



Ottawa, Friday, October 20, 1995

**Inquiry No.: NQ-95-001**

IN THE MATTER OF an inquiry under section 42 of the *Special Import Measures Act* respecting:

**CAPS, LIDS AND JARS SUITABLE FOR HOME CANNING,  
WHETHER IMPORTED SEPARATELY OR PACKAGED TOGETHER,  
ORIGINATING IN OR EXPORTED FROM THE UNITED STATES OF AMERICA**

**FINDING**

The Canadian International Trade Tribunal, under the provisions of section 42 of the *Special Import Measures Act*, has conducted an inquiry following the issuance by the Deputy Minister of National Revenue of a preliminary determination of dumping dated June 22, 1995, and of a final determination of dumping dated September 20, 1995, respecting the importation into Canada of caps, lids and jars suitable for home canning, whether imported separately or packaged together, originating in or exported from the United States of America.

Pursuant to subsection 43(1) of the *Special Import Measures Act*, the Canadian International Trade Tribunal hereby finds that the dumping in Canada of caps, lids and jars suitable for home canning, whether imported separately or packaged together, originating in or exported from the United States of America, has caused material injury to the domestic industry.

Robert C. Coates, Q.C.

Robert C. Coates, Q.C.  
Presiding Member

Desmond Hallissey

Desmond Hallissey  
Member

Lise Bergeron

Lise Bergeron  
Member

Michel P. Granger

Michel P. Granger  
Secretary

The statement of reasons will be issued within 15 days.

**Inquiry No.: NQ-95-001**

Place of Hearing: Ottawa, Ontario  
Dates of Hearing: September 26, 27, 29 and 30, 1995  
  
Date of Finding: October 20, 1995  
  
Tribunal Members: Robert C. Coates, Q.C., Presiding Member  
Desmond Hallissey, Member  
Lise Bergeron, Member  
  
Director of Research: Sandy Greig  
Lead Researcher: Ken Campbell  
Researcher: Shiu-Yeu Li  
  
Economist: Dennis Featherstone  
  
Statisticians: Po-Yee Lee  
Craig Dillabaugh  
  
Counsel for the Tribunal: Robert Desjardins  
  
Registration and Distribution Officer: Margaret J. Fisher

**Participants:**

Darrel H. Pearson  
Peter W. Collins  
for Bernardin Ltd.  
Consumers Packaging Inc.

**(Complainants)**

Riyaz Dattu  
David I.W. Hamer  
John W. Boscariol  
for Kerr Group, Inc.

**(Exporter)**

Ottawa, Monday, November 6, 1995

Inquiry No.: NQ-95-001

**CAPS, LIDS AND JARS SUITABLE FOR HOME CANNING,  
WHETHER IMPORTED SEPARATELY OR PACKAGED TOGETHER,  
ORIGINATING IN OR EXPORTED FROM THE UNITED STATES OF AMERICA**

*Special Import Measures Act* - Whether the dumping of the above-mentioned goods has caused material injury or is threatening to cause material injury to the domestic industry.

**DECISION:** The Canadian International Trade Tribunal hereby finds that the dumping in Canada of caps, lids and jars suitable for home canning, whether imported separately or packaged together, originating in or exported from the United States of America, has caused material injury to the domestic industry. The Tribunal also finds that the requirements of paragraph 42(1)(b) of the *Special Import Measures Act* with respect to massive dumping have not been met.

Place of Hearing: Ottawa, Ontario  
Dates of Hearing: September 26, 27, 29 and 30, 1995

Date of Finding: October 20, 1995  
Date of Corrigendum: October 25, 1995  
Date of Reasons: November 6, 1995

Tribunal Members: Robert C. Coates, Q.C., Presiding Member  
Desmond Hallissey, Member  
Lise Bergeron, Member

Director of Research: Sandy Greig  
Lead Researcher: Ken Campbell  
Researcher: Shiu-Yeu Li

Economist: Dennis Featherstone

Statisticians: Po-Yee Lee  
Craig Dillabaugh

Counsel for the Tribunal: Robert Desjardins  
Hugh J. Cheetham

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**Participants:** Darrel H. Pearson  
Peter W. Collins  
for Bernardin Ltd.  
Consumers Packaging Inc.

**(Complainants)**

Riyaz Dattu  
David I.W. Hamer  
John W. Boscarol  
for Kerr Group, Inc.

**(Exporter)**

**Witnesses:**

Tara L. Fainstein  
General Manager  
Bernardin Ltd.

Ernest Taylor  
Controller  
Bernardin Ltd.

Michael D. Patrick  
President  
Alltrista Corporation

Rémi Bélanger  
Category Manager  
Provigo Retail

Paul James  
Business Analyst  
Pricing Strategy  
Canadian Tire Corporation, Limited

Jan Gorski  
National Account Manager  
Consumers Glass  
Consumers Packaging Inc.

Gary S. Walters  
General Counsel  
Consumers Packaging Inc.

Mario DiGiacomo  
Director, Operations Accounting  
Consumers Glass  
Consumers Packaging Inc.

Paul E. Griffith  
Vice-President and General Manager  
Sales and Marketing  
Consumer Products Division  
Kerr Group, Inc.

D. Gordon Strickland  
Senior Vice-President, Finance  
Chief Financial Officer  
Kerr Group, Inc.

James E. Biernesser  
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Ottawa, Monday, November 6, 1995

**Inquiry No.: NQ-95-001**

IN THE MATTER OF an inquiry under section 42 of the *Special Import Measures Act* respecting:

**CAPS, LIDS AND JARS SUITABLE FOR HOME CANNING,  
WHETHER IMPORTED SEPARATELY OR PACKAGED TOGETHER,  
ORIGINATING IN OR EXPORTED FROM THE UNITED STATES OF AMERICA**

TRIBUNAL: ROBERT C. COATES, Q.C., Presiding Member  
DESMOND HALLISSEY, Member  
LISE BERGERON, Member

**STATEMENT OF REASONS**

**CONDUCT OF THE INQUIRY**

The Canadian International Trade Tribunal (the Tribunal), under the provisions of section 42 of the *Special Import Measures Act*<sup>1</sup> (SIMA), has conducted an inquiry following the issuance by the Deputy Minister of National Revenue (the Deputy Minister) of a preliminary determination of dumping<sup>2</sup> dated June 22, 1995, respecting the importation into Canada of caps, lids and jars suitable for home canning, whether imported separately or packaged together, originating in or exported from the United States of America. On September 20, 1995, the Deputy Minister made a final determination of dumping<sup>3</sup> respecting the subject goods.

On June 22, 1995, the Tribunal issued a notice of commencement of inquiry.<sup>4</sup> As part of the inquiry, the Tribunal sent detailed questionnaires to Canadian manufacturers and to importers and purchasers of the subject goods, requesting production, financial, import and market information, as well as other information, covering the period from January 1, 1991, to June 30, 1995. From the replies to the questionnaires and other sources, the Tribunal's research staff prepared public and protected pre-hearing staff reports covering that period.

The record of this inquiry consists of all Tribunal exhibits, including the public and protected replies to questionnaires and all exhibits filed by the parties throughout the inquiry, as well as the transcript of all proceedings. All public exhibits were made available to the parties. Protected exhibits were made available only to independent counsel who had filed a declaration and undertaking with the Tribunal.

1. R.S.C. 1985, c. S-15, as amended by S.C. 1994, c. 47.
2. *Canada Gazette* Part I, Vol. 129, No. 27, July 8, 1995, at 2227.
3. *Ibid.*, No. 40, October 7, 1995, at 3516.
4. *Ibid.*, No. 26, July 1, 1995, at 2153.

Public and *in camera* hearings were held in Ottawa, Ontario, on September 26, 27, 29 and 30, 1995. The complainants and the exporters were represented by counsel at the hearing. As well, witnesses for Provigo Retail and Canadian Tire Corporation, Limited (Canadian Tire) appeared at the request of the Tribunal.

On October 20, 1995, the Tribunal issued a finding that the dumping in Canada of caps, lids and jars suitable for home canning, whether imported separately or packaged together, originating in or exported from the United States of America, had caused material injury to the domestic industry. The Tribunal also found that the requirements of paragraph 42(1)(b) of SIMA with respect to massive dumping had not been met.

On July 28, 1995, the Tribunal advised counsel that, in the event of a finding of injury, it would consider the question of public interest in accordance with the Tribunal's "Guidelines for Public Interest Investigations" dated February 1995. During the course of the inquiry, Kerr Group, Inc. (Kerr) and the Director of Investigation and Research, Bureau of Competition Policy, Department of Industry, requested an opportunity to make representations on the public interest pursuant to subsection 45(2) of SIMA. On October 20, 1995, the Tribunal informed counsel and interested parties of the procedures to be followed with respect to public interest representations.

