known as beer, of an alcoholic strength by volume of not less than 1.0% and not more than 6.0%, packaged in bottles or cans not exceeding (continued...)

from the United States of America by or on behalf of Heileman, Stroh, and the Pabst Brewing Company ("Pabst").

II. ADMINISTRATIVE HISTORY

On January 22, 1991, the B.C. Brewers filed a complaint under SIMA alleging injurious dumping with respect to beer originating in or exported from the United States of America by or on behalf of Pabst, Heileman, and Stroh for use or consumption in the province of British Columbia. Revenue Canada advised the complainants that the submission was properly documented on February 12, 1991 and initiated an antidumping investigation into the subject beer on March 6, 1991 pursuant to subsection 31(1) of SIMA.[3/]

On April 1, 1991, Stroh made a referral, on the question of injury, to the Canadian International Trade Tribunal ("CITT").

[2/](...continued)
1,180 milliliters (40 ounces)." Beer in kegs or containers with a capacity in excess of 1,180 milliliters (so-called draft beer), beer coolers and shandies were not covered by the Deputy Minister's determination. Final Statement of Reasons, at p. 2. Such beer is currently classifiable under Subheadings 2203.00.00.11, 2203.00.00.19, 2203.00.00.22, 2203.00.00.31, 2203.00.00.39, 2203.00.00.12, 2203.00.00.21, 2203.00.00.29, 2203.00.00.32 of the Harmonized Tariff Schedule. Id. at p. 3.

[3/] Statement of Reasons In the Matter Concerning the Initiation of An Investigation Of Dumping Regarding Certain Beer Originating In Or Exported From the United States of America by G. Heileman Brewing Company, Inc., Pabst Brewing Company and The Stroh Brewery Company For Use or Consumption in the Province of British Columbia, published in No. 12, Vol. 125, Canada Gazette, Part I (March 23, 1991) ("Initiation").

The CITT concluded on May 2, 1991, pursuant to section 37 of SIMA, that the evidence before Revenue Canada disclosed a reasonable indication of material injury to the production of like goods in British Columbia.

On June 4, 1991, Revenue Canada made a preliminary determination of dumping with respect to imports of the subject beer and provisional duties were imposed on shipments.[4/] On August 30, 1991, Revenue Canada made a final determination of dumping with respect to imports of the subject beer.

On October 17, 1991, the CITT issued its final statement of reasons finding that the Canadian beer industry was injured by imports of the subject beer from the United States.

III. PROCEEDINGS BEFORE THE PANEL

Following the request for panel review and the filing of complaints, the following events have occurred.

By motion dated November 14, 1991, the B.C. Brewers requested the Panel to order Revenue Canada to promptly issue Disclosure or Protective Orders to the appropriate parties. In addition, the B.C. Brewers and Heileman, by motions dated November 14, 1991, each requested the Panel to order disclosure

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4/ Statement of Reasons In the Matter Concerning a Preliminary Determination of Dumping Regarding Certain Beer Originating In Or Exported From the United States of America by G. Heileman Brewing Company, Inc., Pabst Brewing Company and The Stroh Brewery Company For Use or Consumption in the Province of British Columbia, published in No. 25, Vol. 125, Canada Gazette, Part I (June 22, 1991) ("Preliminary Statement of Reasons").

of documents for which Revenue Canada had claimed privilege. Upon review and consideration of the motions and written submissions filed by the complainants, B.C. Brewers and Heileman, and the affidavit and written submissions filed by Revenue Canada, the Panel, on December 24, 1991, ordered Revenue Canada to file with the Secretariat on January 8, 1992 all documents in the administrative record except those for which privilege was claimed and to issue Disclosure and Protective Orders to all appropriate parties on January 17, 1992, pursuant to Rule 50 of the Article 1904 Panel Rules, Canadian Gazette, Part I, January 14, 1989 ("Panel Rules"). In addition, the Panel indicated that it would accept additional submissions from Heileman and the B.C. Brewers in response to Revenue Canada's claims of privilege.

Upon review and consideration of these additional submissions, the Panel, in an order dated January 29, 1992, directed Revenue Canada to file certain documents with the Binational Secretariat for review by two members of the Panel pursuant to Panel Rule 55(3). Following review by two of the Panelists, the Panel ordered on February 2, 1992 the disclosure of certain documents which were not found to be privileged within the meaning of Panel Rule 3. On May 6, 1992, the Panel issued its opinion explaining the reasons for this order. This opinion is attached as Appendix A.

By motion dated January 10, 1992, the B.C. Brewers requested an extension of 60 days from the date of Revenue Canada's filing the administrative record to file briefs in this proceeding pursuant to Rule 20 of the Panel Rules. Upon review and consideration of the written submissions of the B.C. Brewers, Heileman, and Revenue Canada, the Panel granted the B.C. Brewers' motion in part and, on January 24, 1992, ordered an extension of 30 days to file briefs. In accordance with the revised schedule, complainant briefs were filed on February 27, 1992.

By motion dated April 23, 1992, the B.C. Brewers requested the Panel to strike the brief of Pabst because of Pabst's failure to file a complaint in this matter. Pabst responded to this motion on April 30, 1992 and also filed a motion dated April 30, 1992, requesting an extension of the time for filing a complaint. The B.C. Brewers responded to Pabst's motion by letter dated May 7, 1992. After reviewing the motions and responses of both the B.C. Brewers and Pabst, the Panel issued an order, dated May 22, 1992, deciding that, as a result of Pabst's failure to file a complaint, Pabst was only permitted to file participant briefs before the Panel and, pursuant to Rules 40 and 62, such briefs would only be considered insofar as they supported the

arguments made by the complainants, Revenue Canada or both.[5/] This order is attached as Appendix B hereto.

In accordance with the revised briefing schedule, Revenue Canada filed its factum on April 27, 1992, and complainant and participant reply briefs were filed on May 12, 1992. The hearing took place in Ottawa, Ontario on June 9 and 10, 1992.

On July 14, 1992, Revenue Canada submitted information and argumentation regarding the treatment of interest expenses and selling commissions. Upon consideration of this submission and the Panel's previous request for information pertaining to the treatment of interest expenses by Revenue Canada and references to S-88, the Panel, by order dated July 17, 1992, rejected this submission as going beyond the Panel's request for information and found that it did not comply with Panel Rule 70 regarding submissions referring to subsequent authorities. Accordingly, the Panel ordered Revenue Canada to submit a revised submission limited to the information specifically requested by the Panel. That submission was made on July 21, 1992.

5/ See Transcript of Hearing, In the Matter of 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, Vol. I (June 9 and 10, 1992), at p. 1 ("Hearing Tr.").

IV. SUMMARY OF ISSUES AND THE PANEL'S DECISION

Complainant, Heileman, argued that Revenue Canada erred in the following respects:

(1) in finding that the domestic and exported beer, which is physically identical and sold under the same brand name in the same packaging configuration, are "identical in all respects" within the meaning of the like goods definition;

(2) in determining the preponderant price of the like goods sold in the four-by-six packaging configuration by reference to sales of twelve-ounce cans sold in all configurations;

(3) in failing to make adjustments for promotional activities performed in both the home and export markets and in failing to adjust for differences in general and administrative expenses in the home and export markets; and

(4) in finding that all twelve-ounce Rainier bottle sales were unprofitable and in using the profit earned on Rainier beer in cans and forty-ounce bottles to calculate profit for the unprofitable bottle sales.

Complainant, Stroh, argued that Revenue Canada erred in including the interest expense incurred by Stroh in the calculation of Stroh's cost of production.

Complainants, B.C. Brewers, argued that Revenue Canada erred in the following respects:

(1) in making downward adjustments to the normal values calculated for Heileman, Pabst and Stroh pursuant to Regulation 6 of SIMA;

(2) in failing to deduct commissions from Pabst's export price; and

(3) in failing properly to calculate Pabst's freight deduction and in failing to deduct the cost of returning the pallets to Pabst's brewery from Pabst's export price.

Upon examination of the administrative record and after full consideration of the arguments presented by the parties in their briefs and at the hearing held in Ottawa, Ontario, this Panel:

Remands to Revenue Canada that aspect of its final determination which concerns the determination of a preponderant price for Heileman's sales in the home market. Revenue Canada is instructed to determine whether there is sufficient evidence on the record to calculate the preponderant or weighted average price for sales of twelve-ounce cans in the four-by-six configuration. If sufficient evidence exists, Revenue Canada is instructed to perform such calculations. If not, Revenue Canada is instructed to explain why the evidence presented by Heileman is insufficient to calculate a preponderant or weighted average price for Heileman's domestic sales of beer in the four-by-six configuration.

Remands to Revenue Canada that aspect of the final determination which concerns the inclusion of interest expense in the calculation of Stroh's cost of production. Revenue Canada is instructed to reconsider the evidence on the record which supports the conclusion that interest expense incurred for the acquisition of the Jos. Schlitz and F. & M. Schaefer breweries is related to production at the St. Paul brewery. If such a connection is not supported by specific evidence of record, Revenue Canada is instructed to recompute the normal value of

Stroh's beer exclusive of the interest expenses incurred in connection with such acquisitions. If Revenue Canada finds that sufficient evidence exists, it is instructed to present the basis for its findings to the Panel.

Affirms all other aspects of Revenue Canada's determination at issue before this Panel.

V. STANDARD OF REVIEW

Under the Canada-United States Free Trade Agreement, the standard of review to govern the proceedings before this Panel is the standard provided in Section 28(1) of the Federal Court Act R.S.C. 1985, c. F-7.[6] Pursuant to section 77.11(4) of SIMA, requests for review to a Panel "may be made only on a ground set forth in section 28(1)."[7] The full text of subsection 28(1) is as follows:

> Notwithstanding section 18 or the provisions of any other Act, the Court of Appeal has jurisdiction to hear and determine an application to review and set aside a decision or order, other than a

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[6] Although Section 28(1) of the Federal Court Act has been changed since the amendments to SIMA implementing the Canada-United States Free Trade Agreement, the reference in section 77.11(4) of SIMA to "subsection 28(a) of the Federal Court Act" has to be understood as referring to that Act as it stood at the time of the implementation of the Free Trade Agreement. SIMA section 77.29(c).

[7] Canada-U.S. Free Trade Agreement, Articles 1904(3), 1911. SIMA, R.S.C. 1985, c. S-15, ss. 77.1(1)(a), 77.11(4). The Panel notes that the reference in SIMA is only for the purpose of setting forth the grounds for review and the distinction drawn in the preamble between judicial and administrative reviews does not alter the application of these grounds in this proceeding.

> decision or order of an administrative nature not required by law to be made on a judicial or quasi-judicial basis, made by or in the course of proceedings before a federal board, commission or other tribunal, on the ground that the board, commission or tribunal:
>
> (a) failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
>
> (b) erred in law in making its decision or order, whether or not the error appears on the face of the record; or
>
> (c) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

Each of the complainants in this case has alleged that all three distinct grounds for review set out in section 28(1) are applicable here. Heileman, Stroh and B.C. Brewers have submitted that Revenue Canada has committed a number of errors of law and errors of fact. Each also contends that as a consequence of the "errors of law" and/or "errors of fact," Revenue Canada failed to exercise its jurisdiction or, alternatively, exceeded its jurisdiction in conducting this investigation.[8/]

[8/] Heileman has alleged errors of law and errors of fact independently. Heileman Complaint, at pp. 2 & 3. Stroh has submitted that each error is an error of law and fact. Stroh Complaint, at pp. 2 & 3. Both Heileman and Stroh have alleged that as a consequence of the alleged errors of law and fact, Revenue Canada declined to exercise or exceeded its jurisdiction in conducting this investigation. Heileman Complaint, at p. 4; Stroh Complaint at p. 3. B.C. Brewers submitted that the errors were errors of

(continued...)

Revenue Canada has suggested that the review is for a jurisdictional error and that only two issues raised by either Canadian or American complainants meet the criteria of presenting a possible jurisdictional error which, as a matter of law, could justify correction. Revenue Canada Factum (April 27, 1992), at p.2. With regard to the alleged errors of fact, Revenue Canada asserts that if a "patently unreasonable assessment of the evidence" exists, this error amounts to an "error of jurisdiction." Revenue Canada Factum, at p. 5.

The applicability of each of the three distinct grounds provided for in section 28(1) will be considered in turn.

A. Subsection 28(1)(a)

When determining the appropriate standard of review for the Panel in relation to subsection 28(1)(a), several different approaches must be considered. Firstly, did Revenue Canada err in determining the nature of its jurisdiction in the proceeding? If an administrative decision contains an error where the administrative body incorrectly determined the scope of its jurisdiction or authority, then the decision may be overturned. In short, an administrative body may not exceed its jurisdictional limits or boundaries and must be "correct" in its

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[8/](...continued)
jurisdiction, errors of law and erroneous findings of fact. B.C. Brewers Complaint, at p. 2.

determination of these limits or boundaries.[9] There are no allegations in this proceeding that Revenue Canada inappropriately exceeded its jurisdiction in this respect.

Another aspect of the test for review pursuant to subsection 28(1)(a) is whether Revenue Canada failed "to observe a principle of natural justice." Principles of natural justice connote fairness in the proceedings. If the proceedings violate the fairness standard of the principles of natural justice, the administrative body may lose jurisdiction.[10] There are no

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[9] This question has been addressed frequently by the Supreme Court of Canada in the context of judicial review of decisions of administrative bodies operating pursuant to labour laws. In the recent case of Public Service Alliance v. Canada (A.G.), [1991] 1 S.C.R. 614, the Supreme Court held that the interpretation of the word "employees" in the Public Service Staff Relations Act was a jurisdictional question. Consequently, when the Public Service Relations Board was incorrect in its decision that a group of individuals were in fact "employees" of the Solicitor General, judicial intervention was warranted to set aside the Board decision. Similarly, in U.E.S., Local 298 v. Bibeault,[1988] 2 S.C.R. 1048, the Supreme Court ruled that jurisdictional intervention was warranted where no "alienation" or transfer of contractual rights within the meaning of civil law took place, thereby concluding that the Labour Court did not have the authority to confirm the issuance of the transfer of rights and obligations from one union to another body of employees. See also Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corporation, [1979] 2 S.C.R. 227; Syndicat des employes de production du Quebec et de l'Acadie v. Canadian Labour Relations Board, [1984] 2 S.C.R. 412.

[10] Pfizer Company v. Deputy Minister of National Revenue, [1977] 1 S.C.R. 456 (Board error relying on information obtained after the hearing without disclosing it to the parties and giving them an opportunity to meet it found to be contrary to the rules of natural justice); Kane v. Board (continued...)

allegations in this proceeding that Revenue Canada inappropriately failed to observe a principle of natural justice in this case.

Yet another aspect of the test for review pursuant to subsection 28(1)(a) is whether, as a consequence of the "errors of law" and/or "errors of fact," Revenue Canada failed to exercise its jurisdiction, or alternatively, exceeded its jurisdiction in conducting this investigation. Revenue Canada argues that this is the appropriate standard, the question becoming one of whether errors of law are so egregious that they result in a loss of jurisdiction. Revenue Canada asserts that these are the only reviewable errors of law.[11/]

For purposes of this review, the Panel finds no reason to distinguish between an error of law reviewable under subsection 28(1)(b) and an error of law that raises an issue of jurisdiction reviewable under subsection 28(1)(a). Apparent errors of law charged in this matter entail questions of interpretation of the

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[10/](...continued)
of Governors of U.B.C., [1980] 1 S.C.R. 1105 (breach of natural justice by failure to observe rule expressed in maxim audi alteram partem).

[11/] Revenue Canada claims that an error of law is "always jurisdictional" and it is "incumbent on the complainants to establish at the threshold that the issues which they raise are errors of law or otherwise of a nature to deprive the Deputy of jurisdiction". Revenue Canada Factum, at pp. 5 & 6 respectively.

statute and regulations that are clearly covered by subsection 28(1)(b).

