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").

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

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

[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 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

(continued...)

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

(...continued)
Consumption in the Province of British Columbia, published in No. 12, Vol. 125, Canada Gazette, Part I (March 23, 1991) ("Initiation").

[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").

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 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

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[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.").

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.

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,

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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 (continued...)

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 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;
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> (b) erred in law in making its decision or order, whether or not the error appears on the face of the record; or
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> (c) based its decision or order on an erroneous finding of fact

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[6/](...continued)
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.

> 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/]

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

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[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 jurisdiction, errors of law and erroneous findings of fact. B.C. Brewers Complaint, at p. 2.

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 determination of these limits or boundaries.[9/] 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 (continued...)

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

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[9](...continued)
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 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).

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 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

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[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.

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/]

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

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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 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.

> 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.

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 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
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> (b) in the absence of any goods described in paragraph (a), goods the uses and other characteris- tics 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

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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.).

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 (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

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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.

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-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

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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.

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

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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 (continued...)

closely resemble the exported Rainier and Lone Star because 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

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pp. 35, 36.

[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.

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 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

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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.

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 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

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22/ Heileman Brief, at p. 25.

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

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 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

(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 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

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(...continued)
differences in production costs, as such between the domestic and exported beer.

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:

[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.

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

(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.

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.

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

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
>
> (a) in their quality, structure, design or material,
>
> (b) in their warranty against defect or guarantee of performance,
>
> (c) in the time permitted from their date of order

[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.

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

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30/ Madison Industrial Equipment, 4 TCT at 3140.

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 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

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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.

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 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.

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

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.

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/]

[33/] Heileman's argument that it would not have sold Rainier in bottles at a price that did not yield a profit is not (continued...)

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 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

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[33/](...continued)
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.

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 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

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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.

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. 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.

[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.

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

(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

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

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."

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 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.

[37/] See Part V, supra.

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:

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

APPENDIX A

APPENDIX B

APPENDIX C

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:

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