## **PRODUCTS**

The products that are the subject of the inquiry are defined in the preliminary determination of dumping as caps, lids and jars suitable for home canning, whether imported separately or packaged together, originating in or exported from the United States of America.

Caps and lids are used with glass jars, commonly referred to as mason jars, for canning preserves, jams, jellies and other food products. The lids are made of tin plate, coated on the inner surface with a ring of plastic compound to help make an air-tight seal. The lids are held in place over the jar opening by a metal band threaded to match the jar. The bands and jars are generally re-usable, while the lids are not.

Caps (comprising bands and lids) are packaged in "bacon" packs (flat packs of 12 caps) and are sold in a box with the jars as one package. Caps and lids are also sold separately as replacement products. Caps and lids are produced in two sizes: standard (70 mm) and wide mouth (86 mm). Jars, which are also produced with standard or wide mouth openings, are sold in various sizes, such as 250 mL, 500 mL and 1 L or American equivalents.

In addition to the standard and wide mouth sizes of caps, lids and jars, Bernardin Ltd. (Bernardin) produces caps and lids with a 78-mm diameter, known as "Gem," and Consumers Packaging Inc. (hereinafter referred to as Consumers Glass) produces a jar with a 78-mm mouth diameter. This product size is not offered by the two U.S. exporters. As well, not all jar sizes are offered by each of the Canadian and U.S. suppliers.

## **DOMESTIC MANUFACTURERS**

Bernardin of Canada, Limited was incorporated as a private company in 1960. On June 6, 1995, the name of the company was changed to Bernardin Ltd. Prior to November 1, 1994, Bernardin was a wholly owned subsidiary of American National Can Corporation of Chicago, Illinois. On November 1, 1994, Bernardin was sold to Alltrista Corporation of Muncie, Indiana.

Bernardin has production facilities in Etobicoke, Ontario, and is the sole domestic manufacturer of caps and lids used with mason jars. Bernardin also markets pectin products, plastic storage lids, canning labels, a publication on home canning and, in 1995, caps and jars packaged together. It markets its products nationally through its own sales force, as well as through broker representatives. Bernardin products are primarily sold in hardware, grocery and general merchandise stores.

Consumers Glass, founded in 1917, is controlled by G&G Investments, Inc. of Pittsburgh, Pennsylvania. Consumers Glass' common shares are traded on the Toronto Stock Exchange. It is the only manufacturer of glass containers, including mason jars, in Canada.

Consumers Glass operates seven plants across Canada and produces a full line of glass containers, including for beer, juice, food, liquor and wine. Mason jars are manufactured, using dedicated moulds, at plants in Toronto and Hamilton, Ontario, Pointe Saint-Charles, Quebec, and Lavington, British Columbia.

## **EXPORTERS AND IMPORTERS**

During the Deputy Minister's investigation, two U.S. exporters of the subject goods were identified, namely, Kerr and Alltrista Corporation (Alltrista). Information before the Deputy Minister indicated that both Kerr and Alltrista exported the subject goods to Canada before they were sold to their customers in Canada. The two exporters used the services of sales agents that received a commission for their services. Accordingly, information before the Deputy Minister indicated that the purchasers in Canada (generally retailers) were the actual importers for purposes of SIMA.

Kerr, with its head office in Los Angeles, California, was founded in 1903. It operates in two business segments: consumer products and plastic products. The Consumer Products Division manufactures and sells caps and lids and sells glass jars, as well as other home canning products. Kerr ships the subject goods to a network of warehouses throughout Canada and maintains five Canadian warehouses and one U.S. "hub" distribution centre.

Alltrista, with its head office in Muncie, Indiana, was formed in early 1993 when Ball Corporation spun off the assets of seven of its divisions into a separate, publicly owned corporation. The Consumer Products Company of Alltrista manufactures and markets a line of home canning supplies. Alltrista, subsequent to its acquisition of Bernardin in November 1994, withdrew from the Canadian market.

## **RESULTS OF THE DEPUTY MINISTER'S INVESTIGATION**

The Deputy Minister's investigation covered shipments of the subject goods to Canada from January 1 to December 31, 1994. The Deputy Minister reviewed 100 percent of Kerr's sales to Canada during the period of investigation and determined that over 99.0 percent of such exports were dumped, by an overall average of 30.1 percent. For replacement caps and lids sold without jars, the weighted average margin of dumping was 22.3 percent and, for jars sold with caps, it was 34.7 percent. The Deputy Minister reviewed 100 percent of Alltrista's sales to Canada during the period of investigation and determined that 100 percent of such exports were dumped, by an overall average of 35.8 percent. For replacement caps and lids sold without jars, the weighted average margin of dumping was 34.9 percent and, for jars sold with caps, it was 36.0 percent.

## **SUMMARY OF POSITION OF PARTIES**

### **Bernardin and Consumers Glass—Manufacturers**

Counsel for the complainants requested that the Tribunal make findings of injury and threat of injury caused by the dumping and of massive importation of the subject goods. In argument, counsel addressed issues relating to injury, first, with respect to the production of caps and lids and, second, with respect to the production of jars. Counsel then addressed issues relating to threat of injury and the causal link between the dumping and the alleged injury. Finally, counsel made argument to support a request for a finding of massive importation.

Regarding injury to the production of caps and lids, counsel for the complainants noted the substantial decline in Bernardin's production subsequent to 1992, which, in their view, was a result of the erosive activities of Kerr and Alltrista. Similarly, counsel submitted that the decline in Bernardin's utilization of production capacity and its loss of sales and market share for caps, lids and bacon packs were clear indicia of injury. Referring to the staff pricing report, counsel stated that it was clear that price levels had decreased substantially whether viewed at an aggregate level or on an account-specific basis. Moreover, counsel argued that there had been an intensification and increased usage of allowances subsequent to 1992. In this regard, counsel contended that it was not the list prices but rather the prices with all off-invoice discounts and allowances that were germane to this case. Counsel also claimed that Bernardin's financial performance had suffered as a result of the dumping. Counsel noted the decline in Bernardin's profitability, its inability to meet yearly budget targets, the increase in unabsorbed fixed overheads and lost margins. Finally, with respect to Bernardin, counsel claimed that its employment and hours worked took a substantial hit in 1993 and 1994 as a result of lost production.

Turning to the production of jars, counsel for the complainants argued that Consumers Glass chose to sacrifice market share in 1993 and 1994 rather than meet the low pricing in the market. As a consequence, counsel submitted that Consumers Glass incurred large declines in production which caused capacity utilization to fall. Further, it suffered injury in the form of lost sales, in terms of both volume and value, with a consequent decrease in market share. In counsel's view, the evidence clearly shows the substantial decline in prices offered by the U.S. suppliers both at an aggregate level and on an account-specific basis. This evidence is further supported, in counsel's submission, by the testimony of the two Tribunal witnesses for Provigo Retail and Canadian Tire. Finally, counsel argued that the financial performance of Consumers Glass' production of jars exhibited substantial injury.



In addressing the question of threat of injury, counsel for the complainants claimed that the negative industry trends that have been apparent in the past three years could do nothing but continue, absent an injury finding. In support of this proposition, counsel pointed to Bernardin's estimates of continued lost sales in 1996 and Consumers Glass' contract prices with Bernardin which were negotiated at suppressed levels due to the pricing activities of the U.S. exporters. Counsel noted, in support of their allegations of threat of injury, the substantial margins of dumping, the price-sensitive nature of the market and the fact that the market for the subject goods is mature and declining. Counsel also referred to the overabundance of production capacity in the United States for caps, lids and glass.

With respect to the causal link between the dumping and the alleged injury, counsel for the complainants pointed to the significant levels of discounting and allowances by the exporters, which resulted in reduced prices or lost sales by the industry. Counsel noted that the preponderance of purchasers that responded to the Tribunal's questionnaire indicated that price was the number one consideration when making a purchase. This was supported, in their view, by the Tribunal's witnesses who also stressed the need to meet competition in a price-sensitive market. In anticipation of arguments on behalf of Kerr, counsel noted Bernardin's strong marketing efforts through its advertising and consumer education programs. Counsel rejected claims by Kerr that its gains were made as a result of innovative marketing techniques. Counsel argued that consumer education, pallet displays and the use of advertising and merchandising allowances were not innovative techniques and that "one-stop shopping" for caps and jars did not confer an advantage on Kerr. Moreover, counsel questioned why the exporters resorted to dumping if certain non-pricing marketing techniques provided them with an advantage over the Canadian producers.