For these reasons, the Panel finds that the grounds for review provided by subsection 28(1)(a) do not apply to the review of any of the allegations of error committed by Revenue Canada in this case.

B. Subsection 28(1)(b)

The standard of review for issues of law determined by an administrative agency, as interpreted by the Supreme Court, depends upon whether the statute authorizing the agency to decide the issue includes a "privative clause" limiting the review of that decision. The decision-making processes of many Canadian administrative agencies are protected by a privative clause. A privative clause is a provision in the enabling legislation which limits or precludes judicial review. Consequently, if an administrative agency is protected by a privative clause, review is limited to cases where an error of law is "patently unreasonable". As explained by the Supreme Court of Canada in National Corn Growers Association v. Canada (Canadian Import Tribunal), [1990] 2 S.C.R. 1324 ("National Corn Growers"), this "severe test" is needed because only a manifest and patent error could justify a reviewing court correcting an error when the legislation has articulated an express intention to the contrary. As articulated by Justice Gonthier, writing for four members of the Court, "[a]lthough the terms of Section 28 of the Federal

Court Act are quite broad in scope, it is to be remembered that courts, in the presence of a privative clause, will only interfere with the findings of a specialized tribunal where it is found that the decision of that tribunal cannot be sustained on any reasonable interpretation of the facts or of the law" (pages 1369-70).

However, three members of the Court in a concurring opinion written by Justice Wilson articulated a more deferential view that asks whether the tribunal so misinterpreted the provisions of the legislation as to embark on an inquiry, or answer a question, not remitted to it.

Justice Wilson contended that the patently unreasonable standard should not be applied to the decision of the tribunal but should be applied to the threshold question of whether the tribunal's interpretation of its constitutive legislation was patently unreasonable. If the tribunal has reasonably interpreted its constitutive legislation, then judicial inquiry ends and the Court should not delve into the reasonableness of the conclusions reached by the agency in the administrative process. As explained by Justice Wilson,

> The distinction is a subtle one. But it is not without importance. One must, in my view, not begin, with the question whether the tribunal's <u>conclusions</u> are patently unreasonable; rather, one must begin with the question whether the tribunal's interpretation of the provisions in its constitutive legislation that define the way it is to set about answering particular questions is patently

> unreasonable. If the Tribunal has not interpreted its constitutive statute in a patently unreasonable fashion, the courts must not then proceed to a wide ranging review of whether the tribunal's conclusions are unreasonable.

National Corn Growers, at 1347-48 (emphasis in original). While this more modern standard of judicial review is slightly less deferential to agency determinations, it remains a standard which, in absolute terms, is very deferential. The opinion does not overturn the ingrained judicial deference to specialized agencies protected by privative clauses.

The final determination of the Investigating Authority in these proceedings is not protected by a privative clause. Consequently, there is no requirement that this Panel's review is limited to a "patently unreasonable" test. However, many cases demonstrate judicial deference to administrative decisions even where the administrative decisions are not protected by a privative clause. The Supreme Court of Canada has addressed the standard of review on an appeal in the absence of a privative clause in Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission), [1989] 1 S.C.R. 1722. In discussing the appropriate standard of review the Court at pages 1745-46 states,

> It is trite to say that the jurisdiction of a court on appeal is much broader than the jurisdiction of a court on judicial review. In principle, a court is entitled, on appeal, to disagree with the reasoning of the lower tribunal. However, within the context of a statutory appeal

> from an administrative tribunal, additional consideration must be given to the principle of specialization of duties. Although an appeal tribunal has the right to disagree with the lower tribunal on issues which fall within the scope of the statutory appeal, curial deference should be given to the opinion of the lower tribunal on issues which fall squarely within its area of expertise.

The Court cites with approval the Federal Court of Appeal in Canadian Pacific Limited v. Canadian Transport Commission (1987), 79 N.R. 13 (F.C.A.) at pp.16-17 where the Court of Appeal held that it "should not interfere with the interpretation made by bodies having the expertise of the [Railway Transport Committee of the Canadian Transport Commission] in an area within their jurisdiction, unless their interpretation is not reasonable or is clearly wrong" (emphasis added).

If curial deference is appropriate on an appeal, it must be still more appropriate on a review, as in the instant case, because the jurisdiction on appeal is much broader than the jurisdiction of a court on judicial review. The interpretation and application of SIMA falls squarely within Revenue Canada's area of expertise. Therefore, any determinations made by Revenue Canada in the course of carrying out its duties pursuant to SIMA should be treated with deference by a review panel.[12/]

[12/] Heileman argued that Revenue Canada should be accorded less deference and that a correctness test should be applied because its decision did not follow an expansive hearing. Hearing Tr., Vol. II, at pp. 174-187. However, Heileman has failed to cite any authority for the proposition that (continued...)

In assessing the extent of the deference to be accorded, commentary by J. Estey of the Supreme Court of Canada in his partial dissent in Douglas Aircraft Company of Canada Ltd. v. McConnell, [1980] 1 S.C.R. 245 is helpful. At page 276, he states,

> A certiorari review of a statutory board free of a privative cloak, brings with it the added ground of review for error on the face of the record. Such error exceeds a difference of opinion by the reviewing tribunal on an interpretative issue and falls short of an error resulting in an excess of its jurisdiction on the part of the board. In the modern era of administrative law, such reviewable error . . . must amount to an error . . . of such magnitude that the interpretation so adopted by the board may not be reasonably borne by the wording of the document in question . . .

If there is more than one reasonable interpretation of the statute, a reviewing body should not substitute its judgement for that of the administrative agency so long as the agency adopts one of the possible "reasonable" interpretations.

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[12] (...continued)
the lack of an expansive hearing is per se a breach of the rules of natural justice which would require a reviewing court to be more vigilant and less deferential in its review. Heileman cites Syndicat des employés de production du Québec et de l'Acadie v. Canadian Labour Relations Board, [1984] 2 S.C.R. 412, in support of its submission that "the Deputy Minister must be correct in her interpretation and application of SIMA". Heileman Brief at p. 49. However, the passage cited from this case (at page 420) does not support Heileman's contention. This passage deals with the distinction between mere errors of law and jurisdictional error. It does not lay down a test for review of errors of law.

In reviewing purported "errors of law," the Panel, therefore, adopts a standard of "reasonableness." If a decision adopted by Revenue Canada respecting an issue of law is a reasonable interpretation, the Panel cannot interfere with the interpretation.

C. Subsection 28(1)(c)

Subsection 28(1)(c) of the Federal Court Act allows for review of decisions based on an erroneous finding of fact that is made in a perverse or capricious manner or without regard for the material before the decision maker. As outlined by Justice Gonthier in reviewing the findings of fact of the Canadian Import Tribunal in National Corn Growers at p. 1381,

> Given these observations by the majority of the Tribunal, I cannot adhere to the view that there was no evidence, with respect to price, indicating that material injury had been caused, was caused and was likely to be caused to corn producers in Canada. Having regard to the evidence before the Tribunal, it cannot be said that its finding of a causal link between American price and injury to the Canadian market was patently unreasonable.

Numerous cases cite the proposition that a finding may be overturned if there is no evidence on the record to support it.[13/] In this proceeding, this Panel need not address the sufficiency of the evidence required to sustain the decision of

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13/ F.W. Bickle v. M.N.R., (1981) 2 C.E.R.323 (F.C.A.); Re Rohm & Haas Canada Ltd. and Anti-Dumping Tribunal, (1978) 91 D.L.R. (3d) 212 (F.C.A.); and Toshiba Corporation and Anti-Dumping Tribunal et al., (1984) 6 C.E.R. 258 (F.C.A.).

Revenue Canada because the Panel could find no evidence to support Revenue Canada's decision in the two instances in which the Panel has remanded for clarification.

VI. LIKE GOODS

Section 15 of SIMA requires Revenue Canada to base normal value on the price of goods sold in the country of export which are "like" the goods exported to Canada. Section 2(1) of SIMA defines "like goods" as:

> (a) goods that are identical in all respects to the other goods, or
>
> (b) in the absence of any goods described in paragraph (a), goods the uses and other characteristics of which closely resemble those of the other goods.

Thus, to determine normal value, Revenue Canada must first attempt to identify goods sold in the domestic market which are identical to the exported goods, and, in their absence, to identify goods which "closely resemble" the exported goods.

Revenue Canada's final determination of dumping with respect to Heileman was based on the comparison of Heileman's domestic and export sales of Rainier, Henry Weinhard, and Lone Star beer.[14/] In reaching the final determination, Revenue Canada found, for purposes of the "like goods" definition, that

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[14/] Final Statement of Reasons, at pp. 8-15. Revenue Canada also examined sales of Mickeys Malt beer in reaching the final determination, although such sales are not at issue in this review. Id. at p. 13.

(1) Rainier beer sold in Washington was "identical in all respects" to Rainier beer exported to British Columbia; (2) Henry Weinhard beer sold in Oregon was "identical in all respects" to Henry Weinhard beer exported to British Columbia; and (3) Lone Star beer sold in Texas was "identical in all respects" to Lone Star beer exported to British Columbia. Final Statement of Reasons, at p. 6. Revenue Canada found that, despite any differences in pricing and the market segments in which such beer is sold, physically identical beer of the same brand name and package configuration sold in the domestic market was "identical" to that sold in British Columbia.

Heileman contests Revenue Canada's application of this definition on several grounds. Heileman argues that the language of the "like goods" definition and Sarco Canada Ltd. v. Anti-Dumping Tribunal, [1979] 1 F.C., 247, 253, and Cars From Korea (Hyundai), (1988) 16 C.E.R. 185 (C.I.T.) require that differences in the market segment in which such beer is sold be considered in determining whether goods are identical. Heileman maintains that certain beer is sold in submarkets (e.g., premium, regular and discount markets) which must be taken into consideration as an aspect of the like goods determination. Heileman Brief, at pp. 22-23. Heileman also argues that the domestic Rainier, Lone Star, and Henry Weinhard beers are not identical to the exported Rainier, Lone Star, and Henry Weinhard beers because of differences in the labeling and the costs of production of the

domestic and exported beer. As a result of these marketing, labeling and cost differences, Heileman maintains that Revenue Canada erred in finding that the domestic and exported beers of the same brand name were identical goods within the meaning of the like goods definition of Section 2(1) of SIMA. Accordingly, Heileman claims that Revenue Canada was required to consider which goods most "closely resemble" the products exported to British Columbia. Accordingly, Heileman requests the Panel to refer the like goods issue back to Revenue Canada with instructions to consider differences in market segments, cost, and labeling in its determination of like goods.

In the alternative, Heileman argues that Revenue Canada improperly found that the only domestic beer "like" the exported beer was that which was sold in the same packaging configuration as that sold in British Columbia. Contending that Revenue Canada calculated higher normal values than it should have, Heileman argues that its twelve-ounce cans of domestic beer sold in all package configurations are "like" the exported beer sold only in one particular configuration.

A. Issues Presented

Heileman's complaint with respect to Revenue Canada's like goods determination raises the following issues for review by this Panel:

(1) whether Revenue Canada erred in finding that physically identical domestic and exported beer sold under the same brand name and in the same packaging configuration is "identical in all respects" within

the meaning of the like goods definition despite differences in the submarkets in which such beer is sold in the domestic and export markets;

(2) whether Revenue Canada erred in finding that physically identical domestic and exported beer sold under the same brand name and in the same packaging configuration is "identical in all respects" within the meaning of the like goods definition despite differences in the required labeling and packaging of the domestic and exported goods;

(3) if the beers sold in the United States and British Columbia are not identical, whether, Revenue Canada is required to find that physically identical beers that are sold in the same submarket more "closely resemble" each other than do physically identical beers that carry the same brand name; and

(4) whether Revenue Canada erred in finding that only beer that was sold in the domestic market in the same packaging configuration is "identical in all respects" to the beer exported to Canada.

Each of the issues identified above involves Revenue Canada's interpretation of the like goods definition. These issues raise, therefore, questions of law, which, as discussed previously, must be reviewed under the reasonableness standard.

B. The Meaning of "Identical" Under the Like Goods Definition

To determine whether dumping exists, Revenue Canada is required by SIMA to compare goods exported to Canada with "like goods" sold in the domestic market. The like goods provision of SIMA is a tool which Revenue Canada employs to identify objectively which goods to compare. As such, this provision is used to minimize differences between products so that fewer adjustments are required and to help ensure that a finding of

dumping does not result from a comparison of merchandise that differs for reasons other than price.

Given the purpose of this provision, SIMA unambiguously establishes a preference for comparing goods which are "identical in all respects." Only in the absence of identical goods may Revenue Canada base normal value on the price of domestic goods which "closely resemble" the exported goods at issue.

Although the phrase "identical in all respects" has not been previously interpreted[15/] or further defined in any authoritative materials provided by the parties, the Panel concludes that it establishes a broad mandate for Revenue Canada to consider all pertinent characteristics of the goods in issue in its determination of like goods. This interpretation stems from a reasonable meaning of the phrase "in all respects" which is not specifically limited to a consideration of physical characteristics alone. It is also consistent with Section 18 of SIMA which indicates that trademarks, a non-physical characteristic, are ordinarily considered in determining like goods. Similarly, the parties agreed that brand, also a non-

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15/ Heileman cited as authority two decisions addressing this provision in the context of the CITT's determination of injury to the domestic industry. See Sarco Canada Ltd. v. Anti-Dumping Tribunal, [1979] 1 F.C., 247, 253, and Cars From Korea (Hyundai), (1988) 16 C.E.R. 185 (C.I.T.). Because of the differences in the issues raised in the injury as opposed to the dumping context, the Panel finds that these cases do not provide binding precedential guidance on its interpretation of this provision in the context of Revenue Canada's determination.

physical characteristic, was relevant to the like goods determination.

This interpretation is further supported by the language of the second prong of the "like goods" definition which requires consideration of "the uses and other characteristics" of the goods at issue. In determining whether goods "closely resemble" each other, SIMA, therefore, specifically directs Revenue Canada to consider non-physical characteristics. See Madison Industrial Equipment Limited v. Revenue Canada of National Revenue for Customs and Excise, 4 T.C.T., 3131, at 3138 (CITT, February 1991) (stating that the second prong requires consideration of "all the characteristics of the goods in question.") (emphasis added).

The Panel recognizes, however, that some characteristics may not be relevant to Revenue Canada's like goods inquiry.[16/] To require the goods to be absolutely identical would, in some instances, appear to result in an unreasonably restrictive interpretation of this provision. As discussed in detail below, the Panel concludes, therefore, that certain characteristics may reasonably be disregarded in determining whether goods are identical.

16/ A similar interpretation was implicitly recognized by the CITT in Madison Industrial Equipment, where it found that at least one characteristic of the goods in question was of only "peripheral importance" in determining whether the particular goods in issue closely resembled each other. Madison Industrial Equipment, 4 T.C.T. at 3139.

1. The Relevance of Market Segments For the Determination of Like Goods

Heileman argues that, as a result of differences in the segment of the market in which its beer is sold domestically and for export, physically identical beer of the same brand name and packaging configuration is not -- as Revenue Canada found -- "identical in all respects" within the meaning the like goods definition. In describing these differences, Heileman states that: (1) Rainier is marketed as a premium beer in Washington state and a discount beer in British Columbia; (2) Lone Star is marketed as a premium beer in Texas and a discount beer in British Columbia; and (3) Henry Weinhard is marketed as a super premium beer in Oregon and as a regular beer in British Columbia.[17/] Because of these differences, Heileman submits that Rheinlander beer, which is physically identical to beer sold under the brand names of Rainier and Lone Star,[18/] would more closely resemble the exported Rainier and Lone Star because

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17/ The Panel notes that Heileman failed to identify any beer that it thought would more closely resemble Henry Weinhard beer sold in British Columbia than the Henry Weinhard beer sold in Oregon which Revenue Canada used to determine the existence and extent of dumping.

18/ That is, the same type and quantity of ingredients and the same brewing processes are used to produce all three brands of beer. Hearing Tr., Vol. I, at pp. 31-32, 41. In addition, the Rainier beer sold in Washington state and British Columbia, the Lone Star beer sold in British Columbia, and Rheinlander beer are all produced in Heileman's Seattle brewery. Hearing Tr., Vol. I, at pp. 35, 36.

Rheinlander is also sold as a discount beer in the domestic market.[19/]

In arguing this point, Heileman cites the notices of initiation, preliminary and final determinations, where Revenue Canada stated that "[i]n the British Columbia market, beer is grouped into three categories: super premium brands, premium or regular brands, and discount brands." Initiation, at p. 2; Preliminary Statement of Reasons, at p. 3; Final Statement of Reasons, at p. 2. Noting that beer is similarly categorized in the United States as super premium, premium, and discount,[20/] Heileman argues that because its beer of the same brand name is sold in different market segments in the domestic and export market, the domestic and export beer of the same brand name are not identical.

In contrast, Revenue Canada and the B.C. Brewers argue that the beer's physical characteristics, package configuration, type of container, and brand name are the most important factors to be considered in determining whether the domestic and exported beer are identical. Revenue Canada Factum (April 27, 1992), at p. 10; B.C. Brewers Reply Brief (May 12, 1992), at pp. 33-34. Having found that beer is essentially directed to the same general market (the beer consumer), Revenue Canada argues that it is not

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[19/] Beer is not, however, sold in British Columbia under the brand name of Rheinlander.

[20/] Heileman Brief, at p. 6; Hearing Tr., Vol. I, at p. 15.

required to consider market segments in determining the question of likeness. Revenue Canada Factum, at p. 10; Hearing Tr., Vol. II, at p. 108.

In reviewing whether Revenue Canada erred in failing to take into account differences in the market segments in which Heileman's beer is sold, the Panel has considered both the language of the statute and the administrative record on which Revenue Canada's decision was based. As discussed above, the language of the first prong of the like goods definition requires a finding that products are "identical in all respects." While this language does not by its own terms limit the factors to be considered in determining likeness, this language must be interpreted consistently with the purpose and nature of SIMA. Although a consideration of differences in market segments as related to brand, where the goods are essentially perceived by the consumer as different products, may represent a proper and necessary inquiry, the Panel finds that it does not need to reach this issue because the record of the investigation in this case contains insufficient evidence for Revenue Canada to make such a determination.

In its discussions of submarkets, Heileman concedes that price is the only manifestation of the fact that the beer is sold in different market segments on the record of this investigation. Hearing Tr., Vol. I, at pp. 38-39, 43, 45, 87. Although advertising may create different images for super premium,

regular, and discount brands -- so that they are considered by the consumer as different products -- Heileman conceded that there were no marketing or follow-up advertising studies in the administrative record which would establish such differences. Id. at p. 49; see also Hearing Tr., Vol. II, at p. 113.

Thus, Revenue Canada was faced with an administrative record which recognized the existence of different market segments but was essentially devoid of information indicating whether beer sold in one market segment would be considered a different product from beer sold in a different market segment, except insofar as such beer was priced differently. Accordingly, to consider differences in submarkets as a distinguishing factor between the domestic and exported products of the same brand name and package configuration, Revenue Canada would have been required to base its findings on the mere existence of price differences between the domestic and exported beer.

Given the purpose of SIMA, the Panel concludes that Revenue Canada's decision not to consider such price differences in making its like goods determination was reasonable. SIMA is a price discrimination statute used by Revenue Canada to determine whether goods are sold in the export market at prices lower than the selling price in the domestic market. Under the terms of the statute, it is clear that if dumping is found to exist, the price as appropriately adjusted (or constructed or prescribed values as

the case may be) of the like goods will always be higher (and therefore different) than the price of the exported goods.

Conversely, if equivalency of price is required as an essential aspect of the like goods determination, then dumping would only rarely be found. Where large price differences between the domestic and exported goods exist -- and a determination of dumping would be more likely -- such price differences themselves would preclude a finding of likeness and therefore a comparison of such goods. In contrast, as Heileman concedes, if there were only small price differences between the products, and therefore a reduced likelihood of finding dumping, then the products could be compared. Hearing Tr., Vol. I, at p. 43. The Panel concludes that this result is inconsistent with the purpose of SIMA to evaluate whether and to what extent the domestic and exported goods are priced differently in order to determine if dumping exists.

The difficulty with the approach advocated by Heileman is compounded in this investigation by the fact that different geographic beer markets have different pricing levels. For example, within the United States market, physically identical beer of the same brand name that is marketed at the same level (e.g. discount beer) in both Montana and Alaska is priced higher in Montana. Id. at p. 44. Thus, price differences alone are not a reliable measure of differences in goods when such prices are compared across geographic markets.

Heileman's reliance on Cars From Korea (Hyundai) is not persuasive. This case, as discussed above, concerns a determination by the Canadian Import Tribunal on the question of injury to the domestic industry and therefore does not constitute binding authority on the interpretation of this provision in the context of Revenue Canada's determination. The Tribunal is charged by section 42 of SIMA with determining whether the dumping of goods into Canada is causing material injury to the production of "like goods" in Canada. Thus, the Tribunal's analysis of "like goods" centers on whether the goods produced in Canada are "like" the goods found to have been dumped. Although prices are at issue before the Tribunal (as a factor in determining whether injury or causation exist), the determination respecting price differences (between the two markets) is not the final goal of the Tribunal's determination, as it is with Revenue Canada's. As a result of the different roles which the Tribunal and Revenue Canada play in administering SIMA, it is apparent that their interpretation of the same provision may differ.

Moreover, even if this decision could be viewed as precedential authority, these cases are factually distinguishable. In Cars From Korea (Hyundai), the Tribunal considered as relevant in its like goods determination a market segmentation scheme which classified different types of cars on the basis of numerous criteria including market segments. In the administrative record before Revenue Canada in this case, there

exists no study of market segmentation in either the U.S. or B.C. beer markets. The only information before Revenue Canada on this issue is the existence of different market segments differentiated solely by price. As is discussed above, this falls far short of establishing that domestic and exported beers of the same brand name are different products.

Based on the foregoing, the Panel determines that it was reasonable for Revenue Canada to find beer of the same brand name, that was sold in different market segments, to be identical when price differences are the only manifestation of market differentiation.

2. The Relevance of Labeling Differences For the Determination of Like Goods

The Panel also considered whether Revenue Canada erred in finding that the beer sold in the United States and in British Columbia was identical despite differences in the labeling of the beer. Both Revenue Canada and Heileman agree that the only physical differences between beer of the same brand name sold in the United States and exported to British Columbia relate to the labels (on the beer container itself and its packaging). The labels of the domestic and exported beer differ in the following ways: (1) the labels on exported beer are in French and English, while the U.S. labels are printed in English only; (2) the labels on the exported product identify quantity in terms of milliliters and the U.S. labels use ounces; (3) the labels on the exported product identify the alcohol content of the beer in terms of

parts per unit while the U.S. labels identify alcohol content on the basis of volume; (4) the labels on the exported product include the CSPC code,[21] which the U.S. labels do not; and (5) the U.S. labels carry a mandatory health warning, while the labels of the Canadian product do not. See, e.g., Heileman Brief, at p. 25; Hearing Tr., Vol. II, at pp. 112, 144. These differences in labeling result from the fact that the beer is being sold in different countries which have distinct labeling requirements.

Heileman argues that the above-described labeling differences are alone sufficient to require a finding that the goods are not identical,[22] while Revenue Canada and the B.C. Brewers contend that such differences are essentially de minimis, having only a minor impact on the cost of producing the domestic and exported beers.[23]

Although the phrase "in all respects" does not specifically exclude minor differences, Revenue Canada's interpretation of this provision to, in fact, exclude such differences is

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[21] The CPSC or Canadian Standard Product Code is a six digit number required to be placed on alcoholic beverage labels by the Provincial Liquor Commissioners for national inventory purposes.

[22] Heileman Brief, at p. 25.

[23] Revenue Canada Factum, at p. 11; B.C. Brewers Reply Brief, at p. 34.

reasonable in light of the purpose of SIMA and the like goods definition. For purposes of Revenue Canada's determination, all goods being compared are sold in different countries. If minor labeling differences that result from differences in labeling requirements between the domestic and export markets are considered sufficient to find that goods are not identical, the first prong of the like goods definition would only be satisfied in the case of commodity goods sold in bulk and not subject to labeling requirements.[24/] The Panel concludes that such a result is not required by either the language or purpose of the like goods definition, particularly in this case where the labeling differences have no bearing on price, only a small effect on the cost of the goods being compared and do not change the nature of the product or its appeal to the consumer.

Consequently, the Panel finds that Revenue Canada reasonably determined that the exported and domestic beer is identical despite minor differences in labeling.[25/]

[24/] The Panel has noted that this definition is also used by the CITT in its consideration of injury to the domestic industry. In those circumstances, however, there is an even lower likelihood that goods would be found to be "like goods" because the goods in question are produced by different manufacturers in different countries, whereas, for Revenue Canada's purposes, the goods are produced by the same manufacturer in the same country.

[25/] Heileman also argues that differences in the production costs of the domestic and exported beer make the goods not identical. Heileman Brief, at p. 25. Insofar as these production cost differentials relate to differences in

(continued...)

3. The Relevance of Packaging Configuration For the Determination of Like Goods

As noted above, Revenue Canada determined that the like product is Rainier beer in cans in the same packaging configuration (indeed, the only packaging configuration) sold in British Columbia. Heileman challenges this decision on the ground that it ignores the other packaging configurations, including the twelve-can and the twenty-four can "loose packs", which predominate in the United States. Canadian Secretariat File No. CDA-91-1904-01, Vol. 47, at p. 113 and Vol. 14, at pp. 142-65; Heileman Brief, at p. 12. Because these other configurations are sold at prices that, due to discounts, are lower on average than those charged for the four six-pack package sold in British Columbia, Heileman contends that the normal value was higher than it should have been. Hearing Tr., Vol. I, at p. 56. Revenue Canada justified its position, in part, on the

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[25] (...continued)
labeling and packaging, the Panel finds that, as discussed above, such minor differences due to exportation are insufficient to preclude a finding that goods are identical under the like goods definition. See Heileman Brief, at pp. 13, 25. Heileman also appears to argue that production cost differentials alone are sufficient to preclude a finding of identical goods. The Panel concludes, however, that it is the manifestation of cost differences (e.g. in physical differences in the goods or the price at which they are sold), not the cost differences themselves, which must be considered in determining whether goods are identical for purposes of the like goods provision. Consequently, the Panel sustains as reasonable, Revenue Canada's determination that the goods are identical despite any differences in production costs, as such between the domestic and exported beer.

ground that packaging costs and prices differ by configuration. Hearing Tr., Vol. II, at p. 140.

To summarize, Heileman argues that packaging is irrelevant; a twelve-ounce can is a twelve-ounce can regardless of the package in which it is sold. Revenue Canada's position is that packaging is a relevant factor in like product selection.

As discussed above, section 2(1) of the SIMA defines like goods as goods that are "identical in all respects to the other goods" or, if there are no identical goods, "goods the uses and other characteristics of which closely resemble those of the other goods." The Panel upheld Revenue Canada's determination that the minor difference in labeling is irrelevant to the determination that Rainier beer sold in the United States is identical to Rainier beer sold in Canada, because it results solely from the differing labeling requirements in the United States and Canada and has no material effect on cost, price or trade dress.[26/] Since the record establishes such a relationship between price (and cost) and packaging, the Panel holds that Revenue Canada reasonably determined that packaging configuration, like brand name (but unlike the required labeling), is a relevant factor in determining whether the goods sold in both markets are identical "in all respects."

[26/] See part VI, section B, subsection 2, supra.

C. Conclusion[27/]

For the reasons, set forth above, the Panel affirms Revenue Canada's findings that (1) Rainier beer sold in Washington was "identical in all respects" to Rainier beer exported to British Columbia; (2) Henry Weinhard beer sold in Oregon was "identical in all respects" to Henry Weinhard beer exported to British Columbia; and (3) Lone Star beer sold in Texas was "identical in all respects" to Lone Star beer exported to British Columbia. The Panel also affirms Revenue Canada's finding that only domestic beer sold in the same packaging configuration as the exported beer is "identical" within the meaning of the like goods definition.

VII. NORMAL VALUE

The American and Canadian complainants have raised issues relating to the determination of normal value. The American complainants argue that Revenue Canada erred in the following respects:

(A) in determining the preponderant price of the like goods by reference to sales of twelve-ounce cans in all configurations;

[27/] Heileman argues that, under the second prong of the like goods definition, physically identical beers that are sold in the same market segments, in the same packaging configurations and under different brand names more closely resemble each other than physically identical beers in the same packaging configurations that are sold in different market segments but carry the same brand names. Having found that Revenue Canada reasonably determined that the domestic and exported beer are identical, the Panel does not reach this issue.

(B) in failing to allow a trade level adjustment for promotional expenditures where the type of expenditure was made in both the U.S. and the B.C. markets regardless of the difference in the levels of expenditure in the two markets and in failing to adjust for differences in general and administrative expenses in the U.S. and B.C. markets;

(C) in finding that nearly all sales of Rainier beer in bottles were unprofitable and in using profitable sales of Rainier beer in cans as a surrogate for bottle sales; and,

(D) in including the interest expense incurred by Stroh in connection with the acquisition of F. & M. Schaefer and the Jos. Schlitz Company in the cost of production of Stroh beer at its St. Paul brewery.

The Canadian complainants claim that Revenue Canada acted improperly in allowing deductions from normal value under Regulation 6 for discounts on the sale of like goods in the United States (section E).

The standard of review applicable to errors of law by administrative agencies is that of reasonableness, entailing deference to the administrative agency's decisions on issues of law and fact.[28/] Applying this standard, the Panel sustains the decisions of Revenue Canada on each of the issues bearing on the calculation of normal value, except for the determination of the preponderant price of twelve-ounce canned beer and the inclusion of interest in calculating Stroh's cost of production.

28/ See part V, supra, for a comprehensive discussion of standard of review.

A. Preponderant Price

Section 17 of the SIMA states that the normal value is equal to "the price at which the preponderance of sales of like goods . . . was made by the exporter to purchasers throughout the period" unless there is no preponderant price, in which case normal value is based on the weighted average price in the period of investigation.

Heileman argues that Revenue Canada improperly calculated the preponderant price based on a weighted average of prices of twelve-ounce cans in all configurations. Heileman Brief, at pp. 33-35. Had Revenue Canada limited its analysis to the four-by-six packaging configuration, Heileman contends, it would have found that there was no preponderant price and proceeded to calculate normal value by reference to the weighted average of prices for same configuration sales. See Heileman Brief, at p. 34; Hearing Tr., Vol. II, at p. 342.

Revenue Canada does not dispute that identical goods pricing is preferable to averaging the prices of sales in all configurations. Rather, it maintains that Heileman did not provide the information necessary to determine the preponderant (or weighted average) sales price of Rainier in the four-by-six configuration. Revenue Canada Factum, at pp. 19-20.

More particularly, Revenue Canada contends that Heileman provided internal reports, referred to as "Bond 1" reports, listing sales by brand by state, without regard to configuration.

Revenue Canada asserts that Heileman provided information on sales by configuration only for the states of Washington and Oregon. Id. at p. 19. The Bond 1 reports were relied upon in the preliminary determination; Revenue Canada disclosed this to Heileman and gave Heileman the "opportunity to provide more complete information for purposes of the Final Determination." Id. at p. 20. According to Revenue Canada, no such information was provided. Heileman counters that the record contains evidence in the form of reports listing sales of its products in various configurations to wholesalers (which are listed by state) from which the critical data relating prices to packaging configuration may be extracted. Hearing Tr., Vol. II, at p. 369; Heileman Brief, at pp. 34-35 (citing portion of record containing data necessary to make calculation).