Finally, counsel for the complainants argued that the evidence supports a finding of massive importation as set out in paragraph 42(1)(b) of SIMA. Counsel argued that there was considerable importation of dumped goods by Kerr in the first half of 1995, prior to the preliminary determination of dumping. Counsel submitted that the importer, whether it was Kerr or Kerr's customers, was or should have been aware that the exporter was dumping. In this regard, counsel noted that Bernardin had made it very clear to the trade that dumping was a concern well before the issuance of the preliminary determination of dumping. Finally, counsel argued that, as a result of the massive importation by Kerr, in combination with the seasonal nature of the market for caps, lids and jars, the industry had not received protection from the dumping in 1995. Further, Kerr's large inventory surplus would prevent the industry from obtaining the protection to which it would be entitled in 1996.

### **Kerr—Exporter**

Counsel for Kerr argued that problems suffered by Bernardin and Consumers Glass between 1991 and 1994 were structural in nature and not related to dumping. In counsel's submission, competition for the production of glass was eliminated when Consumers Glass merged with Domglas Inc. in 1989, thereby placing Consumers Glass in a monopoly position. In such a position, it was argued, it was normal that competitors would enter the market because purchasers look for second suppliers. Counsel claimed that the structural reality was that the production of mason jars by Consumers Glass was a minuscule component of its business and that it did not give that production the attention that it needed. Counsel alleged that the Canadian Tire account, with its large volume purchases, was pivotal to Consumers Glass. This account, in counsel's view, required little attention from Consumers Glass; it simply needed low prices. As a result of the focus on Canadian Tire, counsel suggested that Consumers Glass ignored marketing to, and proper

servicing of, other accounts, which opened the door for Kerr to initially enter Eastern Canada. Moreover, counsel argued that the low prices obtained by Canadian Tire, not only for jars but also for caps and lids, caused Canadian Tire's retail prices to "skunk the market" because other competitors, particularly the grocery trade, could not compete with Canadian Tire's low prices.

In the submission of counsel for Kerr, Alltrista had been the price undercutter when it entered the Canadian market in 1991. Counsel contrasted Alltrista's commodity price-driven approach and Kerr's marketing strategy approach. Rather than take a low-price strategy to the market, counsel argued that Kerr practiced a disciplined approach which emphasized buyer research, innovative marketing techniques and a strong broker network. Kerr's gains in the Canadian market were made because of the poor efforts of Consumers Glass and not because of lower pricing. In support of these claims, counsel pointed to the staff price index which, they claimed, showed that Kerr was not the price undercutter.

In comparing prices, counsel for Kerr maintained that merchandising and advertising allowances should not be deducted from the list price since they were payments for value received. Counsel cited a decision of the Supreme Court of Canada<sup>5</sup> in support of their contention.

With respect to claims of financial injury, counsel for Kerr argued that Consumers Glass failed to make a case. Counsel stated that the profitability of the subject goods was very much dependent upon the profitability of glass manufacturing and noted the discrepancies between the data filed with the Department of National Revenue and those filed with the Tribunal. Further, they argued that Consumers Glass did not submit proper financial statements and reports for the subject goods, did not segregate export performance from domestic performance and allocated excessive costs to the subject goods. Similarly, counsel questioned Bernardin's financial performance during the 1991-93 period because, it was argued, Bernardin was in a monopoly position during those years, and the financial results were, therefore, not reflective of a competitive market. Further, counsel stated that Bernardin's financial statements for the first half of 1995 did not take into account the unusual items relating to its acquisition by Alltrista.

With respect to the future, counsel suggested that Bernardin and Consumers Glass, as a result of their new production and marketing arrangements, had finally got their act together. The fact that they had not negotiated an appropriate marketing relationship in the past, counsel argued, had hurt their sales and was a factor unrelated to the dumping. Counsel claimed that the restrictive terms of the contract would cause Consumers Glass considerable difficulty in both the domestic and export markets.

Finally, counsel for Kerr argued that the evidence does not support a finding of massive importation. Counsel claimed that Kerr's imports increased in the first half of 1995 because it had gained significant new sales. In counsel's view, this naturally led to higher inventory levels in order to service the accounts, but did not translate into market share gains for U.S. exporters. Moreover, counsel argued that there was not a history of dumping of caps, lids and jars in the domestic market, that a finding of massive importation had to be found against a country and not against a particular exporter and that there was not clear evidence that Kerr knew or ought to have known that it was dumping. Finally, counsel argued that, in the event of an injury finding, Kerr would have difficulty selling the subject goods in Canada, including any inventory remaining from products which were imported prior to the preliminary determination of dumping. Consequently, industry claims of massive importation, in counsel's view, failed to meet the requirements of SIMA.

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5. *The Queen v. John Stuart Sales Limited*, [1956] C.T.C. 64.

**ECONOMIC INDICATORS**

The following table summarizes some of the key economic indicators in this inquiry. For reasons of confidentiality, only the index values of the numbers have been released.

<b>INDEX VALUES OF SELECTED KEY ECONOMIC INDICATORS</b>						
<b>CAPS, LIDS AND JARS</b>						
<b>(1991=100)</b>						
	<b>1991</b>	<b>1992</b>	<b>1993</b>	<b>1994</b>	<b>January - June</b>	
					<b>1994</b>	<b>1995</b>
<b>Apparent Market (gross)</b>	100	102	90	102	51	53
<b>Market Share<sup>1</sup> (%)</b>						
Domestic Industry	100	96	75	67	62	68
Importers	100	118	203	236	255	231
<b>Domestic Industry</b>						
Production (gross)	100	120	70	75	50	53
Volume of Sales (gross)	100	97	67	68	32	36
Employment (number of employees)	100	111	44	40	69	76
Net Income (\$)	100	95	94	60	-	33
<b>Imports (gross)</b>						
Volume of Imports	100	123	184	226	140	216
Volume of Sales	100	120	183	241	130	123
<b>Weighted Average Prices</b>						
<b><u>Caps and Lids (\$/gross)</u></b>						
Domestic	100	108	92	102	-	99
Imported	100	92	91	83	-	81
<b><u>Jars<sup>2</sup> (\$/gross)</u></b>						
Domestic	100	100	97	92	-	101
Imported	100	84	77	80	-	86
<b>Notes:</b>						
1. Market share percentage calculated using volume of sales.						
2. Jars with bacon packs.						
Source: <u>Protected Pre-Hearing Staff Report</u> , August 15, 1995, Tribunal Exhibit NQ-95-001-7 (protected), Administrative Record, Vol. 2 at 5; and <u>Protected Pre-Hearing Pricing Report</u> , August 15, 1995, Tribunal Exhibit NQ-95-001-26 (protected), Administrative Record, Vol. 2 at 48.						

The apparent market for caps, lids and jars,<sup>6</sup> measured in volume, grew marginally in 1992 compared to 1991, then fell back substantially in 1993. The market recovered to 1992 levels in 1994 and then declined in the first half of 1995, compared to the same period in 1994.

The domestic industry's share of the apparent market for caps, lids and jars decreased somewhat in 1992 and then declined dramatically in 1993. By 1994, the domestic industry had lost just under a third of its market share compared to the start of the period. Its market share increased in the first six months of 1995. The importers' share of the apparent market more than doubled between 1991 and 1994, with the greater portion of the increase taking place in 1993. Their market share decreased in the first six months of 1995.

The domestic industry's production and volume of sales fell to their low point in 1993 and then increased in 1994. However, over the 1991-94 period, production and volume of sales were down by 25 and 32 percent, respectively. As for employment, it was only 40 percent of 1991 levels in 1994. Net income before taxes was only 60 percent of 1991 levels in 1994. Production and employment showed improvement in the first six months of 1995.

The volume of imports increased in each year during the period of inquiry. The increases were particularly large in 1993, 1994 and the first six months of 1995. Sales from imports showed a similar pattern, except that they were down in the first six months of 1995, subsequent to the withdrawal of Alltrista from the domestic market.

Throughout the inquiry period, importers' average prices<sup>7</sup> for both caps and lids and jars were higher than the domestic industry's average prices. However, the spread in prices narrowed. The average price for domestic industry sales of caps and lids was up by 2 percent in 1994 compared to 1991, whereas the importers' average price was down by 17 percent. For jars, the domestic price was down by 8 percent in 1994 compared to 1991, while the importers' price was down by 20 percent. These average prices, however, tend to mask what was happening to prices at a regional level and prices to individual accounts, which will be discussed further in the following analysis.