The Panel has examined this evidence and has found that it appears to contain the information needed to make the relevant calculations, albeit in a format which is not particularly user friendly. The Panel, therefore, remands the preponderant price issue to Revenue Canada for the purpose of reexamining this evidence and determining whether, based on the record, it is sufficient to enable the calculation of the preponderant or weighted average price for sales of twelve-ounce cans in the four-by-six configuration. If Revenue Canada finds that the information provided is sufficient, it should recalculate the preponderant or weighted average price. If Revenue Canada finds

the information provided is insufficient, it should explain the deficiencies in the submission of its findings.

B. Promotion Expenditures and General and Administrative Expenses

Revenue Canada allowed trade level adjustments for expenditures on selling activities with respect to Rainier and Henry Weinhard brands performed in the home market but not incurred with respect to the B.C. market. In Revenue Canada's opinion, these were justified under Regulation 9(a) of SIMA. However, Revenue Canada declined to allow any adjustment where the type of activity was performed in both the home market and the B.C. market regardless of the difference in the relative levels of expenditures in the two markets. It was accepted by Revenue Canada that spillover effects of advertising are minimal and could therefore be disregarded. Final Statement of Reasons, at p. 6. Also, Revenue Canada declined to make allowance for differences in general and administrative expenditures allocable to the separate markets. However, in making these determinations, Revenue Canada did categorize the various expenditures in considerable detail, differentiating between media expenditures and sponsorships.

Heileman complained against this decision on the ground that section 15 of SIMA is intended to achieve price comparability and that Revenue Canada misapplied Regulation 9(a) or that Regulation 9(a) is not authorized by SIMA. Heileman Brief, at p. 52. The latter point was not pursued at the

hearing. Heileman also argued that Regulation 5 (adjustments for different "conditions of sale") is applicable if Regulation 9(a) does not permit the requested adjustments, focusing on the words "differences in terms and conditions of sale" and "other differences relating to price comparability" as set out in section 15 of SIMA.

Although section 15 does indicate that achievement of price comparability is the intention of the section, Revenue Canada has no choice but to apply the Regulations that have been prescribed. The Regulations provide for several adjustments for the purposes of section 15 along with section 19 and 20, for example, differences in quantity, discounts, delivery costs and taxes and duties, and specifically permit adjustments for trade levels as follows:

> 9. For the purposes of sections 15 and 19 and sub-paragraph 20(c)(i) of the Act, where purchasers of like goods who are at the trade level nearest and subsequent to that of the importer in Canada have been substituted for purchasers who are at the same or substantially the same trade level as that of the importer, the price of the like goods shall be adjusted by deducting therefrom
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> (a) the amount of any costs, charges or expenses incurred by the vendor of the like goods in selling to purchasers who are at the trade level nearest and subsequent to that of the importer that result from activities that would not be performed if the like goods were sold to purchasers who are at the same or substantially the same

> trade level as that of the importer; or
>
> (b) in the absence of information relating to the costs, charges and expenses mentioned in paragraph (a), an amount not exceeding the discount that is generally granted on the sale of like goods by other vendors in the country of export to purchasers who are at the same or substantially the same trade level as the importer.

Acting within that Regulation, Revenue Canada made adjustments for the costs of particular advertising activities that were not performed with respect to sales to Canada, but not for certain promotional activities (i.e., sponsorships) performed in both markets, although the level of expenditure was proportionately much greater in the home market than for the B.C. market.

As noted elsewhere in this opinion, the applicable standard of review is whether Revenue Canada's interpretation of SIMA and the Regulations was a reasonable interpretation in the circumstances. If Regulation 9, together with the other provisions for adjustments, does not achieve the purpose of SIMA as reflected in section 15 of the Act, that is a matter for action by Parliament or the Governor in Council. Neither the Act nor the Regulations set out a broad rule that adjustments must be made by Revenue Canada to achieve price comparability. Rather the Regulations refer to particular "activities" which are or are not performed in the home and export markets respectively, and are exhaustive of the adjustments that may be made in determining

normal value. It might well be, having regard to the purpose of the Regulations indicated by section 15 of SIMA, that an interpretation of "activities" that permitted further differentiation among various levels of costs and types of promotional activities would be reasonable. However, the Panel cannot say that Revenue Canada's interpretation which grouped sponsorships as an activity category is not reasonable, and therefore Heileman's complaint fails on that ground.[29/]

Heileman also argued, in the alternative, that its claim for an adjustment for promotion costs should be based on Regulation 5, which is as follows:

> 5. For the purposes of section 15, 19 and 20 of the Act, where the goods sold to the importer in Canada and the like goods differ
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> (a) in their quality, structure, design or material,
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> (b) in their warranty against defect or guarantee of performance,

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[29/] The application of Regulation 9(a) is open to question, since sales in both markets were made at the wholesale price. See Hearing Tr., at p. 237, 365-66. Although the British Columbia Liquor Distribution Branch functions as a retailer as well as a wholesaler, the former capacity would appear to have little, if anything, to do with price relationships which are normally the subject of level of trade adjustments. Since no party objected to Revenue Canada's determination respecting the applicability of Regulation 9(a), however, the Panel sees no reason to review this aspect of the decision which appears to be aimed at achieving a fair comparison. As noted elsewhere, the treatment of this issue may suggest a need to consider whether the regulations meet the objective of SIMA as reflected in section 15 of the Act.

(c) in the time permitted from their date of order to the date of their scheduled shipment, or

(d) in their conditions of sale, other than the conditions referred to in paragraphs (b) or (c) or any conditions that result in any adjustment being made pursuant to any other section of these Regulations, and that difference would be reflected in a difference between the price of the like goods and the price at which goods that are identical in all respects, including conditions of sale, to the goods sold to the importer in Canada would be sold in the country of export, the price of the like goods shall be adjusted

(e) where the price of the like goods is greater than the price of the identical goods, by deducting therefrom the estimated difference between those prices; and

(f) where the price of the like goods is less than the price of the identical goods, by adding thereto the estimated difference between those prices.

Allowing a wide interpretation of the term "conditions of sale," it might be that the term could reasonably be interpreted to cover differences in marketing or selling expenditures. Paragraph (d) of Regulation 5 recognizes that other provisions in the Regulations may be the basis for adjustments and might be seen to define "conditions of sale" widely by reference to the variety of "conditions" for which adjustments are specifically permitted, including those mentioned in paragraphs (a), (b) and

(c) of Regulation 5. But, no provision goes so far as to introduce a general adjustment rule that would permit the apportioning of costs between home and export markets. Rather, the adjustments are for categories of expenses that are or are not incurred in each market respectively. Also, paragraphs (a), (b) and (c) indicate that such conditions of sale (referred to as "conditions" in paragraph (d)) relate to the goods themselves and the contract for their sale rather than to expenses for selling (including advertising and promotion) and general and administrative expenses.

The Panel notes also that Regulation 5 requires that the adjustment be a "difference that would be reflected in a difference between the price of the like goods and the price at which goods that are identical in all respects, including conditions of sale, to the goods sold to the importer in Canada would be sold in the country of export." This introduces another factor with respect to which the Panel has not been directed to any conclusive evidence in the administrative record. It is perhaps implicit in Heileman's position that differences in promotion costs should be recognized by an adjustment under Regulation 5.

In the course of the proceedings, reference was made to the decision of the Canadian International Trade Tribunal in Madison Industrial Equipment Limited v. Deputy Minister of National Revenue for Customs and Excise, 4 TCT 3131 (1991), an appeal from

a redetermination by Revenue Canada under section 59 of SIMA. The appellant sought adjustments under Regulation 9(a) and, alternatively, under Regulation 5 for warehousing, warranties, bad debts and certain administrative expenses which were alleged to apply to home-country sales and not to exports to Canada. The majority of the Panel first dealt with Regulation 5 and concluded that none of the expenses could properly be regarded as relating to "conditions of sale", stating that "there is no basis to assume that Parliament and the Governor in Council intended the expression 'conditions of sale' to encompass anything beyond what is usually associated with selling in the plain and ordinary sense of that commercial activity". The Panel also concluded that "... the relevant provisions of the Act and the Regulations are couched in terms of sales and activities relating to selling, not of the general conduct of business."[30/] Although the reasons of the majority of the Panel did not deal with the issue of whether such expenses should be apportioned between domestic and export sales, the position of the majority may be inferred from the dissenting opinion of Chairman Bertrand. He interpreted both Regulations 9 and 5 to require that expenses be apportioned when that can be done on the available evidence.

As noted above, even if the wide interpretation adopted by Chairman Bertrand is permissible under the Act, it is not unreasonable for Revenue Canada to adopt the narrower view which

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30/ Madison Industrial Equipment, 4 TCT at 3140.

apparently, but not explicitly, received the approval of the majority of the panel of the CITT in Madison Industrial Equipment. Accordingly, it is not open to this Panel to adopt conclusively the more generous interpretation of Regulation 5 favored by Chairman Bertrand, and argued by counsel for Heileman.[31/]

Heileman also complained that general and administrative ("G&A") expenses should be the subject of an adjustment for differences in those expenses as between sales in the United States and sales in Canada. There are in effect two issues, one being whether Revenue Canada was reasonable in not differentiating such expenses into different "activities," and the other being whether Revenue Canada addressed the relevant facts and came to a conclusion that was perverse or unsupported by any evidence. The record shows that there were G&A expenses with regard to sales in both the Canadian and U.S. markets and, for the reasons given above with regard to expenditures for promotions, the Panel cannot conclude that Revenue Canada's interpretation of the Regulation is unreasonable. Further, it appears clear that Revenue Canada considered the relevant facts.

Heileman made reference in its brief to the GATT Antidumping Code and to U.S. law. The Panel notes that while the relevant provisions of the GATT Code may be taken into account by

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31/ The Panel does not wish to leave the issue without remarking that the Regulations seem to be narrowly drafted in view of the stated purpose of section 15 of SIMA.

Revenue Canada (as determined by the Supreme Court of Canada in the Corn Growers' case[32/] vis-à-vis the proper construction of a statute by the CITT), the Panel cannot say that it was unreasonable for Revenue Canada to decline to do so in this case.

With respect to U.S. law, the Panel notes that the U.S. regulations are couched in language significantly different from the Canadian regulations. The Panel, as well as Revenue Canada, is bound by the words of the Canadian regulations, and the Panel cannot conclude that Revenue Canada's interpretation was unreasonable because different applicable language in U.S. law would, or might, result in a different conclusion.

C. Use of Profitable Rainier Can Sales as a Surrogate for Bottle Sales

In addition to its sales of Rainier in cans, Heileman also sold Rainier in twelve-ounce bottles during the period of the investigation. Revenue Canada found that these sales were unprofitable and used as a surrogate the average profit margin on sales of Rainier beer in cans and bottles, regardless of size.

Heileman's objections to these findings are twofold. First, Heileman argues that Revenue Canada erred in determining bottle sales to have been unprofitable. Assuming, however, that this determination is upheld, Heileman then claims that the surrogate profit should have been derived from the sale of forty-ounce bottles only without considering sales of cans.

32/ National Corn Growers Association of Canada v. Canadian Import Tribunal [1990] 2 S.C.R. 1324.

On the issue of the profitability of twelve-ounce bottle sales, Heileman contends that indirect costs were misallocated, but does not propose an alternative. See Heileman Brief, at pp. 45-46. As Heileman acknowledges, Revenue Canada used the same standard for allocating such costs in determining that the bottle sales were unprofitable as it applied in finding that can sales were profitable. The Panel finds no basis for upsetting what Revenue Canada has done here; i.e., allocating indirect costs on a uniform and consistent basis.[33/]

If sales of twelve-ounce bottles nonetheless were found to be unprofitable, Heileman argues that the profit margin on can sales should be ignored in calculating the appropriate surrogate. In support of this position, Heileman claims that the markets for cans and bottles are so dissimilar that the profit derived from the sale of cans cannot reasonably be used to measure the profit which normally should be achieved on sales of bottles. See Heileman Brief, at pp. 45-46. Apart from the obvious point that cans and bottles are different, Heileman offers little to support its position. Moreover, the same critique could be made of the comparison Heileman prefers -- twelve and forty-ounce bottles are also different (perhaps more different in terms of consumer

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33/ Heileman's argument that it would not have sold Rainier in bottles at a price that did not yield a profit is not persuasive. Sales at such prices may be economically justifiable because the firm considers any selling price above the marginal cost for that unit of production to be acceptable.

appeal than twelve-ounce cans and twelve-ounce bottles). Under these circumstances, the Panel finds that the approach taken by Revenue Canada - to use an average profit margin on sales of twelve-ounce cans and forty-ounce bottles - is reasonable.

D. Interest Expense as Part of Cost of Production

Stroh claims that Revenue Canada erred in including the interest expense incurred in the acquisition of the Jos. Schlitz and F. & M. Schaefer breweries in the cost of production of Stroh beer, which resulted in a finding under section 16(2)(b) of SIMA that certain sales of Stroh's products took place at prices which were not profitable. More particularly, Stroh argues that (i) interest should not be included in calculating the cost of production of Stroh beer at its St. Paul brewery because the borrowing was unrelated to that facility and (ii) interest, as a matter of law, is not a cost of production.[34/]

Revenue Canada agrees that a borrowing must be related to the production or operation of the plant at which the goods are produced if the interest paid to service the debt is to be considered in determining the cost of production. Indeed, interest expense incurred by Heileman in connection with the acquisition of its brewery assets was not included in the cost of

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34/ Revenue Canada also appears to argue that the issue is moot because the loan has been paid off. Even if that were the case (and Stroh does not concede the point), the issue would not be moot, since the treatment of interest will have a bearing on the margin of dumping.

production of Rainier beer because of the lack of such a relationship. Final Statement of Reasons, at p. 7.

The Panel has found no evidence in the record supporting the distinction drawn by Revenue Canada between Heileman's acquisition debt and Stroh's borrowings to finance the acquisition of the Jos. Schlitz and F. & M. Schaefer breweries. The Final Statement of Reasons concludes that these acquisitions related to production costs at the St. Paul's brewery because "Stroh has rationalized its production with each brewery producing the brands that are marketed in the geographic area serviced by that brewery." Final Statement of Reasons, at p. 21.[35/] If there were evidence supporting this conclusion, the Panel would have no difficulty upholding it. But the Panel has found none. And Revenue Canada, despite a request to cite such evidence to the Panel, failed to do so. The Panel, therefore, remands this issue to Revenue Canada for reconsideration of whether the evidence of record supports the conclusion that the interest expense incurred for the acquisition is related to production at the St. Paul brewery. If such a connection is not supported by the evidence of record, Revenue Canada should recompute the normal value of Stroh's beer excluding the interest expenses incurred in connection with the acquisitions by Stroh.

35/ Revenue Canada also submitted an internal memorandum on the interest issue for the record. Canadian Secretariat File No. CDA-91-1904-01, 4235-218-2, Vol. 4, Tab 4. This memorandum does not present evidence of any linkage between the production of Stroh and the acquisition.

If Revenue Canada concludes that such evidence exists, it should present the basis for that conclusion in its findings. If necessary, the Panel will thereafter decide whether such interest expense is a cost of production.

E. Regulation 6 Discounts

Heileman, Pabst and Stroh all granted discounts to United States wholesalers. These discounts were termed "deferred promotional discounts" or "post-off discounts" as they were generally paid to the wholesaler after the sale by the wholesaler to the retailer. The discounts, which varied from state to state, were offered only during certain months and only in certain states. The purpose of the discounts was, as expressed by the U.S. producers, to ensure floor space, to promote brands, and to maximize sales in down periods. No comparable discounts were offered or paid to the Canadian buyer, the British Columbia Liquor Distribution Branch ("BCLDB").

In calculating normal value for each exporter, Revenue Canada made certain downward adjustments for the discounts pursuant to Regulation 6 of SIMA. Regulation 6 provides:

> For the purposes of sections 15, 19 and 20 of the Act, where any rebate, deferred discount or discount for cash is generally granted in relation to the sale of like goods in the country of export, the price of the like goods shall be adjusted by deducting therefrom the amount of any such generally granted rebate or discount for which the sale of the goods to the importer in Canada would qualify if that sale occurred in the country of export.

The B.C. Brewers oppose the adjustments made for the discounts on the grounds that Revenue Canada failed to properly consider and apply the criteria of Regulation 6. According to the B.C. Brewers, Revenue Canada failed to find that the discounts, in fact, were "generally granted" or that the Canadian importer would have qualified for the discounts if the sale to the importer had occurred in the United States, the country of export. The B.C. Brewers argue that Revenue Canada failed to address these requirements in its determination, which amounts to "a refusal to exercise the jurisdiction accorded to it by Parliament." B.C. Brewers Complaint, at p. 40, para. 103. They further argue that, had Revenue Canada properly applied Regulation 6, it would have found that neither of the two requirements had been met.[36/]

[36/] The B.C. Brewers also suggest that certain calculation errors were made in connection with the Regulation 6 adjustments for Stroh. Stroh replies that there were no calculation errors but, rather, that what the B.C. Brewers term errors results from the fact that the discounts are paid after the sales occur. As a consequence of this lag, the discounts paid in a particular month may appear large relative to the number of sales to the wholesaler in that month.

According to the B.C. Brewers' reply brief, the purpose of noting the alleged errors was to support their position that "there was incomplete analysis of the data used . . . ." B.C. Brewers Reply Brief, at p. 20. Accordingly, the Panel has considered these allegations in ruling on this issue but does not consider remand warranted regarding these "errors." Stroh's explanation as to the seemingly high discounts appears valid. As regards the one error noted by the B.C. Brewers that does, indeed, appear to be an error (an incorrect 1991 subtotal for deferred discounts

(continued...)

Revenue Canada and the U.S. producers counter that the requirements of the regulation were considered, that it is not reversible error merely because Revenue Canada chose not to make explicit written findings with respect to each requirement, and that, in fact, the discounts did meet both requirements of the regulation.

As regards the allegation that Revenue Canada failed to consider and address each Regulation 6 requirement, the Panel is satisfied that Revenue Canada did analyze the discounts in light of the two criteria in determining whether or not to grant the adjustments for the discounts. While the Statement of Reasons does not state explicitly that each requirement was considered for and met by each company--

> it is not error of law for a tribunal not to give reasons on every argument presented to it, nor even to fail to make an explicit written finding on each constituent element of its decision [citations omitted].

Maclean Hunter v. Deputy Minister of National Revenue (Customs and Excise), (1988), 87 N.R. 195 (F.C.A.) at 198. See also, Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Association of Nipawin, et al. (1973), 41 D.L.R. (3d) 6 (S.C.C.) at 13, "A tribunal is not required to make an explicit written finding on each constituent element, however subordinate, leading to its final conclusion."

[36/](...continued)
on Stroh Light), this error, if corrected, would have, at most, a de minimis impact on the final results.

Turning now to the question of whether the discounts met the Regulation 6 requirements, the Panel takes up first the issue of whether the Canadian importer, the BCLDB, would have qualified for the discounts. The B.C. Brewers maintain that the BCLDB could not have qualified for the discounts because it was not simply a wholesaler, but rather a wholesaler and retailer, and because it failed to meet all the terms and conditions for the discounts set by the producers.

As support for their position, the B.C. Brewers cite Flat Wooden Toothpicks from the U.S., Statement of Reasons, Final Determination, Feb. 13, 1992, p. 7, and Certain Integral Horsepower Induction Motors from the U.S., Statement of Reasons, Section 59 Re-determination, Nov. 20, 1991, p. 3. In these cases, adjustments for Regulation 6 discounts were denied because the importers did not meet the conditions for the discounts. While the cases cited by the B.C. Brewers confirm that the Regulation 6 adjustment requires that the importer meet the terms and conditions of the discount, they provide little guidance for the Panel in the instant case as Toothpicks does not indicate what terms and conditions were not met and Induction Motors apparently involved discounts for early payment, a condition not relevant to the discounts at issue here.

The Panel finds that BCLDB would likely have qualified for the discounts had the BCLDB been a buyer in the United States. Although the B.C. Brewers suggest that the terms and conditions

to receive the discounts were stringent, the record indicates that the only real criteria for receiving the discounts were that the wholesaler buy the goods and then sell them to a retailer during a time when the discounts were offered. Had the BCLDB been located in a state where and when the discounts were offered, it is reasonable to assume that the discount would have been offered to and taken by the BCLDB.

The Panel also finds that the fact that the BCLDB was more than a wholesaler, that is, that it functioned both as a retailer and a wholesaler, would not have disqualified it from receiving the discount. Since the purpose of the discount was to move the merchandise from the wholesaler to the retailer, the dual function of the BCLDB would presumably have qualified the BCLDB for the discount at the moment it purchased the goods.

Regarding the issue of whether the discounts were "generally granted", the B.C. Brewers argue that the discounts could not have met this criterion as the discounts were granted only in certain states, were granted only at certain times, and were not taken advantage of by all wholesalers. The B.C. Brewers also cite to Revenue Canada's guidelines which indicate that "generally granted" means granted on 50 percent or more of sales. Specifically, those guidelines state:

> The rebates, deferred discounts or discounts for cash must be generally granted on the sales of like goods used in the determination of normal value. The term "generally granted" in the application of this regulation means that such rebates

> or discounts must be granted on at least 50% of sales of the like goods used before an adjustment can be considered.

Revenue Canada Assessment Programs Manual, Vol. 2, SIMA, Part VIII, c. 3., S.C.

Finally, the B.C. Brewers cite two cases, Certain Carbon Steel Welded Pipe from Argentina, et al., Statement of Reasons, Final Determination, June 21, 1991, and Lint Rollers from the U.S., Statement of Reasons, Final Determination, December 18, 1990, which demonstrate that, for the Regulation 6 adjustment to be granted, a "majority of the customers that are offered the discount [must] take it." Lint Rollers at 6.

Revenue Canada and the exporters answer this argument by noting that the fact that the discounts were offered only periodically and in certain states does not negate the fact that they were generally granted and that Revenue Canada, in fact, found that the 50 percent test was met on those sales and in those months to which the Regulation 6 adjustment was applied.

The Panel finds that the allowance of the adjustment by Revenue Canada in the manner allowed was reasonable. While, as the B.C. Brewers note, the discounts may not have been offered or granted on a majority of sales throughout the entire United States or throughout the entire period of the investigation, Revenue Canada took this into account by limiting the adjustment to sales in the months when and the states where the discounts were offered. Moreover, where the amounts of the discounts

varied, Revenue Canada deducted a weighted average discount from normal value.

The record indicates that, if Revenue Canada had applied the discount to all sales investigated, it would have been in contravention of Regulation 6 since the discounts were not granted on a majority of sales throughout the entire period. This, however, Revenue Canada did not do. By limiting the adjustment to sales only in certain months and in certain states, Revenue Canada implemented the regulation in a reasonable manner. Accordingly, the Panel finds the Regulation 6 discounts were reasonably calculated and applied.

VIII. EXPORT PRICE

Complainants B.C. Brewers argue that Revenue Canada erred in its calculation of export values:

> by failing to deduct commissions from Pabst's export prices; and
>
> by failing properly to calculate Pabst's freight.

The first issue raises a question of law and the second issue raises a question of fact.[37/]

A. Commissions

Pabst and Heileman pay commissions on sales in Canada. No comparable commissions are paid on sales in the United States. The Canadian commission agent of Pabst is North America Imports, Inc. ("NAI"); of Heileman, Haida Trading, Inc. ("Haida"). In the

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37/ See Part V, supra.

final determination, Revenue Canada deducted the Haida commissions from Heileman's export prices but did not deduct NAI's commissions from the export prices of Pabst.

The B.C. Brewers argue that NAI's commissions must be deducted from Pabst's export prices. Heileman initially objected to the deduction of Haida's commissions; however, at oral argument, counsel for Heileman indicated that the issue had "become moot" because Revenue Canada subsequently issued a redetermination in which it did not deduct the Haida commissions. See Hearing Tr., Vol. I, at p. 6.

In light of Heileman's effective withdrawal of its claim, the Panel will deal here only with the B.C. Brewer's complaint relating to Pabst.

Among other arguments, the B.C. Brewers claim that there is an inconsistency amounting to reviewable error in the final results because Revenue Canada failed to deduct NAI's commissions when virtually identical commissions were deducted from Heileman's export price. A reading of the Final Statement of Reasons indicates that Revenue Canada was not inconsistent in the treatment of the commissions. The Haida commissions were deducted, not because Revenue Canada found the commissions deductible per se, but rather because the information submitted by Heileman was not sufficient to allow Revenue Canada to determine the exact nature of the payments to Haida. The Final Statement of Reasons (p. 11) notes:

> The commission is being deducted since . . . complete information on the breakdown of Haida's costs and expenses was not provided to permit the Department to determine the actual costs absorbed by Haida.

In light of this language, and irrespective of the redetermination relating to the Haida commissions, the Panel does not find any inconsistency in the treatment of the commissions as between Pabst and Heileman.

The B.C. Brewers premise their contention that a deduction for commissions must be made on section 24 of SIMA. Section 24 reads:

> The export price of goods sold to an importer in Canada, notwithstanding any invoice or affidavit to the contrary, is an amount equal to the lesser of
>
> (a) the exporter's sale price for the goods, adjusted by deducting therefrom
>
> (i) the costs, charges and expenses incurred in preparing the goods for shipment to Canada that are additional to those costs, charges and expenses generally incurred on sales of like goods for use in the country of export,
>
> (ii) any duty or tax imposed on the goods by or pursuant to a law of Canada or of a province, to the extent that such duty or tax is paid by or on behalf or at the request of the exporter, and
>
> (iii) all other costs, charges and expenses resulting from the exportation of the goods, or arising from their shipment from the place described in paragraph

> 15 (e) or the place substituted therefor by virtue of paragraph 16(1)(a); and
>
> (b) the price at which the importer has purchased or agreed to purchase the goods, adjusted by deducting therefrom all costs, charges, expenses, duties and taxes described in subparagraphs (a) (i) to (iii).

According to the B.C. Brewers, a commission is an "expense" within the language of section 24 and, therefore, must be deducted from export price. Revenue Canada and Pabst take the position that selling commissions are not covered by section 24 and are not deductible as they are akin to costs for sales and administrative services that Pabst itself performs in the domestic market.

The B.C. Brewers also argue, in the alternative, that the commissions may make the export price determined under section 24 unreliable because the commission constitutes a "compensatory arrangement." In such a situation, according to the B.C. Brewers, section 25 of SIMA applies. That section provides, in pertinent part:

> Where, in respect of goods sold to an importer in Canada,
>
> (a) . . .
>
> (b) the Deputy Minister is of the opinion that the export price, as determined under section 24, is unreliable
>
> (i) by reason that the sale of the goods for export to Canada was a sale between associated persons, or

(ii) by reason of a compensatory arrangement, made between any two or more of the following, namely, the manufacturer, producer, vendor, exporter, importer in Canada and any other person, that directly or indirectly affects or relates to

(A) the price of the goods,
(B) the sale of the goods,
(C) the net return to the manufacturer, producer, vendor or exporter of the goods, or
(D) the net cost to the importer of the goods,

the export price of the goods is [calculated differently from section 24].

The B.C. Brewers contend that the commissions paid to NAI must be deducted from the export price pursuant to either section 24 or 25 of SIMA.

As regards the "compensatory arrangement" argument of the B.C. Brewers, a commission paid to an unrelated agent does not appear to be the type of arrangement contemplated by section 25. More significantly, the provision leaves the determination as to the reliability of the export price calculated under section 24 up to the "opinion" of Revenue Canada. Only if Revenue Canada finds the price calculated under section 24 to be "unreliable" does section 25 come into play. Revenue Canada determined that Pabst's export prices should be calculated pursuant to section 24, not section 25, and the Panel finds nothing unreasonable in this determination.

With regard to the treatment of commissions under section 24, the term "commission" does not appear in the statutory language. The B.C. Brewers argue, nevertheless, that commissions are covered by the general term "expenses". Subsections (a)i and (a)iii of section 24 each contain the term "expenses". However, the "costs, charges and expenses" covered by subsection (a)i relate to those incurred in preparing the goods for shipment, while the "other" costs and expenses covered by subsection (a)iii relate to exportation and shipment, i.e., to costs relating to the physical movement of the goods. Given the wording of these subsections, the Panel finds that Revenue Canada acted reasonably in holding that selling commissions, which are not in the nature of shipment costs or exportation costs, were not intended to be covered by section 24.

Revenue Canada's position is supported by the fact that SIMA aims for "apples to apples" price comparisons. Since the commission agent NAI performs those same selling functions in Canada that Pabst itself performs in the United States, deduction of the commissions from export prices without a similar deduction from normal value for Pabst's U.S. selling expenses would be unfair and would skew the comparison. This was stated by Revenue Canada in the preliminary determination as follows:

> The functions being performed by North American Imports are functions which are also performed in the domestic market. In the domestic market, they are performed by sales and/or administrative staff. The general, selling and administrative

> expenses included in the domestic costs already include these functions. Therefore, no adjustment from export price will be made to account for this commission.

Preliminary Statement of Reasons, at p. 24.

In view of the foregoing, the Panel finds that Revenue Canada's position as to the non-deductibility from export price of the commissions paid by Pabst to NAI is reasonable.

B. Freight

To calculate export price, Revenue Canada deducted freight costs from the exporter's sales price pursuant to section 24 of SIMA. The B.C. Brewers contend that, while Revenue Canada was correct to deduct freight, for Pabst, the computation of average freight was done incorrectly, thereby understating Pabst's true cost of shipping its goods to the BCLDB.

By letter dated, August 4, 1992, however, the B.C. Brewers notified the Panel that it has withdrawn its complaint insofar as it relates to the calculation of freight expenses for Pabst, having reached a stipulation with Revenue Canada as to the methodology to be used for the calculation of such expenses. This letter is attached as Appendix C. Accordingly, the Panel does not address this issue herein.

The B.C. Brewers also argue that the cost of returning the pallets from British Columbia to the Pabst Brewery is absorbed by Pabst and that this cost was not deducted from the export price. Pabst claims that, while the pallets are sent back by the BCLDB,

Pabst does not absorb that cost. The Panel finds nothing in the record that would support the B.C. Brewers' contention that Pabst, rather than the BCLDB, pays the pallet-return cost.

IX. CONCLUSION

For the reasons stated above, Revenue Canada's determination is hereby affirmed in part and remanded in part.

The results of this remand shall be provided by Revenue Canada to the Panel within 45 days of this decision.

SIGNED IN THE ORIGINAL BY:

August 5, 1992	Joseph F. Dennin
Date	**Joseph F. Dennin, Chairman**
August 5, 1992	David E. Birenbaum
Date	**David E. Birenbaum**
August 5, 1992	Ivan R. Feltham
Date	**Ivan R. Feltham**
August 5, 1992	Dennis James, Jr.
Date	**Dennis James, Jr.**
August 5, 1992	Wilhelmina K. Tyler
Date	**Wilhelmina K. Tyler**

ARTICLE 1904 BINATIONAL PANEL REVIEW
pursuant to the
CANADA-UNITED STATES FREE TRADE AGREEMENT

IN THE MATTER OF:	
Certain Beer Originating in or Exported from the United States of America by G. Heileman Brewing Company, Inc., Pabst Brewing Company and the Stroh Brewery Company for Use or Consumption in the Province of British Columbia	Secretariat File No. CDA-91-1904-01

ORDER

For the reasons stated in the memorandum opinion of the Panelists, the Panel affirms in part and remands in part Revenue Canada's final determination with respect to Certain Beer Originating In Or Exported From the United States of America by G. Heileman Brewing Company, Inc., Pabst Brewing Company and The Stroh Brewery Company For Use or Consumption in the Province of British Columbia for further proceedings consistent with the memorandum opinion.