## **ANALYSIS**

This is the first inquiry under section 42 to proceed under SIMA, as amended by the *World Trade Organization Agreement Implementation Act*<sup>8</sup> (the WTO Implementation Act). Prior to the amendments, the critical wording in subparagraph 42(1)(a)(i) of SIMA read as follows: "has caused, is causing or is likely to cause material injury or has caused or is causing retardation." The provision now reads: "has caused injury or retardation or is threatening to cause injury." (Emphasis added)

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6. Hereinafter, unless otherwise specified, jars include bacon packs.

7. The average prices were for four comparable caps and lids and four comparable jars with bacon packs. These eight products accounted for approximately 80 percent of the volume of the subject goods sold during the period of inquiry.

8. S.C. 1994, c. 47.

The Clause by Clause Guide to the WTO Implementation Act describes the change in wording of section 42 of SIMA as follows:

*Subparagraph 42(1)(a)(i) requires the Tribunal to determine whether the dumping or subsidizing of goods “has caused injury or retardation or is threatening to cause injury.” This replaces the current injury test of “has caused, is causing or is likely to cause material injury or has caused or is causing retardation” based on [ADA] Article 3 (footnote 9) and [SCMA] Article 15 (footnote 45).<sup>9</sup>*

The purpose of amending subparagraph 42(1)(a)(i) of SIMA was to make it consistent with the *WTO Agreement on Implementation of Article VI of GATT 1994*<sup>10</sup> (the ADA) and the *WTO Agreement on Subsidies and Countervailing Measures*.<sup>11</sup> The definition of “injury” in Article 3 of the ADA (footnote 9) reads as follows:<sup>12</sup>

*Under this Agreement the term “injury” shall, unless otherwise specified, be taken to mean material injury to a domestic industry, [or] threat of material injury to a domestic industry ... and shall be interpreted in accordance with the provisions of this Article.*

In addition to the separate reference to injury and threat of injury determinations in the definition of “injury,” the ADA distinguishes between injury and threat of injury findings in at least three additional ways. First, an investigating authority is directed to consider factors for threat of injury that are different from factors for injury. Thus, the evidentiary basis for each finding is different.

With respect to determining injury, paragraphs 1 to 3 of Article 3 of the ADA set out the factors that an investigating authority is to take into account and provide some direction as to the manner in which these factors should be analyzed. The factors in determining threat of injury are found in paragraph 7 of Article 3. These distinctions are reflected in the amendments to the *Special Import Measures Regulations*<sup>13</sup> (the Regulations) made as part of the process of implementing the WTO Implementation Act. More specifically, subsection 37.1(1) of the Regulations now sets out the factors found in paragraphs 1 to 3 of Article 3, while the factors relating to threat of injury found in paragraph 7 of Article 3 are set out separately in subsection 37.1(2) of the Regulations.

Second, paragraph 7 of Article 3 of the ADA provides that a finding of threat of injury may only be made where the circumstances in which the dumping would cause injury are clearly foreseen and imminent. This requirement has been specifically included in SIMA under subsection 2(1.5).

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9. *World Trade Organization Agreement Implementation Act, Clause by Clause Guide to Bill C-57*, Department of Foreign Affairs and International Trade, November 1994, comments on clause 170.

10. Signed at Marrakesh on April 15, 1994.

11. Signed at Marrakesh on April 15, 1994. As this case deals with dumping, subsequent references are to the ADA, although the Tribunal is of the view that the approach to the amendments set out in these reasons would also apply to subsidy cases.

12. As the amendments to SIMA being discussed do not directly relate to “retardation,” the third possible determination or “finding” that the Tribunal can make in respect of subparagraph 42(1)(a)(i) is not discussed in these reasons.

13. SOR/95-26, *Canada Gazette* Part II, Vol. 129, No. 1, January 11, 1995, at 80.

Third, paragraph 8 of Article 3 of the ADA sets out an additional admonition to investigating authorities. It reads as follows:

*With respect to cases where injury is threatened by dumped imports, the application of anti-dumping measures shall be considered and decided with special care.*

The differences between injury and threat of injury in SIMA and the Regulations suggest to the Tribunal that it is no longer directed to consider “past, present and future” injury, but rather directed to consider whether the domestic industry either has suffered material injury or is threatened with material injury. In other words, injury and threat of injury are distinct findings, and the Tribunal does not need to make a finding relating to both under subsection 43(1) of SIMA. In addition, the Tribunal is of the view that the structure of Article 3 of the ADA, which is incorporated to a significant degree in the Regulations, suggests to the Tribunal that it should first consider and make a finding as to injury before considering threat of injury. If the Tribunal made an injury finding, it would not be required to go on to consider threat of injury.<sup>14</sup> If the Tribunal made a finding of no injury, then it would go on to consider the evidence relating to threat of injury and make a finding regarding this question. Therefore, the Tribunal requires evidence relating to threat of injury in any inquiry under section 42 of SIMA, so that if it makes a finding of no injury, it will be able to go on to consider the question of threat of injury.

With respect to the collection of duties, the Tribunal notes that the duty collection provisions at sections 3 to 8 of SIMA have been amended in a manner consistent with the new wording of subparagraph 42(1)(a)(i) of SIMA. As discussed, the Tribunal is of the view that, under subsection 43(1) of SIMA, it is not required to make a finding relating to both injury and threat of injury. The Tribunal is also of the view that duties would be assessed as a result of either finding, in the following manner. Where the Tribunal made an injury finding, and did not go on to consider threat of injury, duties would be collected from the date of the preliminary determination of dumping to the date of the Tribunal’s finding and for up to five years from the date of the finding, unless the finding were reviewed and/or continued by the Tribunal pursuant to section 76 of SIMA. If the Tribunal made a finding of no injury and a finding of threat of injury, duties would be assessed only from the date of the finding for up to five years, unless the finding were reviewed and/or continued, i.e. duties collected between the date of the preliminary determination of dumping and the date of the finding would be reimbursed by the Deputy Minister.

“Injury” is defined in section 2 of SIMA as “material injury to a domestic industry.” “Domestic industry” is defined, in part, as “the domestic producers as a whole of the like goods or those ... whose collective production of the like goods constitutes a major proportion of the total domestic production of the like goods.” Therefore, in arriving at its decision in the present inquiry, the Tribunal will first determine which domestically produced goods are “like goods” to the subject goods and then determine who are the domestic producers of those goods, i.e. which producers constitute the domestic industry. The Tribunal will then proceed to determine if that domestic industry has been injured within the meaning of SIMA and, if so, whether a causal relationship exists between that injury and the dumping of the subject goods.

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14. The Tribunal notes that the investigating authorities in both the United States and the European Union do not usually proceed to make a finding of threat of material injury in cases where they make a finding of material injury.

## **Like Goods**

Subsection 2(1) of SIMA defines “like goods” in relation to the subject goods, as follows:

*(a) goods that are identical in all respects to the other goods, or*

*(b) in the absence of any goods described in paragraph (a), goods the uses and other characteristics of which closely resemble those of the other goods.*

The evidence is clear that the caps, lids and jars suitable for home canning produced by the domestic industry, whether sold separately or packaged together, and the subject goods have similar physical characteristics, have the same end uses and compete with and can be substituted for one another. Furthermore, the Tribunal considers that caps, lids and jars are so intimately related and so complementary in function that they are part of the same product class. Indeed, caps, lids and jars, if not used together, would appear to be without any significant purpose or use. Therefore, the Tribunal finds that the complainants’ caps, lids and jars, whether sold separately or packaged together, constitute like goods to the subject goods.

Counsel for Kerr argued that two domestically produced goods could not be considered like goods to the subject goods. These goods were Consumers Glass’ production of jars in 1995, which were sold to Bernardin to be packaged and resold with Bernardin’s bacon packs, and Bernardin’s production of bacon packs prior to 1995, which were sold to Consumers Glass to be packaged and resold with Consumers Glass’ jars. Counsel argued that, in each instance, the products constituted upstream production of inputs for like goods rather than like goods themselves.

As noted, the Tribunal has found that the complainants’ caps, lids and jars, whether sold separately or packaged together, constitute like goods to the subject goods. This finding is based, in part, on the Tribunal’s view that the evidence shows that jars and caps, if not used together, appear to be without any significant purpose or use. It follows that the production of jars or the production of caps and lids by a domestic producer would not constitute “upstream production of like goods,” but rather actual production of like goods. Therefore, producers of such goods should be considered part of the domestic industry.