The results of the remand shall be provided by Revenue Canada to the Panel within 45 days of this decision.

SIGNED IN THE ORIGINAL BY:

August 5, 1992
Date

Joseph F. Dennin
Joseph F. Dennin, Chairman

August 5, 1992
Date

David E. Birenbaum
David E. Birenbaum

August 5, 1992
Date

Ivan R. Feltham
Ivan R. Feltham

August 5, 1992
Date

Dennis James, Jr.
Dennis James, Jr.

August 5, 1992
Date

Wilhelmina K. Tyler
Wilhelmina K. Tyler

APPENDIX A

CERTAIN BEER ORIGINATING IN OR EXPORTED FROM THE UNITED STATES OF AMERICA BY G. HEILEMAN BREWING COMPANY, INC., PABST BREWING COMPANY AND THE STROH BREWERY COMPANY FOR USE OR CONSUMPTION IN THE PROVINCE OF BRITISH COLUMBIA

SECRETARIAT FILE NO.: CDA-91-1904-01

OPINION OF THE PANEL REGARDING THE CLAIMS FOR DELIBERATIVE PROCESS AND SOLICITOR/CLIENT PRIVILEGE IN RESPECT OF CERTAIN DOCUMENTS

This memorandum sets out the reasons of the Panel for the Order made by the Panel on February 7, 1992 in which the Panel directed that the Investigating Authority disclose and file certain documents with the Secretariat on or before February 11, 1992 and that certain documents not be disclosed.

This proceeding is a review of the Final Determination issued by the Deputy Minister of National Revenue for Customs and Excise on August 30, 1991 pursuant to Sub-section 41(1) of the Special Import Measures Act [Revised Statutes of Canada 1985, Chapter S-15 as amended ("SIMA")] in connection with the subject matter described above.

.../2

Requests for panel review in accordance with SIMA which implemented the Canada-United States Free Trade Agreement ("FTA") were duly filed by G. Heileman Brewing Company, Inc. ("Heileman") and The Stroh Brewery Company ("Stroh"). A request for panel review was also filed on behalf of breweries in British Columbia, namely, Labatt Breweries of British Columbia, Molson Breweries (B.C.) and Pacific Western Brewing Company ("B.C. Brewers").

Documents Filed[•]

In compliance with Rule 41(1), the Investigating Authority filed with the Binational Secretariat, Canadian Section, an Index of the Administrative Record on November 4, 1991. Amended pages of the Index were filed by the Investigating Authority nine days later, on November 13, 1991. On the initial filing of the Index, the Investigating Authority claimed privilege for 52 documents. The amended filing reduced that number to 46 documents.

As required by Rule 41(3), Heileman and B.C. Brewers each filed a "Designation of Record", and in accordance with Rule 4l(4), each filed a notice of motion for disclosure of documents containing information for which privilege had been claimed by the Investigating Authority.

• Headings are inserted only for convenience of reference and are not intended to be definitive of the text that follows.

In accordance with Rule 55(2), the Investigating Authority filed on November 25, 1991 an affidavit of Arthur Daniel Atwood, the Director, Textiles and Consumer Products Assessment Programs, Customs and Excise, Department of National Revenue, together with written submissions on behalf of the Deputy Minister of National Revenue, Customs and Excise, (hereinafter "Deputy Minister") on points of law with respect to the notice of motion by Heileman and separately with respect to the notice of motion by B.C. Brewers.

Mr. Atwood identified and described four classes of documents in Schedules I to IV of his affidavit and took the following positions concerning disclosure of each class: (i) the disclosure of documents described in Schedule I (nineteen documents) would not constitute disclosure of privileged information; (ii) the disclosure of documents described in Schedule II (nine documents) would constitute disclosure of information of the Investigating Authority constituting part of the deliberative process with respect to the final determination and with respect to which the privilege had not been waived**; (iii) the disclosure of documents described in Schedule III (sixteen documents)would not constitute disclosure of privileged information, but he noted that the said documents contain proprietary or other information that was confidential in the proceedings before the Deputy Minister and the person who designated or submitted the information had not withdrawn the claim as to the confidentiality of the

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** Document 4235-218-2, vol. 4, tab. 5 is listed on both Schedule I and Schedule II. Having regard to the fact that this document is specifically described in Mr. Atwood's affidavit as a document for which privilege is claimed, we have treated the listing in schedule I as an error.

information; and (iv) the documents described in Schedule IV (three documents) are communications which passed between the Department of National Revenue, Customs and Excise and its solicitors for the purpose of giving instructions or seeking and receiving advice in respect of matters arising during the deliberative process and constitute information of the Investigating Authority that is subject to solicitor/client privilege under the laws of Canada and for which privilege has not been waived.

Mr. Atwood went on to describe in Paragraph 6 of his affidavit the nature of the documents listed in Schedules II and IV. In Paragraphs 8, 9 and 10, he set out his reasons for taking the position that the documents listed in Schedule II are part of the deliberative process relating to the final determination and should not be disclosed. These will be referred to later in this memorandum.

Solicitor/Client Privilege

At this point, it is convenient to dispose of the issue with regard to the claim for solicitor/client privilege. Upon reviewing the notices of motion by Heileman and B.C. Brewers and the affidavit of Mr. Atwood together with the submission of the Deputy Minister's counsel, the Panel concluded that all of the documents listed in Schedule IV of Mr. Atwood's affidavit appeared to be solicitor/client communications for which solicitor/client privilege was properly claimed, with the possible exception of the draft ministerial specification and its accompanying memorandum to the Minister (but not "a memorandum to Legal Services") identified in Sub-paragraph (b)

of Paragraph II of Mr. Atwood's affidavit. In compliance with the Panel's order of January 29, 1992, the draft ministerial specification and the accompanying memorandum to the Minister referenced in the affidavit were duly disclosed to two members of the Panel in accordance with Rules 55(5) and (6). Acting upon the report of the panel members so designated, the Panel ordered disclosure of these documents. The reason of the two panel members endorsed by the other members of the Panel is simply that these documents are not solicitor/client communications and therefore the Investigating Authority is not entitled to claim solicitor/client privilege for them.

Applicable Statutes, Regulations and Rules

At this juncture, it is important to summarize the authority and responsibility of a panel with respect to a claim for deliberative process privilege.[***] The authority of a panel derives from the Canada-United States Free Trade Agreement Implementation Act, Statutes of Canada 1988, Chapter 65 ("FTAIA") and SIMA (as amended in particular by the FTAIA).

SIMA provides that, "A panel shall conduct a review of a definitive decision in accordance with Chapter Nineteen of the Free Trade Agreement and the rules", and that "A panel has such powers, rights and privileges as are conferred on it by the

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[***] References hereinafter to privilege or privileged documents do not include solicitor/client communications or "government information". See Rules 3, 41(2), 41(8). There is no claim that any of the documents in question in these proceedings involve government information as defined in Rule 3.

regulations." [SIMA, Section 77.15, Sub-sections (1) and (2)] A "definitive decision" is defined by Section 77.1 to include "a final determination of the Deputy Minister under paragraph 4l(l)(a)". SIMA further provides in Section 77.27 that the Governor in Council, on the recommendation of the Minister for International Trade and the Minister of Finance, may make regulations, "conferring on a panel or committee such powers, rights and privileges as the Governor in Council deems necessary for giving effect to Chapter Nineteen of the Free Trade Agreement and the rules, including powers, rights and privileges of a superior court of record".

The Regulations provide in Section 36.5 that, "For the purposes of sub-section 77.15(2) of [SIMA], a panel shall have the powers, rights and privileges of a superior court of record to compel the production of and to examine the administrative record of proceedings in respect of the definitive decision, other than government information, as that expression is defined by the rules, for the purpose of the full review of the definitive decision".

Section 77.1 of SIMA defines "rules" to mean "the rules of procedure, as amended from time to time, made pursuant to Chapter Nineteen of the Free Trade Agreement". Acting pursuant to the statutory authority and in accordance with Article 1904 of the Free Trade Agreement, rules were duly agreed to and promulgated, insofar as Canadian law is concerned, in the Canada Gazette, Part I,

dated January 14, 1989. The said rules provided that they may be cited as the "Article 1904 Panel Rules"; for convenience in this opinion they are referred to simply as the "Rules".

The only definition of "administrative record" to be found in the relevant prescriptive documents is in Article 1911 of the FTA which provides as follows:

> "administrative record means, unless otherwise agreed by the Parties and the other persons appearing before a panel:
>
> a) all documentary or other information presented to or obtained by the competent investigating authority in the course of the administrative proceeding, including any governmental memoranda pertaining to the case, and including any record of ex parte meetings as may be required to be kept;
>
> b) a copy of the final determination of the competent investigating authority, including reasons for the determination;
>
> c) all transcripts or records of conferences or hearings before the competent investigating authority; and

d) all notices published in the *Canada Gazette* or the *Federal Register* in connection with the administrative proceeding."

SIMA, in Section 77.14, provides that on the appointment of the members of a panel to review a definitive decision, the appropriate authority shall cause a copy of the Administrative Record to be forwarded in accordance with the Rules. Rule 41(1) accordingly provides that, within a specified time limit, "an Index comprised of a descriptive list of all items contained in the administrative record with proof of service of the Index on persons listed on the service list" shall be filed with the responsible Secretariat. Rule 41(2) further provides that an Index referred to in Rule 41(1)" shall, where applicable, identify those items that contain proprietary information, privileged information or government information by a statement to that effect". Rule 3 defines privileged information to mean, inter alia, "(a) with respect to a panel review of a final determination made in Canada, information of the investigating authority that ... constitutes part of the deliberative process with respect to the final determination and with respect to which privilege has not been waived."

Rule 55(l) provides that, " A Notice of Motion for disclosure of a document in the administrative record identified as containing privileged information shall set out

a) the reasons why disclosure of the document is necessary to the case of the participant filing the Notice of Motion; and

b) a statement of any point of law or legal authority relied on, together with a concise argument in support of the disclosure".

Within a specified period of time, the Investigating Authority shall, if it intends to respond, file the following in response: [Rule 55(2)]

"a) an affidavit of an official of the investigating authority stating that, since the filing of the Notice of Motion, the official has examined the document and has determined that disclosure of the document would constitute disclosure of privileged information;

b) a statement of any point of law or legal authority relied on, together with a concise argument in support of non-disclosure".

The Rules further provide [Rule 55(3)] that after having reviewed the notice of motion referred to in Subrule I and the response referred to in Subrule 2, if any, a panel may order:

"(a) that the document shall not be disclosed; or

(b) that the investigating authority file two copies of the document under seal with the responsible Secretariat in order that two panelists may examine the document".

The two panelists so designated are required to examine the document *in camera* and to communicate their decision, if any, to the panel. That decision shall be issued as an order of the panel. [Rule 55(6) and (7)]

Thus, it appears, in summary, that a panel has conferred upon it by SIMA, the Regulations and the Rules authority to act in accordance with the Rules to determine 1) whether a document falls within a privileged category and 2) if so, whether the document should be ordered disclosed (which in this context we understand to mean filed with the Secretariat and available only to persons with respect to whom a disclosure order has been issued insofar as documents containing proprietary information are involved). There is no further guidance in SIMA, the Regulations or the Rules as to the principles to be applied in the exercise of that authority.

Having reviewed the authority of a panel to examine a document for which privilege has been claimed, and to order disclosure of it, we now turn to a review of authoritative statements of principle, as set out in the FTA and in the material filed in these proceedings, that might be relevant to determine whether a document falls

within a privileged category and, if so, in what circumstances a document should be ordered disclosed.

Article 1904, Paragraph 6, of the FTA provides that a panel "shall conduct its review in accordance with the procedures established by the Parties pursuant to paragraph 14". Paragraph 14 in turn provides that the Parties shall adopt rules of procedure, which "rules shall be based, where appropriate, upon judicial rules of appellate procedure and shall include rules concerning the content and service of requests for panels, a requirement that the competent investigating authority transmit to the panel the administrative record of the proceeding, the protection of business proprietary and other privileged information", and other matters not pertinent to this memorandum.

With respect to the review of a final determination, the issue being whether the final determination is in accordance with the antidumping or countervailing duty law of the importing Party, Article 1904, Paragraph 2, provides that the applicable law "consists of the relevant statutes, legislative history, regulations, administrative practice, and judicial precedents to the extent that a court of the importing Party would rely on such materials in reviewing a final determination of the competent investigating authority". Paragraph 3 goes on to provide that, "The panel shall apply the standard of review described in Article 1911 and the general legal principles that a court of the importing Party otherwise would apply to a review of a determination

of the competent investigating authority". In addition to defining "administrative record", as noted above, Article 1911 states that "general legal principles includes principles such as standing, due process, rules of statutory construction, mootness, and exhaustion of administrative remedies" and that "standard of review means the following standards, as may be amended from time to time by a Party:

> (a) in the case of Canada, the grounds set forth in section 28(l) of the *Federal Court Act* with respect to all final determinations ....".

It thus appears that there is no specific direction with regard to the principles applicable to determination of whether a document falls within a category of privilege and, if so, whether it may or should be ordered disclosed. However, it is clearly implied by the prescriptive material that, subject to that material including the Rules, the principles of Canadian law and practice should be applied.

Submissions of the Parties

In support of their notice of motion filed November 14, 1991, counsel for B.C. Brewers submitted that the general rule is that litigants should have access to all evidence that may be of assistance to the fair disposition of the issues, citing R. v. Snider [1954] S.C.R. 479 at 482, and therefore that a provision that purports to grant immunity from disclosure should be interpreted restrictively. The submission went on to rely on dictionary definitions of both the French and the English versions of the

Rules with regard to "deliberative process" and argued that "deliberative process" refers only to the debates and discussions surrounding the actual decision-making process. Thus, their first line of argument was that the documents for which privilege was claimed should not be determined to fall within the category of privileged documents. Alternatively, counsel for B.C. Brewers submitted that the Panel is not bound by the claim of privilege and should order disclosure of the documents in these proceedings, citing authorities which dealt with "Crown privilege" or "public interest immunity". Although the submission did not explicitly distinguish between public interest immunity as discussed in the Supreme Court of Canada decision in Carey v. Ontario [1986] 2 S.C.R. 637, and deliberative process privilege, the submission apparently proceeds on the ground that a public interest test should be applied to a claim for deliberative process privilege, as it is to a claim for public interest immunity, and that in the circumstances of this case a full review by the Panel of the documents for which privilege is claimed is justified.

Counsel for Heileman likewise argued that resort should be had to the dictionary definition of "deliberative" as pertaining to deliberation, namely, "the action of deliberating, or weighing a thing in the mind; careful consideration with a view to decision". Counsel made a distinction between the deliberative process and the investigative process, and argued that much of the work of Revenue Canada in an anti-dumping case constitutes the investigative process; it is only when approaching a final decision that deliberation on the basis of the information collected becomes

part of the deliberative process. Counsel for Heileman also categorized the documents by reference to whether they related to the preliminary determination or the final determination, and argued that, since the Panel's review is of the final determination, all documents relating to the preliminary determination cannot be said to be part of the deliberative process relating to the final determination.

Counsel for the Deputy Minister addressed the respective submissions of B.C. Brewers and Heileman in separate responses. As noted above, an affidavit of Arthur Daniel Atwood, Director, Textiles and Consumer Products Assessment Programs, Department of National Revenue Customs and Excise, was also filed in compliance with Rule 55(2)(a).