## **Domestic Industry**

Having determined that the like goods in this inquiry are domestically produced caps, lids and jars, whether sold separately or packaged together, the Tribunal must next determine who are the domestic producers of these like goods. The evidence shows that the complainants’ production constitutes 100 percent of the total domestic production of the like goods and, therefore, the Tribunal finds that Consumers Glass and Bernardin constitute the domestic industry in this inquiry.

## **Canadian Market**

For purposes of this inquiry, the Tribunal looked at events that occurred in the Canadian market over the period from 1991 to mid-1995. During this period, total market demand for caps, lids and jars exhibited negligible growth. The volume of sales was only marginally higher in 1994 than was the case in 1991.

A number of factors indicate that the domestic market for home canning products is mature, with only moderate growth anticipated, at best.<sup>15</sup> Among the factors which indicate little growth in the future for these products are changing lifestyles, such as an increase in the number of working women and smaller family size. As well, the increasing year-round availability of fresh fruits and vegetables and alternative preservation methods will also serve to restrain demand for home canning products.<sup>16</sup>

During the period of inquiry, market demand for caps, lids and jars was supplied by two domestic producers, namely, Bernardin and Consumers Glass, and two U.S. exporters, namely, Kerr and Alltrista. Bernardin, which until 1994 had been owned by American National Can Corporation, had a long history of producing and marketing caps and lids in the Canadian market. In November 1994, Bernardin was acquired by Alltrista. Prior to the change in ownership, Bernardin sold bacon packs to Consumers Glass which, in turn, marketed the bacon packs with its mason jars. Bernardin marketed, and continues to market, caps and lids to the replacement market under its own name. Consumers Glass, with the acquisition of Domglas Inc. in 1989, became the sole domestic supplier of mason jars. In 1995, the marketing arrangement between Consumers Glass and Bernardin was reversed so that Bernardin now purchases and markets jars produced by Consumers Glass, although the jars with bacon packs are still packaged and held in inventory by Consumers Glass.

With respect to the U.S. suppliers, Kerr had a long history of supplying the subject goods to the B.C. market and an established presence in the Prairies over the past decade.<sup>17</sup> In 1992, Kerr began to market caps, lids and jars in the Atlantic provinces and, shortly thereafter, it moved into the larger Quebec and Ontario markets.<sup>18</sup> Alltrista, Kerr's major competitor in the United States, began to supply the Canadian market in 1991. Alltrista's marketing efforts were centred on the high-volume accounts in Ontario and Quebec.<sup>19</sup> Subsequent to its acquisition of Bernardin in November 1994, Alltrista withdrew from the Canadian market.

## **Injury**

It is against this market background that the Tribunal now addresses issues relating to injury to the domestic producers of like goods. In this regard, the Tribunal considers that the economic indicators shown in the table under "Economic Indicators" are particularly telling. The combined imports of the subject goods from the two U.S. suppliers showed substantial year-over-year increases between 1991 and 1994, having more than doubled over the four years. Between 1992 and 1994, production by the domestic industry fell sharply and, in 1994, was 25 percent lower than in 1991. The effect of the surge in imports is apparent when viewed against the industry's declines in sales and market share. Industry sales fell steadily and, by 1994, were some 32 percent lower in volume than in 1991. Similarly, the industry's market share was rapidly eroded and fell by 33 percent over the period. While the industry witnessed declines in sales and market

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15. Transcript of Public Hearing, Vol. 1, September 26, 1995, at 28, and Vol. 2, September 27, 1995, at 499.

16. Transcript of Public Hearing, Vol. 1, September 26, 1995, at 32.

17. Exporter's Exhibit C-2B, Administrative Record, Vol. 11.

18. Tribunal Exhibit NQ-95-001-16.2 (protected), Administrative Record, Vol. 6 at 36; and Exporter's Exhibit C-2B, Administrative Record, Vol. 11.

19. Manufacturer's Exhibit A-43, Administrative Record, Vol. 9.



share, sales of U.S. caps, lids and jars soared. In 1994, U.S. sales were almost 2.5 times greater than in 1991, and U.S. market share more than doubled. The Tribunal notes that these gains were made in a market which, in total, had exhibited virtually no growth.

Weighted average prices shown in the table indicate that, on sales of caps and lids to the replacement market, Bernardin's prices tended to fluctuate, but were 2 percent higher in 1994 than in 1991. Weighted average prices for both Kerr and Alltrista, however, fell throughout the inquiry period, with the largest decrease occurring in 1994, at which point the import prices were 17 percent lower than in 1991. Similarly, the weighted average prices for Consumers Glass' sales of jars declined by 8 percent between 1991 and 1994, but this decline did not match the 20 percent decrease in the import prices for jars over the period. Data contained in the Protected Pre-Hearing Pricing Report,<sup>20</sup> however, show that, in spite of the sharp decline in import prices for caps, lids and jars, the importers' unit selling prices, on average, exceeded the domestic producers' unit selling prices.

In the Tribunal's study of the pricing evidence, it is apparent that aggregate price comparisons at the national level tend to mask the events that were occurring in the domestic market. When viewed at a regional level and on an account-specific basis, the effect of the low pricing by the U.S. exporters becomes more apparent.

The pricing data indicate that, in Western Canada, Kerr maintained its position as the predominant supplier.<sup>21</sup> Price pressures from the subject goods appeared to be less severe in the western market, which can be partially attributed to the minor presence of Alltrista, Kerr's long history in that market and the tendency of purchasers to buy from more than one supplier. However, in the Atlantic provinces, price competition became intense when Kerr entered that market in 1992 (Alltrista did not compete in the Atlantic provinces). The evidence reveals that Kerr undercut Bernardin's prices for caps and lids, and the extent of the price undercutting increased over time.<sup>22</sup> Although Kerr's jar prices were initially higher than those of Consumers Glass, in 1993, Kerr's prices were considerably lower, which resulted in Consumers Glass' decision to essentially withdraw from the Atlantic provinces.<sup>23</sup> In 1994, Kerr increased its prices for mason jars in these provinces.

In 1992, Kerr entered the Quebec and Ontario markets. As previously noted, Alltrista had targeted a number of large accounts in these two provinces and, with the entry of Kerr, price competition became intense. As a result, in 1993, prices declined, and the two domestic producers incurred a significant loss of sales at several accounts and suffered price suppression at a number of other accounts.

On an account-specific basis, it is clear to the Tribunal that the impact of the dumping resulted in substantial lost sales and price suppression to the domestic industry, the effect of which was injurious. Prior to 1994, both Bernardin and Consumers Glass lost large volume sales to major accounts for reasons of price. In 1994, the period during which the Deputy Minister found dumping, losses to the two U.S. exporters

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20. August 15, 1995, Tribunal Exhibit NQ-95-001-26 (protected), Administrative Record, Vol. 2 at 48.

21. Protected Pre-Hearing Pricing Report, revised September 11, 1995, Tribunal Exhibit NQ-95-001-26C (protected), Administrative Record, Vol. 2 at 285-92.

22. Protected Pre-Hearing Pricing Report, revised August 21, 1995, Tribunal Exhibit NQ-95-001-26A (protected), Administrative Record, Vol. 2 at 265.

23. Transcript of Public Hearing, Vol. 2, September 27, 1995, at 493-94.

increased. Subsequent to Alltrista's withdrawal from the market in late 1994, sales by both Kerr and the domestic industry increased in 1995. However, the evidence indicates that accounts continued to be lost to Kerr's low prices. The Tribunal recognizes that non-price factors appear to have played a role in the exporters' success in gaining sales at a number of accounts. However, the weight of the evidence clearly indicates that many other sales and accounts were lost due to the dumped prices of the U.S. exporters.

The Tribunal also notes that the domestic industry suffered price suppression during this period of intense price competition. In this regard, the evidence shows that the industry maintained the Canadian Tire account, but only at a significant cost. Canadian Tire is the largest domestic purchaser of caps, lids and jars. The pricing data show that the industry was able to increase unit prices to Canadian Tire in 1992.<sup>24</sup> However, in response to price offerings from the U.S. exporters, in 1993 and beyond, the industry had to lower prices in order to retain the account.<sup>25</sup> Because of Canadian Tire's large volume purchases, the Tribunal considers this account alone to be sufficient evidence of the price suppression.

In the Tribunal's opinion, the significant loss of sales and market share and the price suppression had a negative impact on the financial performance of the domestic industry. As a result of the substantial loss of sales revenue in 1993 and 1994, compared with 1992, both Bernardin and Consumers Glass witnessed declining gross margins. Moreover, the net income earned on sales of like goods declined by 40 percent between 1991 and 1994. Although Bernardin's sales of caps and lids to the replacement market were profitable throughout the inquiry period, profit levels declined in 1994 and 1995. In addition, the negative sales performance of Consumers Glass over the 1991-94 period not only resulted in poor financial results for Consumers Glass but also produced negative results on Bernardin's sales of bacon packs to Consumers Glass.