In response to the B.C. Brewers' submission, the submission of the Deputy Minister apparently conceded that the Rules bestow upon a panel the authority to review and order the production of a document for which privilege has been claimed (paragraph 9). It was argued, however, that the jurisdiction should be sparingly exercised and, moreover, that B.C. Brewers had failed to show that production of the material would be relevant as required by Rule 55(1). While apparently conceding as noted above that panels have authority under the Rules to order disclosure of documents for which deliberative process privilege is claimed, counsel for the Deputy Minister nonetheless goes on to argue in his brief that the deliberative process privilege is to be distinguished from "executive" privilege (for which he concedes that

the public interest test applies) and to assert that the authorities cited (paragraph 21) "make it clear that staff reports and advice are not available to the Parties: they are part of the internal processes of the government body and should not form a part of the record on review by a court or other reviewing body". (paragraph 22) However, this assertion seems to be at odds with the apparent concession in paragraph 9 that the Rules have bestowed upon panels jurisdiction to review documents for which deliberative process privilege has been claimed and to order disclosure of those documents in appropriate circumstances. If by the submission that the jurisdiction "should be sparingly exercised", counsel intended to refer only to a determination as to whether a document falls within the privileged class and not to a determination as to whether, if so, the document should be ordered disclosed, the Panel concludes for the reasons set out in this memorandum that its power is not so limited. Indeed, if it had been intended to confer an absolute privilege on documents falling within the deliberative process, the Rules would surely have been made clear on the point, as they have with regard to "government information". [Rule 41(8)]

Counsel goes on to rely on a provision of the Access to Information Act and this apparently leads him to a review of certain jurisprudence on the concept of the deliberative process as developed in connection with the United States Freedom of Information Act. The Panel does not find it necessary to decide upon the relevance of the U.S. jurisprudence. However, as will be noted hereunder, even adopting the test extracted from that jurisprudence in paragraph 34 of counsel's brief, the

documents ordered disclosed in this case, for the reasons stated below, do not satisfy those requirements.****

The brief filed by counsel for the Deputy Minister with regard to the Heileman submission is identical in all material respects. Counsel addresses Heileman's point with regard to the distinction between preliminary determination and final determination stages. In the Panel's view, a distinction between the preliminary determination stage and the final determination stage is not conclusive, but remoteness of a document from the final determination is a relevant consideration.

The affidavit of Arthur Daniel Atwood sets out in paragraphs 8, 9 and 10 the rationale for deliberative process privilege. In summary, he emphasizes that, "The investigatory work leading to preliminary and final determinations is cumulative and requires the weighing of information and evaluation of alternatives at every stage of the process". "Each step, including the final determination itself, is dependent upon

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**** We note in passing counsel's submission in paragraph 16 of the Deputy Minister's response to the Heileman motion "that one of the underlying purposes of the F.T.A. and of the Rules created under it is to harmonize some of the concepts of our legal systems so that a common approach to panel matters can be developed". The Panel makes no comment on this submission, other than to note that it is the experience of certain panel members that the United States Department of Commerce would not likely claim privilege for documents comparable to those for which deliberative process privilege is claimed in this case, and that such documents would generally be released under judicial protective order by the United States Court of International Trade. In making its decision on disclosure, the Panel did not rely on this understanding, but rather confined its deliberation to the powers conferred by the FTAIA, the Regulations and the Rules, the submissions of counsel and the material filed in these proceedings.

the evaluation of alternatives which preceded it. Case officers are encouraged and in many instances required to document in written form their analyses and consideration of alternatives behind the conclusions and recommendations they reach." (paragraph 8). "After-the-fact exposure of the work of the case officers by disclosure of the documents for which privilege is being maintained would discourage case officers from recording the full range of options and alternatives considered and the reasons why their particular choices were made". [paragraph 9]

In response to the Order of the Panel December 24, 1991 giving parties an opportunity to respond to the written submissions of the Deputy Minister and his Counsel of November 25, 1991, counsel for Heileman argued that the requirement of showing necessity (Rule 55) is not relevant because the documents for which deliberative process privilege was claimed are not entitled to be so characterized. However, Counsel went on to submit that even if the documents are found to be part of the deliberative process, they should be ordered disclosed so that the Panel and the parties will be able to determine whether "the Investigating authority erred in law and[or] based its decision on an erroneous finding of fact with little or no regard to the material provided". [paragraph 9].

Counsel for B.C. Brewers addressed the issues somewhat differently, arguing that the descriptive list supplied by the Investigating Authority in compliance with Rule 41 did not contain sufficient information for a party to determine whether disclosure

of the documents is necessary to the complainant's case. Further, in any event, the Panel should review the documents to assess the claim for privilege. Counsel also submitted that "statutory provisions which restrict or abolish the traditional judicial discretion to weigh and determine claims of privilege" should be interpreted narrowly and that the deliberative process with respect to the final determination should cover only such information as is required for the decision-making process (distinguishing the investigative process).

Summary of the Issues

It is useful to summarize the four issues that emerge from the foregoing. They are:

1) Does a panel have the power to review documents to determine whether a document constitutes part of the deliberative process with respect to the final determination? (Put another way, is a panel bound by a claim of the Investigating Authority to treat a document as falling within the privileged class?)

2) If a Panel has the power to review the documents, what are the principles applicable to determining whether a document constitutes part of the deliberative process with respect to the final determination?

3) Does a panel have the power to order disclosure of a document that is determined to be part of the deliberative process with respect to the final determination?

4) If so, what are the relevant criteria to apply in deciding whether to order disclosure of documents which constitute part of the deliberative process with respect to the final determination?

With regard to the first issue, as noted above in connection with the review of the relevant legislation including the Rules, the panel understands the Rules to make it clear that a panel does have the authority to determine whether a document constitutes part of the deliberative process. If this conclusion were not intended by the Rules, there would be no purpose in providing for review of the documents as set out in Rule 55. This conclusion is fortified by the well established power of courts to make such a determination with regard to claims for privilege. In particular, the Panel notes that panels are constituted courts of record. [SIMA section 77.15(2), Regulation 36.5].

With regard to the second issue, the panel notes that a document is subject to the deliberative process privilege if it contains information that "constitutes part of the deliberative process with respect to the final determination" [Rule 3]. It seems to us that the term "deliberative" denotes, as elaborated upon by Mr. Atwood in his

affidavit, the weighing of alternatives in the process of coming to a decision based on the assembled facts and relevant law. We accept the submission that efficient and effective functioning of the administrative system, including decision making by senior management vested with the appropriate authority, requires that staff reports be full and frank. At the same time, it is our view that documents for which deliberative process privilege is claimed must in themselves reflect the weighing of alternatives to be characterized as "deliberative".

With regard to the third issue, the Panel is satisfied that the Rules imply that a panel has the power to order disclosure of documents that are determined by the panel to be part of the deliberative process. Our conclusion is supported by Rule 41(8) which sets out a special rule for government information, namely, that the information shall not be disclosed unless government review procedures result in a decision by the appropriate authority to disclose the information. As we noted above in connection with the Deputy Minister's submission, if such absolute privilege had been intended for information forming part of the deliberative process, the Rules would surely have been explicit. We are also fortified in our conclusion by the reasons for the decision of the Supreme Court of Canada in Carey v. Ontario. [1986] 2 S.C.R. 637. Mr. Justice La Forest, speaking for the Court, dealt extensively with public interest immunity which he described as the correct term for the concept that is variously referred to as "Crown privilege" and "executive privilege". (page 653). The decision clearly enunciates the principle that it is for the court and not the

government to determine the public interest with regard to disclosure of documents for which public interest immunity is claimed. We accept the Deputy Minister's proposition in these proceedings that deliberative process privilege is a different concept from public interest immunity (as indicated by the Rules themselves) but we are satisfied that the principle stated by the Supreme Court, namely, that disclosure may be ordered at the discretion of a court (or a panel, exercising the power of a court), is generally applicable. However, we are not required to explore the issue in depth because we have concluded that the documents ordered disclosed should not be characterized as constituting part of the deliberative process.

The fourth issue referred to above poses a dilemma in view of Rule 55(1) which requires that a party seeking disclosure of a document for which deliberative process privilege is claimed "shall set out the reasons why disclosure of the document is necessary to the case of the participant...." It is difficult to envision a party's being able to satisfy such a requirement without knowing the contents of the document in some considerable detail. Nor is a panel in a better position to do so, at the preliminary stage at which the issue has arisen in these proceedings, namely, before the briefs of the parties have been filed. Before having the opportunity to study those briefs, a panel cannot identify the issues with the degree of particularity required to determine whether disclosure of a document is necessary to a participant's case with regard to such issues. Nor is it practicable for a panel to review the administrative record (as voluminous as it is in this case) to determine whether a document contains

any information which is not otherwise to be found in the record available to the parties. In any event, the relevance of any such information could only be determined after a full hearing on the issues identified by the parties in their briefs. Fortunately, we are not required to resolve the dilemma in these proceedings. It is sufficient to dispose of the issues in these preliminary proceedings by noting that, having examined the documents for which disclosure is not ordered, we have concluded that they do not contain any factual information which is not contained in the Preliminary Determination and the Final Determination respectively.

Judicial Authorities

We now turn to a consideration of the judicial authorities cited by counsel for the Deputy Minister. We understand our mandate to be to adjudicate issues on the principles that would be applied by the courts in Canada subject to the direction of the governing statutes, regulations and rules which, as noted above, include SIMA as amended by the FTAIA, the Regulations passed thereunder, the provisions of the Canada-United States Free Trade Agreement incorporated into Canadian law by SIMA as amended, and the Rules adopted by the Canadian and United States Governments in accordance with the FTA (the "legislative material"). We have considered, in addition to the legislative material, the judicial authority cited by counsel for the parties. After careful consideration of those judicial authorities, we have concluded that they are not definitive with regard to the position of the Deputy Minister that the

documents in question should not be disclosed. We have addressed only the material filed by counsel and we have not had the benefit of oral argument.

As counsel for the Deputy Minister has stated, we are presented with a concept that is "unique with respect to Canadian law". [paragraph 23 of the submission of the Deputy Minister in reply to the Heileman brief] Although the Canadian judicial authorities cited do deal in one context or another with staff reports and other internal memoranda, we have not been made aware of any Canadian judicial authority defining the concept of deliberative process privilege. We must, of course, consider these authorities to determine whether any principles are apparent which govern the issues we have to decide. At the same time, we must give paramountcy to the Rules applicable in these proceedings which establish the concept of *deliberative* process privilege. Having regard to the Rules, we conclude that the privilege requires that documents, to fall within the privileged category, must exhibit substantial deliberative content as we stated above in reference to the second issue.

In Burnbrae Farms Limited v. Canadian Egg Marketing Agency [1976] 2 F.C. 217, Chief Justice Jackett, speaking for the Federal Court of Appeal, dealt with several issues in connection with an order of the Agency. One basis for the complaint against the order was that, following a hearing, the Agency had consulted its counsel on a point without giving the applicant an opportunity to be heard on the issue. The issue was whether, after the fact, the party had thus been denied natural justice by

the Agency. We do not understand any such allegation to have been made at this stage in these proceedings. Rather, the issues are whether the documents in question formed part of the deliberative process with respect to the Final Determination and, if so, whether they should be ordered disclosed. In Burnbrae, the Court was not presented with the issue of whether to order disclosure of such documents for the purpose of the review. We note again that the Panel in these proceedings was required to make a decision on disclosure before briefs of the parties had been filed to identify fully the issues raised by the complainants against the Final Determination of the Deputy Minister and the response of the Deputy Minister to those complaints.

Local Government Board v. Arlidge, a decision of the House of Lords in 1914, referred to by Chief Justice Jackett in Burnbrae, was also cited for the proposition that the documents for which deliberative process privilege is claimed should not be made available to the parties. Arlidge was a case involving a procedure to determine whether an order within the authority of the Local Government Board should be overturned because, inter alia, a report to the Board by a hearing officer had not been disclosed to the party affected. The House of Lords found that the order was not unlawful for that reason, asserting, in effect, that administrative convenience dictated that such reports not be disclosed for scrutiny and comment by a party who might be affected. The report in question in Arlidge might well have been characterized as part of the deliberative process with respect to the final decision, but the Court did not distinguish deliberative documents from others, a distinction which is clearly

contemplated by the Rules applicable in these proceedings. The reasoning of the Court seems remote from modern considerations, and we do not find the broadly stated conclusion persuasive in the context of the Rules applicable in these proceedings. Although referred to with apparent approval by Chief Justice Jackett in Burnbrae, it is perhaps significant that the Arlidge decision is not made the foundation for the reasoning in the other decisions of the Federal Court of Appeal cited to us.

In Trans Quebec and Maritimes Pipeline v. National Energy Board, [1984] 2 F.C. 432, the Federal Court of Appeal addressed the issue of what N.E.B. staff papers should be disclosed for the purpose of review under section 28 of the Federal Court Act and for the purpose of an appeal under the National Energy Board Act. It is significant that the Federal Court Rules in question in that case [Rule 1402(1)(b) and Rule 1301 as they then stood], were different from the Rules applicable in these proceedings. Rule 1402 (1)(b), applicable to the motion to set aside the order of the Board under section 28 of the Federal Court Act, required the filing inter alia of "all papers relevant to the matter that are in the possession or control of the tribunal".

Dealing with the question of staff memoranda, the Court stated:

> (at page 437) "The motions were heard together on March 21, 1984, and judgment thereon was reserved. Since then, letters have been sent to the Court indicating that it is common ground between the parties that staff members

of the Board, in reviewing the material on the record of a Board proceeding, may express opinions in the course of that review. Though the letters do not say so, it seems safe to assume that the opinions referred to are expressed in staff memoranda and that the memoranda here in question include such opinions. [emphasis added]

That, as I see it, summarizes the whole of what is before the Court as to the nature of the documents which the applicant seeks to have included in the case for the section 28 application and also to have forwarded to the Court for use on the application for leave to appeal.

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(at page 440) The position in the present case, as I see it, is that the National Energy Board has not complied with the Rule. It has neither forwarded to the Court under paragraph (a) nor prepared and forwarded to the Court under paragraph (b) of Rule 1402(3) copies of the papers in its possession or control which it considers to be within the definition of paragraph (b) of Rule 1402(1).

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(at page 440-441) On the other hand, assuming that the Board when it complies with the Rule will not include the documents here in question, has the applicant demonstrated that they should be included? I think not. All that is known of them is that they are papers authored by members of the Board's staff of assistants (who are provided for by statute), which papers include opinions by such staff members. [emphasis added] It is not unlikely that the papers or some of them came into existence after the public hearings before the Board and in the course of its decision-making process. While they may have been created in the course of and pertain to the proceeding before the Board which resulted in the decision under attack, it is not shown by anything in the material before the Court that such opinions or the papers containing them amount to additional evidence or to anything more than comments or suggestions by the staff on the material before the Board or that they form part of the material on which the decision is founded. Nor is there any reason

> made out why such papers ought to be before the Court for the hearing of the section 28 application. Indeed, having regard to the fact that the section 28 application is brought against the Board's refusal to review its earlier decision, which I do not think can be regarded as an application to review the earlier decision, I find it difficult to imagine what memoranda or opinions, if any, having to do with that decision are in existence. Accordingly, I would refuse the order sought and dismiss the motion brought in the section 28 proceeding."

Chief Justice Thurlow then went on to deal with the application for leave to appeal under the provisions of the National Energy Board Act, to which Rule 1301 was applicable. Although Rule 1301 in its terms apparently permitted a party to have transmitted to the Court the whole as well as any part of the relevant file of a tribunal, the Court refused to order transmittal of the file, stating:

> (at page 442) "The purpose of the Rule cited seems clear. An applicant is to establish by affidavit the facts on which he relies. If he required the tribunal's file or something in it to support what the affidavit shows, he is entitled to have what he requires sent to the Court for use on the hearing of the application, after which it is to be returned to the tribunal. The Rule, however, does not provide a discovery procedure. Nor is it intended to authorize a fishing expedition, of which the present application has all the ear-marks, by making a demand for the whole of the tribunal's file so that the applicant can search for grounds for an application for leave to appeal."

We note also the concluding paragraph of Chief Justice Thurlow's reasons which apparently referred to both applications and which was as follows:

"The applicant's memorandum indicates that the principal reason for seeking the inclusion of staff memoranda in the case is to attempt to establish the Board's reasons for decision. The analysis and opinion [emphasis added] in staff memoranda are irrelevant to the ascertainment of the Board's reasons for decision because they cannot be assumed to have been adopted by it as its reasons. The Board's reasons for decision are those which it chooses to express or which can otherwise be clearly shown from its own words or actions to have been its reasons."

In Toshiba v. Anti-dumping Tribunal, (1984) 8 Admin. L.R. 173 (contemporaneously with the Trans Quebec decision but a different panel of the Court), the judgement of the Federal Court of Appeal, delivered by Mr. Justice Hugessen, stated with respect to a preliminary report prepared by the staff of the Anti-dumping Tribunal that "inevitably it [the preliminary report] contains a number of statements of fact which bear directly upon the ultimate issue which the Tribunal was called upon to decide. It was not revealed to the parties or their counsel. This is a dangerous practice", citing Magnasonic Canada Limited v. ADT, Sarco Canada Ltd. v. ADT and Brunswick International Canada Limited v. ADT, all decisions of the Federal Court of Appeal. (page 175). He added that it would have been prudent for the Tribunal to have revealed the preliminary staff report to the parties. However, Mr. Justice Hugessen said with respect to a staff report prepared after the hearing that "quite different considerations apply to the final staff report. It consists of summary and commentary [emphasis added] on the evidence and submissions made at the inquiry. There is nothing whatever improper in this and it is not dissimilar to the kind of work that law clerks sometimes do for Judges. It is a proper part of the functions of the tribunal staff. Nothing requires that such reports be revealed to the parties.

They are simply part of the tribunal's own internal decision-making process for which, of course, the Tribunal alone is responsible. In my view, they should not even form part of the record in this Court."

It is evident that had the matter come before the Court at a stage equivalent to the situation at the time of this Panel's Order, the Court would have ordered disclosure of the preliminary staff report (it was evidently before the Court and presumably the parties at the time of the review by the Federal Court of Appeal). We infer from Mr. Justice Hugessen's statement of reasons that the final staff report was indeed deliberative in the sense described by Mr. Atwood in his affidavit in these proceedings. We have applied this reasoning in deciding not to order disclosure of document 4235-218-2, vol. 5, Tab 2 (pages 1-29 inclusive). We have, however, ordered disclosure of the appendices to that document which apparently contain factual information only.

In Sanyo v. CAMA, (1983), referred to in Trans Quebec (1984), the Federal Court of Appeal ordered the Anti-dumping Tribunal to disclose staff reports, but reasons are not recorded. In Trans Quebec, the issue was the use of the National Energy Board's internal memoranda which were assumed to contain opinions of the staff. The decision does not lay down an absolute rule but rather appears to recognize that there may be circumstances in which staff reports should be ordered disclosed to the parties. The decision in Sanyo was distinguished as not being

authority for a general proposition that staff reports prepared for the assistance of members of a tribunal either in the course of a proceeding or in the judgment-making process are papers that must be included in the material on which the tribunal's decision is to be reviewed. (p. 443). The Court also noted that there were differences in the applicable statutes and the procedures under which the Anti-dumping Tribunal operated in the Sanyo situation "which may have had a bearing on the view of the Court as to the need for production of the reports". (p. 443) It is notable that the Federal Court of Appeal in Toshiba v. Anti-dumping Tribunal (1984), while ruling that the final staff reports prepared after the hearing should not be disclosed, (and indeed should not be part of the record on appeal; but compare the definition of "administrative record" in Article 1911 of the Free Trade Agreement), was of the opinion that a staff memorandum prepared before the hearing should be disclosed to the parties. It appears to us that the Federal Court of Appeal in the Burnbrae decision (1976) decided only that the Egg Marketing Agency (and by implication, other similar boards) might use staff advice in arriving at their decisions without giving the parties an opportunity to comment on the advice.

Counsel for the Deputy Minister also cited Wah Shing Television Ltd. v. Canadian Radio-television and Telecommunications Commission [1984] 2 F.C. 381 which dealt only with disclosure of the names of the members of the Commission who had participated in the decision and whether the individual reasoning of the members who did so should be disclosed to the parties. We find nothing in that

decision applicable to the issue at hand. Nor is the case of Rubin v. Canada (Solicitor General) [1986] 1 F.T.R. 157 of assistance because it deals with a provision of the Canadian Access to Information Act which is phrased very differently from the rule applicable in this case. Similarly, Kamloops School District No. 24 v. Minister of National Revenue (1986) (F.C.A. No. A-838-85) is not helpful in that the Federal Court of Appeal in that case dealt only with the issue of whether the applicant should have the opportunity to conduct an oral examination of the Minister of National Revenue as to the reasons for the Minister's decision in the case. There is no similar suggestion in the proceedings before us.

The cases dealing with the United States Freedom of Information Act are helpful in that they examine the rationale for non-disclosure of staff analyses. In our view, the essential consideration is whether documents in question reflect the give-and-take of the deliberative process and contain opinions, and recommendations or advice to the decision-maker.

Conclusions

The foregoing leaves for determination the results of the application of the principles described above to the documents for which privilege is claimed. Our examination of the documents ordered disclosed (subject to the protection of propriety information) reveals to us that the documents reflect little if any evaluation of

alternatives as described in paragraphs 8 and 9 of Mr. Atwood's affidavit. In particular, we have concluded as follows:

a) Document 4235-218-2, vol. 1, tab 27. This document is an analysis performed by a case officer prior to initiation of the anti-dumping investigation. It is subject to further investigation and confirmation, and further consideration with regard to the relevant facts and law. In this case, we concluded that its extreme remoteness from the Final Determination was the critical factor excluding it from the privileged category.

b) Document 4235-218-2, vol. 4, tab 1. Although containing the recommendation that the Preliminary Determination as drafted be issued, the document itself contains no indication of discussion with senior officers or others, and does not contain any discussion of alternatives and analysis of relevant considerations that were not contained in the Preliminary Determination as issued.

c) Document 4235-218 - Volume 2, Tab 6. This "65-day report" to the Assistant Deputy Minister from the Director General of Assessment Programs, although it identifies the issues, is stated in terms of conclusions. There is nothing to indicate that the Assistant Deputy

Minister was being informed of alternative considerations that might be included in the final document, and there is no record of any response from the Assistant Deputy Minister such as a decision selecting among alternatives advanced for her consideration by the Director General.

d) Document 4235-218-2 - Volume 4, Tab 4. This is a memorandum regarding the treatment of interest expenses which was prepared before the Preliminary Determination. It is a statement of what the Department is doing, it does not request approval, and there is no discussion of the issues in the sense of presenting alternatives for a decision by the Assistant Deputy Minister.

e) Document 4235-218-1 - Volume 4 (Heileman), Tab 6a. This is a discussion of the request for disclosure of information before the Preliminary Determination. It does discuss Department policy and discloses differences of opinion, but the issue is generic to all cases and is, therefore, not exclusively connected with the particular reasoning process leading to the Preliminary Determination or the Final Determination in this case.

f) Document 4235-218-1 - Volume 3 (Pabst), Tab 6. This is the report of a verification meeting with Pabst April 25, 1991. It is part of the investigation before the Preliminary Determination. There are 18 pages of purely factual report followed by one page of recommendations as to how to treat some of the information. Because it is largely factual, and because the recommendations are preliminary, we conclude that it was not part of the deliberative process relating to the Final Determination.

g) Document 4235-218-2 - Volume 4, Tab 5. This is a "65-day report" to the Assistant Deputy Minister at the Final Determination stage. As with the other 65-day report, it is a one-page document with provision for ticking some boxes together with, in this case, one page which identifies an issue but does not involve any discussion about the issue and contains no request for approval or comment. In our view, the document has no deliberative characteristic.

h) Document 4235-218-2 - Volume 5, Tab 2. This document is, as described by Mr. Atwood in his affidavit, a case analysis prepared by the case officer predating the Deputy Minister's Final Determination. When compared with the Final Determination, the document contains evidence of revision in drafting the Final Determination and we therefore concluded that it is deliberative. Our review noted no factual information

APPENDIX B

ARTICLE 1904 BINATIONAL PANEL REVIEW
pursuant to the
CANADA-UNITED STATES FREE TRADE AGREEMENT

IN THE MATTER OF:	
Certain Beer Originating in or Exported from the United States of America by G. Heileman Brewing Company, Inc., Pabst Brewing Company and the Stroh Brewery Company for Use or Consumption in the Province of British Columbia	Secretariat File N CDA-91-1904-01

DECISION AND ORDER

Upon consideration of the following documents:

1. the Notice of Motion to Strike the brief of Pabst Brewing Company filed by counsel for Labatt Breweries of British Columbia, Molson Breweries (B.C.) and Pacific Western Brewing Company (known collectively as "the B.C. Brewers") on April 23, 1992, and all papers and proceedings therein;

2. the Response of Pabst Brewing Company filed on April 30, 1992 to the B.C. Brewers' Notice of Motion, and all papers and proceedings therein;

3. the Reply Brief filed by counsel for Pabst Brewing Company on May 12, 1992, and all papers and proceedings therein;

4. the letter from counsel for Pabst Brewing Company dated April 30, 1992 enclosing Pabst's Response to the B.C. Brewers' Motion to Strike filed April 23, 1992 and requesting that the B.C. Brewers' Motion to Strike and Pabst's Motion for an Extension of Time to file a Complain be heard together by telephone conference;

5. the Notice of Motion for Extension of Time to file a Complaint and Written Submissions filed by counsel for Pabst Brewing Company on April 30, 1992, and all papers ar proceedings therein; and

6. the Response of the B.C. Brewers filed on May 7, 1992 to Pabst's Notice of Motion for Extension of Time to file a Complaint, and all papers and proceedings therein.

The Panel's decision is:

1. that Panel Rule 7 is explicit and unqualified;

2. that Pabst Brewing Company has not shown any reasonable basis for being relieved of the requirement to file a timely complaint if it wished to challenge the decision o

the Deputy Minister of National Revenue, Customs and Excise, insofar as it relates to Pabst Brewing Company; and

3. that it is unnecessary to arrange a hearing, by telephone conference call or otherwise, of the motions filed herein, as requested by counsel for Pabst Brewing Company in his letter dated April 30, 1992.

THEREFORE, IT IS HEREBY ORDERED:

1. The request of Pabst Brewing Company for a telephone conference to hear the B.C. Brewers' motion to strike and Pabst Brewing Company's motion for extension of time to file a Complaint is denied;

2. The B.C. Brewers' motion to strike the brief of Pabst Brewing Company is denied;

3. The motion of Pabst Brewing Company for an extension of time to file a complaint is denied; and

4. Pabst Brewing Company, having failed to file a complaint in accordance with Panel Rule 39, is hereinafter to be treated as a participant (and not as a complainant) for all purposes relevant to this proceeding. Accordingly, the brief filed by Pabst Brewing Company on February 26, 1992 and the reply brief filed by Pabst Brewing Company on May 12, 1992 will be considered only insofar as they address allegations of errors of fact or law made in the complaints filed herein, and the request for relief shall not be considered.

SIGNED IN THE ORIGINAL BY:

Dated: May 22, 1992 — Joseph F. Dennin
Joseph F. Dennin, Chairman

Dated: May 22, 1992 — David E. Birenbaum
David E. Birenbaum

Dated: May 22, 1992 — Ivan R. Feltham
Ivan R. Feltham

Dated: May 22, 1992 — Dennis James, Jr.
Dennis James, Jr.

Dated: May 22, 1992 — Wilhelmina K. Tyler
Wilhelmina K. Tyler

APPENDIX C

McCarthy Tétrault
AVOCATS · AGENTS DE BREVETS & MARQUES DE COMMERCE
BARRISTERS & SOLICITORS · PATENT & TRADEMARK AGENTS

275 SPARKS 1000, OTTAWA
ONTARIO, CANADA K1R 7X9
FAX (613) 563-9386 · TELEPHONE (613) 238-2000

August 4, 1992

VIA FACSIMILE & COURIER

Ms. Cathy Beehan
Canada-United States Free Trade Agreement
Binational Secretariat
Canadian Section
#705-90 Sparks Street
Ottawa, Ontario
K1P 5B4

Dear Ms. Beehan,

Re: CDA-91-1904-01, Pabst Freigt Expenses

I am pleased to report that we have reached an agreement with counsel for the Investigating Authority, the Deputy Minister of Revenue Canada-Customs and Excise, with respect to the issue of Pabst freight expenses. We have attached the original of a "Stipulation" signed by counsel for the B.C. Brewers and for the Investigating Authority. Accordingly, we would like to formerly provide you with notice that the B.C. Brewers hereby withdraw their complaint against the Investigating Authority insofar as it relates to the calculation of freight expenses for the Pabst Brewing Company.

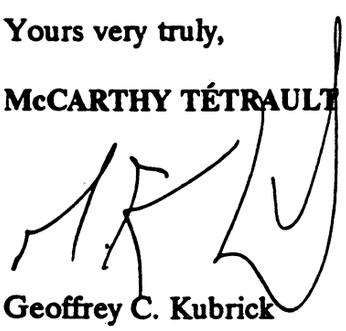
We note that the rules do not appear to provide for filing of such a "Stipulation" or agreement between parties. If the attached document is insufficient for your purposes, we would appreciate any direction you may wish to provide in this matter.

.../2

Should you have any questions or require any additional information, please do not hesitate to call.

Yours very truly,

McCARTHY TÉTRAULT



Geoffrey C. Kubrick

GCK/dt
Enclosure

cc: Brian R. Evernden, Department of Justice (Fax only)
John P. Landry, Davis & Company, Counsel for Pabst (fax only)

McCarthy Tétrault
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July 31, 1992

VIA MESSENGER

Mr. Brian R. Evernden, General Counsel
Civil Litigation Section,
Department of Justice
Room 534, Justice Building
Kent and Wellington Streets
Ottawa, Ontario K1A 0H8

Dear Mr. Evernden,

Re: CDA-91-1904-01
Pabst Freight Expenses

Further to our discussions of June 23, 1992, it is our understanding that Revenue Canada has amended its methodology for the calculation of freight expenses incurred by the Pabst Brewing Company on sales of subject beer to the province of British Columbia. We were informed that Revenue Canada now determines export price deductions for freight by dividing the total freight expenses for a given shipment by the number of cases of subject beer in that shipment to determine an average freight cost per case. The freight costs so determined may then be averaged with similar costs derived from other shipments. This methodology is acceptable to us. It is also our understanding that this methodology was recently employed for the redetermination of normal values under section 55 of the Special Import Measures Act ("SIMA"), and further that it is Revenue Canada's intention to continue to use this methodology in future administrative reviews, barring any changes in circumstances, or in legislative or judicial policy. On the basis of this information, we are prepared to withdraw our complaint in the above-noted matter insofar as it relates to the calculation of Pabst freight expenses.

We would also note that our concern has centred on ongoing enforcement rather than seeking to exact any retroactive penalties for shipments already made.

.../2

If we have correctly characterized current departmental methodology and if you are agreeable to termination of the B.C. Brewers' complaint in respect of Pabst freight expenses on the terms noted above, please have the appropriate official of Revenue Canada sign in the place indicated below and we will forward this document to the Panel with our request that the B.C. Brewers' complaint in respect of Pabst freight rates be withdrawn.

Yours very truly,

McCARTHY TÉTRAULT

C.J. Michael Flavell
Counsel for the B.C. Brewers

AGREED:

Revenue Canada
per:

GCK/CJMF/dt
Encl.