Turning to domestic industry employment, the Tribunal notes that industry production employment fell by 60 percent between 1991 and 1994, with a corresponding decline in hours worked. Moreover, the evidence indicates that, prior to 1993, Bernardin relied on part-time employees in order to meet production levels.<sup>26</sup> However, since 1993, Bernardin has not hired temporary employees, as a result of declining production.

Finally, with respect to capacity utilization, the evidence suggests that Bernardin's utilization rate fell to less than 50 percent of capacity after 1992. In 1994, Bernardin's utilization of production capacity was 38 percent lower than in 1992.<sup>27</sup> Evidence concerning the utilization of capacity by Consumers Glass was less definitive. The Tribunal recognizes that the production of mason jars<sup>28</sup> represents only a small percentage of Consumers Glass' total glass production. Accordingly, attempts to measure production capacity and utilization rates for mason jars would not result in meaningful information.

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24. Protected Pre-Hearing Pricing Report, revised September 11, 1995, Tribunal Exhibit NQ-95-001-26C (protected), Administrative Record, Vol. 2 at 301-302.

25. Transcript of Public Hearing, Vol. 2, September 27, 1995, at 422-23; and Protected Pre-Hearing Pricing Report, revised September 11, 1995, Tribunal Exhibit NQ-95-001-26C (protected), Administrative Record, Vol. 2 at 301-302.

26. Manufacturer's Exhibit A-28 (protected) at 3-4, Administrative Record, Vol. 10.

27. *Ibid.* at 4.

28. Consumers Glass' production of mason jars does not include bacon packs produced by Bernardin.

The Tribunal concludes that the domestic industry has suffered material injury, primarily in the form of lost production, sales and market share, price suppression and reduced profitability due to lost revenues.

### **Causation**

Having determined that the domestic producers of like goods have been materially injured, the Tribunal must determine whether there is a causal link between the injury and the dumping of the subject goods.

In brief, counsel for the complainants argued that the domestic industry suffered substantial declines in production, sales and market share, price suppression and reduced profitability due to the competition from dumped U.S. prices. Counsel for Kerr, however, argued that any difficulties suffered by the industry were structural in nature and that such problems were not related to price. In the view of counsel for Kerr, their client gained entry into the eastern Canadian market because of innovative marketing techniques, Consumers Glass was not meeting the purchasers' needs in a timely fashion and Bernardin and Consumers Glass failed to properly market home canning products.

Evidence adduced during the inquiry reveals a rapid and escalating increase in imports of the subject goods, and this increase occurred in what was essentially a flat market. Between 1991 and 1994, imports of caps and lids almost doubled. In the first half of 1995, during which period Alltrista had withdrawn from the market, Kerr's imports continued to surge, having increased by 92 percent when compared with the first half of 1994. Imports of jars followed a similar trend, with total U.S. imports more than tripling between 1991 and 1994. Kerr's imports of jars continued to increase in the first half of 1995, by 130 percent over the corresponding period of 1994.

The impact of this import surge became particularly acute in 1993, a year in which total market demand fell by 11 percent. In spite of lower demand, U.S. imports increased in that year by almost 50 percent over 1992. The effect of this dramatic increase in imports, which continued unabated through 1994 and the first half of 1995, was evident in the substantial loss of sales and market share by the domestic industry.

In the Tribunal's view, there is a clear causal relationship between the dumping and the sharp increase in imports of the subject goods. The Tribunal notes that the margins of dumping are substantial, at a weighted average of 30 percent for Kerr and 36 percent for Alltrista. In a highly price-sensitive market, the Tribunal has no doubt that the gains made by the U.S. exporters resulted from lower price offerings which were assisted by dumping. The evidence indicates that, in 1992, the domestic producers were able to maintain or increase average unit prices. However, in 1993, in the face of declining U.S. import prices, the domestic industry not only lost the 1992 price gains but had to lower prices below the 1991 levels. In 1994 and the first half of 1995, average U.S. prices continued to decline well below the price levels of 1991.

The response by the two domestic producers to the low U.S. pricing was mixed. Bernardin attempted to meet the price competition,<sup>29</sup> but, in many instances, was unable to maintain or regain accounts which were lost to dumped products. Consumers Glass, however, generally decided to sacrifice market

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29. Manufacturer's Exhibit A-1 (protected) at 7, Administrative Record, Vol. 10.

share rather than incur further financial losses.<sup>30</sup> In any event, the impact of the U.S. pricing on the domestic industry was similar. Both companies incurred large decreases in sales revenues, which resulted in declining profitability and a significant decrease in production and employment levels.

With respect to the pricing activities of the exporters, the Tribunal notes the extensive evidence of Bernardin and Consumers Glass on the prices offered by the exporters at individual accounts, the pricing negotiations at individual accounts brought about by the prices offered by the exporters and the results in terms of lost sales and price suppression for the domestic industry.<sup>31</sup> The Tribunal also notes the evidence of its two witnesses. The witness for Provigo Retail stated that Kerr was the most aggressive pricer in the domestic market.<sup>32</sup> The witness for Canadian Tire stated that Kerr's prices were used as a negotiating tool to lower the prices offered by the domestic producers.<sup>33</sup> The Tribunal also notes the replies by purchasers to the Tribunal's market characteristics questionnaire. The preponderance of purchasers that responded to the questionnaire indicated that price was the key factor in the buying decisions of the purchasers.<sup>34</sup>

In respect of lost sales, the Tribunal has reviewed the pricing and sales information contained in the staff pricing report to determine at which accounts the exporters were undercutting the prices of the domestic industry. The Tribunal relied on the report because it contained the most comprehensive information<sup>35</sup> available on pricing and sales by the domestic industry and the exporters to Canadian accounts for caps, lids and jars. The Tribunal is of the view that this information, when considered in light of the evidence discussed above, leads to the conclusion that the exporters were undercutting the prices of the domestic industry at a number of accounts and that lost sales at those accounts were lost principally for reasons of price.

The Tribunal focused on the net/net pricing contained in that report. In general, net/net pricing is invoice pricing less all off-invoice discounts and allowances.<sup>36</sup> In the Tribunal's view, net/net pricing is the best reflection of the actual prices that accounts were paying for their supplies of caps, lids and jars. In this regard, the Tribunal rejects Kerr's argument that listing fees, as well as advertising and merchandising allowances, are performance-based payments which should, therefore, not be deducted in determining net/net prices. The evidence indicates that these fees and allowances are often used by purchasers to

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30. Transcript of Public Hearing, Vol. 2, September 27, 1995, at 493-94.

31. Manufacturer's Exhibit A-1 (protected), Administrative Record, Vol. 10; and Manufacturer's Exhibit B-5 (protected), Administrative Record, Vol. 10A.

32. Transcript of Public Hearing, Vol. 2, September 27, 1995, at 346.

33. Transcript of Public Hearing, Vol. 2, September 27, 1995, at 422-23.

34. Public Pre-Hearing Staff Report, August 15, 1995, Tribunal Exhibit NQ-95-001-6, Administrative Record, Vol. 1 at 136 and 138.

35. The Tribunal notes several deficiencies in the data relating to returns, broker commissions and minimum order quantities. The Tribunal has reviewed the evidence and finds that these deficiencies have had a negligible impact on the pricing analysis. See Tribunal Exhibit NQ-95-001-24.4E (protected), Vol. 6.3A at 70; Transcript of In Camera Hearing, Vol. 3, September 29, 1995, at 236; and Manufacturer's Exhibit B-5 (protected) at 3-4, Administrative Record, Vol. 10A.

36. Protected Pre-Hearing Pricing Report, revised August 21, 1995, Tribunal Exhibit NQ-95-001-26A (protected), Administrative Record, Vol. 2 at 263-64.

negotiate the lowest possible prices.<sup>37</sup> The evidence also indicates the growing demand for net/net pricing by the retail trade, which indicates that retailers view these allowances as part of price.<sup>38</sup> The Tribunal also notes that Kerr, in its “Meet Competition” marketing program, considered such allowances as price discounts.<sup>39</sup>

The staff report shows that, in 1994, or prior to that year, accounts were lost by the domestic industry to the exports, where the exporters’ prices for caps, lids and jars were lower in 1994 than the corresponding prices at which the domestic industry last sold to those accounts.<sup>40</sup> The evidence shows that the efforts of the domestic industry to sell at all these accounts in 1994 were affected by the prices being offered by the exporters. Specifically, the evidence shows that, for all these accounts, the exporters’ prices were below the prices that the domestic industry offered. At certain accounts, the domestic industry was given the opportunity to respond to the prices offered by the exporters in order to hold or regain the accounts.

Accounts lost in this regard in 1994 were the Kmart Canada Limited<sup>41</sup> and Wal-Mart Canada Inc.<sup>42</sup> accounts for caps, lids and jars, and the Bolands Limited,<sup>43</sup> Hudon et Deaudelin Ltée<sup>44</sup> and Marchands Unis Inc.<sup>45</sup> accounts for jars.

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37. Transcript of Public Hearing, Vol. 1, September 26, 1995, at 233, 277-78 and 310, and Vol. 2, September 27, 1995, at 363.

38. Transcript of Public Hearing, Vol. 1, September 26, 1995, at 310-11, and Vol. 2, September 27, 1995, at 348 and 412.

39. Manufacturer’s Exhibit A-58, Administrative Record, Vol. 9.

40. Price comparisons were carried out separately for sales of four comparable caps and lids and for sales of four comparable jars. If the results of the price comparisons were not consistent across all comparable products, i.e. importers’ prices were lower than domestic producers’ prices for some comparable products, but higher for others, the Tribunal assessed whether the overall importers’ prices for the comparable products were higher or lower than those of the domestic industry.

41. Manufacturer’s Exhibit A-1 (protected) at 26, Administrative Record, Vol. 10; Manufacturer’s Exhibit A-8 (protected), Administrative Record, Vol. 10; Manufacturer’s Exhibit B-5 (protected) at 9, Administrative Record, Vol. 10A; and Tribunal Exhibit NQ-95-001-21.10, Administrative Record, Vol. 5.2 at 161.

42. Manufacturer’s Exhibit A-1 (protected) at 24, Administrative Record, Vol. 10; Manufacturer’s Exhibit A-8 (protected), Administrative Record, Vol. 10; and Manufacturer’s Exhibit B-5 (protected) at 9, Administrative Record, Vol. 10A.

43. Manufacturer’s Exhibit B-5 (protected) at 11-12, Administrative Record, Vol. 10A; Manufacturer’s Exhibit B-26 (protected), Administrative Record, Vol. 10A; and Tribunal Exhibit NQ-95-001-21.5, Administrative Record, Vol. 5.2 at 102.

44. Manufacturer’s Exhibit B-5 (protected) at 13, Administrative Record, Vol. 10A; and Tribunal Exhibit NQ-95-001-10.2 (protected), Administrative Record, Vol. 4A at 19.

45. Manufacturer’s Exhibit B-5 (protected) at 10, Administrative Record, Vol. 10A.

Accounts lost by the domestic industry to the exporters prior to 1994<sup>46</sup> and which continued to be lost to the exporters in 1994 were D.H. Howden & Co. Ltd.,<sup>47</sup> Marchands Unis Inc.,<sup>48</sup> Sodisco Inc.,<sup>49</sup> Loeb Inc.<sup>50</sup> and Zellers Inc.<sup>51</sup> for caps and lids, and Loeb Inc.,<sup>52</sup> Provigo Distribution Inc.,<sup>53</sup> Provigo Retail<sup>54</sup> and Zellers Inc.<sup>55</sup> for jars.

In respect of price suppression, the Tribunal considered the evidence on the Canadian Tire account. As referenced earlier, the witness for Canadian Tire stated that Kerr's prices were used as a negotiating tool to lower prices offered by the domestic producers. In the Tribunal's opinion, the evidence of this witness clearly reflects a causal relationship between the exporters' pricing and the price suppression incurred by the domestic industry. At the Canadian Tire account alone, lost revenues relating to price suppression were substantial in 1994.

Overall, the net/net pricing data and the evidence indicate that the domestic industry lost more than \$2 million<sup>56</sup> in revenues in 1994 as a result of lost sales and price suppression caused principally by the pricing of the exporters. The Tribunal notes that this is only part of the injury experienced by the domestic industry. However, given the total value of industry sales of like goods, the Tribunal is of the view that \$2 million alone is a material loss of revenues.

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46. At these accounts, the exporters' prices for caps, lids and jars were also lower, in the year in which the account was lost, than the corresponding prices at which the domestic industry sold to those accounts in the previous year.

47. Manufacturer's Exhibit A-1 (protected) at 22, Administrative Record, Vol. 10; Manufacturer's Exhibit A-8 (protected), Administrative Record, Vol. 10; and Tribunal Exhibit NQ-95-001-21.4, Administrative Record, Vol. 5.2 at 90 and 92.

48. Manufacturer's Exhibit A-1 (protected) at 18, Administrative Record, Vol. 10; and Manufacturer's Exhibit A-8 (protected), Administrative Record, Vol. 10.

49. Manufacturer's Exhibit A-1 (protected) at 27, Administrative Record, Vol. 10; Manufacturer's Exhibit A-8 (protected), Administrative Record, Vol. 10; Tribunal Exhibit NQ-95-001-10.1 (protected), Administrative Record, Vol. 4 at 34; and Tribunal Exhibit NQ-95-001-24.2 (protected), Administrative Record, Vol. 6.3 at 93.

50. Manufacturer's Exhibit A-1 (protected) at 20-21, Administrative Record, Vol. 10; and Manufacturer's Exhibit A-8 (protected), Administrative Record, Vol. 10.

51. Manufacturer's Exhibit A-1 (protected) at 17, Administrative Record, Vol. 10; and Manufacturer's Exhibit A-8 (protected), Administrative Record, Vol. 10.

52. Manufacturer's Exhibit B-5 (protected) at 8, Administrative Record, Vol. 10A.

53. Manufacturer's Exhibit B-5 (protected) at 13, Administrative Record, Vol. 10A; and Tribunal Exhibit NQ-95-001-21.17, Administrative Record, Vol. 5.2A at 7 and 9.

54. Manufacturer's Exhibit B-5 (protected) at 13, Administrative Record, Vol. 10A; Tribunal Exhibit NQ-95-001-21.15, Administrative Record, Vol. 5.2 at 216 and 218; and Transcript of Public Hearing, Vol. 2, September 27, 1995, at 346.

55. Manufacturer's Exhibit A-1 (protected) at 17, Administrative Record, Vol. 10; and Tribunal Exhibit NQ-95-001-10.2 (protected), Administrative Record, Vol. 4A at 25.

56. Lost revenues due to lost sales is the value of the exporters' 1994 sales of all the subject goods to those accounts. Lost revenues due to price suppression at Canadian Tire is the volume of domestic industry sales to Canadian Tire in 1994 times the difference between the 1994 and 1992 prices.

For a number of reasons, the Tribunal considers the \$2 million in lost revenues as a result of the dumping to be a conservative number. First, there were a number of other accounts where both the domestic industry and the exporters made sales in 1994, where the exporters' 1994 prices were below those of the domestic industry. The evidence shows that the sales and prices of the domestic industry to these accounts were affected by the prices being offered by the exporters. These accounts were Atlantic Wholesalers/National Grocers,<sup>57</sup> Bolands Limited,<sup>58</sup> Home Hardware Stores Limited,<sup>59</sup> Horne & Pitfield, A Division of Oshawa Holdings Limited,<sup>60</sup> Hudon et Deaudelin Ltée<sup>61</sup> and Oshawa Foods<sup>62</sup> for caps and lids. No calculation was made of the revenues lost because of lost sales and price suppression at these accounts because of the dumping. Second, accounts which were considered made up only 74 percent of total market volume in 1994. Revenues may have been lost because of dumping at accounts not reported. Finally, no provision was made for inflation in the price comparison. Yet, inflationary pressures are evident in both Statistics Canada indices for glass and stamped metal products.<sup>63</sup>

The Tribunal now assesses Kerr's claims that non-price factors led to its gains in the Canadian market. First, Kerr's claim that its overall success in the Canadian market was due to innovative marketing techniques does not stand up to careful scrutiny. The Tribunal does not see anything "innovative" in Kerr's marketing approach which could account for its substantial sales gains at the expense of the domestic industry. Clearly, the use of advertising and marketing allowances was not unique to Kerr. Rather, the increasing use of these marketing techniques simply served to heighten the price competition and drive down prices even farther.

Second, Kerr claimed that the domestic industry supplied Canadian Tire at such low prices that Canadian Tire "skunked the market" and thereby made other retailers, particularly in the grocery trade, uncompetitive. The Tribunal notes the evidence of the witness for Canadian Tire which clearly indicates the role played by Kerr in driving down industry prices to Canadian Tire. Moreover, given the large volume purchases made by Canadian Tire, it is not surprising that it would receive preferential prices.

Finally, the Tribunal does not accept Kerr's allegations that the domestic industry was the master of its own difficulties because it did not properly market its home canning products. As evidenced by the testimony of the witness for Provigo Retail, the question of "one-stop shopping" was not a consideration in its choice of suppliers.<sup>64</sup> The fact that purchasers bought from separate domestic manufacturers does not appear to have limited the complainants' access to accounts. The Tribunal heard little evidence to suggest

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57. Manufacturer's Exhibit A-1 (protected) at 16-17, Administrative Record, Vol. 10; Manufacturer's Exhibit A-12 (protected), Administrative Record, Vol. 10; and Manufacturer's Exhibit A-13 (protected), Administrative Record, Vol. 10.

58. Manufacturer's Exhibit A-1 (protected) at 14, Administrative Record, Vol. 10; Manufacturer's Exhibit A-10 (protected), Administrative Record, Vol. 10; and Tribunal Exhibit NQ-95-001-21.5, Administrative Record, Vol. 5.2 at 102 and 104.

59. Manufacturer's Exhibit A-1 (protected) at 23, Administrative Record, Vol. 10.

60. Manufacturer's Exhibit A-1 (protected) at 24, Administrative Record, Vol. 10.

61. Manufacturer's Exhibit A-1 (protected) at 19-20, Administrative Record, Vol. 10.

62. Manufacturer's Exhibit A-1 (protected) at 22, Administrative Record, Vol. 10.

63. Tribunal Exhibit NQ-95-001-54, Administrative Record, Vol. 1B at 3-4.

64. Transcript of Public Hearing, Vol. 2, September 27, 1995, at 354.

that either Bernardin or Consumers Glass did not actively promote the sale of its products. Further, with the possible exception of some minor supply difficulties encountered by Consumers Glass in the 1991-92 period, the Tribunal is persuaded that both producers were able to supply customers in the required volume and within the necessary time frames established by the customers.<sup>65</sup> In addition, the Tribunal is not persuaded that Kerr's broker network was somehow superior to that of the industry. Both Bernardin and Consumers Glass have well-established distribution networks, and the evidence suggests that these networks solicit sales and support customer needs on a national level. However, the Tribunal notes that Bernardin's viability, more so than that of Consumers Glass, relies upon the successful production and marketing of the like goods. For Consumers Glass, the production of mason jars represents only about 1 percent of its total production of glass containers. As a result, it appears that Consumers Glass' commitment to the marketing of the like goods was not as intensive as Bernardin's commitment. Because of this, the Tribunal accepts that the door may have been open to Kerr to gain certain sales due to non-price reasons.

The Tribunal is of the opinion that the dumping was not the only factor contributing to the success of the exporters in gaining sales in Canada. However, the Tribunal is not convinced that other factors explain the magnitude of lost sales, lost market share and price suppression which resulted in reduced profitability for the domestic industry. The Tribunal is persuaded that the evidence shows that price was the key factor in the buying decisions of purchasers and that the evidence discussed in this section demonstrates a causal link between the dumping of the subject goods by the exporters and the material injury suffered by Bernardin and Consumers Glass.

As discussed above, the Tribunal is of the view that, having found that the dumping of the subject goods has caused material injury to the domestic industry, under the new wording of subparagraph 42(1)(a)(i) of SIMA, it is not required, at this time, to consider whether the dumping of the subject goods is threatening to cause material injury to the domestic industry. The Tribunal notes that there is extensive evidence in the administrative record in this inquiry relating to this issue, which the Tribunal could, if necessary, consider at a later date.

### **Massive Dumping**

As mentioned earlier, counsel for the complainants requested a finding of massive dumping in accordance with the provisions of paragraph 42(1)(b) of SIMA. As such, the massive dumping provisions of SIMA allow for the retroactive assessment of anti-dumping duties against imported goods under exceptional circumstances. In argument, *inter alia*, counsel underlined the fact that there was considerable importation of dumped goods by Kerr in the first six months of 1995, as compared with the volumes imported into Canada in the same period in the previous year, prior to the issuance of the preliminary determination of dumping. Counsel also noted that there was no practice of having the subject goods sitting in inventory in Canada in the months of April and May.

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65. Public Pre-Hearing Staff Report, August 15, 1995, Tribunal Exhibit NQ-95-001-6, Administrative Record, Vol. 1 at 28-29.



As pointed out by counsel for Kerr in argument, the Tribunal has made findings of massive dumping in just a few cases. There are a number of elements that must exist before such a finding can be made. The Tribunal does not intend to enumerate them here or make a finding with respect to each of these elements. One of these elements, as noted by counsel for both sides, is that, before section 5 of SIMA can be invoked, it must appear “necessary to the Tribunal that duty be assessed on the imported goods” in order to prevent the recurrence of the injury caused by the massive dumping. In the words of counsel for the complainants, this is a sensitive issue and one which gives the Tribunal a fair amount of discretion to decide whether or not to penalize an importer with retroactive anti-dumping duties.

There is no question that there was a marked increase in imports of the subject goods in the first half of 1995. However, in light of the evidence before it, the Tribunal is not convinced that a finding of massive dumping is warranted in the present case. Bearing in mind, in particular, the level represented by the inventories of caps, lids and jars in terms of Kerr’s needs in a normal year, the Tribunal is of the view that it is not necessary for anti-dumping duties to be assessed retroactively in order to prevent a recurrence of injury.

### **CONCLUSION**

Based on the foregoing and on its examination of all the information on the record and the evidence adduced at the hearing, the Tribunal finds that the dumping in Canada of caps, lids and jars suitable for home canning, whether imported separately or packaged together, originating in or exported from the United States of America, has caused material injury to the domestic industry. The Tribunal also finds that the requirements of paragraph 42(1)(b) of SIMA with respect to massive dumping have not been met.

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

Desmond Hallissey  
Desmond Hallissey  
Member

Lise Bergeron  
Lise Bergeron  
Member

**CORRIGENDUM**

**TO THE FINDING OF OCTOBER 20, 1995**

Ottawa, Friday, October 20, 1995

**Inquiry No.: NQ-95-001**

IN THE MATTER OF an inquiry under section 42 of the *Special Import Measures Act* respecting:

**CAPS, LIDS AND JARS SUITABLE FOR HOME CANNING,  
WHETHER IMPORTED SEPARATELY OR PACKAGED TOGETHER,  
ORIGINATING IN OR EXPORTED FROM THE UNITED STATES OF AMERICA**

**FINDING**

The Canadian International Trade Tribunal, under the provisions of section 42 of the *Special Import Measures Act*, has conducted an inquiry following the issuance by the Deputy Minister of National Revenue of a preliminary determination of dumping dated June 22, 1995, and of a final determination of dumping dated September 20, 1995, respecting the importation into Canada of caps, lids and jars suitable for home canning, whether imported separately or packaged together, originating in or exported from the United States of America.

Pursuant to subsection 43(1) of the *Special Import Measures Act*, the Canadian International Trade Tribunal hereby finds that the dumping in Canada of caps, lids and jars suitable for home canning, whether imported separately or packaged together, originating in or exported from the United States of America, has caused material injury to the domestic industry. The Tribunal also finds that the requirements of paragraph 42(1)(b) of the *Special Import Measures Act* with respect to massive dumping have not been met.

Robert C. Coates, Q.C.

Robert C. Coates, Q.C.  
Presiding Member

Desmond Hallissey

Desmond Hallissey  
Member

Lise Bergeron

Lise Bergeron  
Member

Michel P. Granger

Michel P. Granger  
Secretary

The statement of reasons will be issued within 15 days.

**Inquiry No.: NQ-95-001**

Place of Hearing: Ottawa, Ontario  
Dates of Hearing: September 26, 27, 29 and 30, 1995  
  
Date of Finding: October 20, 1995  
Date of Corrigendum: October 25, 1995  
  
Tribunal Members: Robert C. Coates, Q.C., Presiding Member  
Desmond Hallissey, Member  
Lise Bergeron, Member  
  
Director of Research: Sandy Greig  
Lead Researcher: Ken Campbell  
Researcher: Shiu-Yeu Li  
  
Economist: Dennis Featherstone  
  
Statisticians: Po-Yee Lee  
Craig Dillabaugh  
  
Counsel for the Tribunal: Robert Desjardins  
  
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Consumers Packaging Inc.

**(Complainants)**

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David I.W. Hamer  
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**(Exporter)**