

Ottawa, Friday, May 31, 1996

Inquiry No.: NQ-95-004

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

BACTERIOLOGICAL CULTURE MEDIA ORIGINATING IN OR EXPORTED FROM THE UNITED STATES OF AMERICA AND PRODUCED BY OR ON BEHALF OF BECTON DICKINSON AND COMPANY OR PRODUCED BY OR ON BEHALF OF DIFCO LABORATORIES, THEIR RESPECTIVE SUCCESSORS AND ASSIGNS, AND BACTERIOLOGICAL CULTURE MEDIA ORIGINATING IN OR EXPORTED FROM THE UNITED KINGDOM AND PRODUCED BY OR ON BEHALF OF UNIPATH LIMITED, ITS SUCCESSORS AND ASSIGNS

FINDINGS

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 January 31, 1996, and of a final determination of dumping dated April 26, 1996, respecting the importation into Canada of bacteriological culture media originating in or exported from the United States of America and produced by or on behalf of Becton Dickinson and Company or produced by or on behalf of Difco Laboratories, their respective successors and assigns, and of bacteriological culture media originating in or exported from the United Kingdom and produced by or on behalf of Unipath Limited, its successors and assigns.

Pursuant to subsection 43(1) of the *Special Import Measures Act*, the Canadian International Trade Tribunal hereby finds that the dumping in Canada of the aforementioned goods originating in or exported from the United Kingdom and produced by or on behalf of Unipath Limited, its successors and assigns has not caused material injury to the domestic industry and is not threatening to cause material injury to the domestic industry.

In accordance with subsections 43(1) and 43(1.01) of the *Special Import Measures Act*, the Canadian International Trade Tribunal also finds that the dumping in Canada of the aforementioned goods originating in or exported from the United States of America and produced by or on behalf of Becton Dickinson and Company or produced by or on behalf of Difco Laboratories, their respective successors and assigns has not caused material injury to the domestic industry and is not threatening to cause material injury to the domestic industry.

Arthur B. Trudeau
Arthur B. Trudeau
Presiding Member

Anthony T. Eyton
Anthony T. Eyton
Member

Desmond Hallissey
Desmond Hallissey
Member

Michel P. Granger
Michel P. Granger
Secretary

The Statement of Reasons will be issued within 15 days.

Inquiry No.: NQ-95-004

Place of Hearing: Ottawa, Ontario
Dates of Hearing: April 29 to May 3, 1996
Date of Findings: May 31, 1996
Tribunal Members: Arthur B. Trudeau, Presiding Member
Anthony T. Eyton, Member
Desmond Hallissey, Member
Director of Research: Marcel J.W. Brazeau
Research Manager: Richard Cossette
Researcher: Shiu-Yeu Li
Economist: Marcie Doran
Statistical Officer: Margaret Saumweber
Counsel for the Tribunal: Joël J. Robichaud
Registration and Distribution Officer: Pierrette Hébert
Participants:
Robert J. Bertrand, Q.C.
Jean-Claude Thivierge
for Quélab Laboratories Inc.
(Domestic Producer)
Dalton J. Albrecht
Andrew D. Green
Markus Koehnen
for Becton Dickinson Canada Inc.
Becton Dickinson and Company
(Importer/Exporter)
Riyaz Dattu
John W. Boscarior
for Difco Laboratories
(Exporter)

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Riyaz Dattu
Colin S. Baxter
Debbie L. Wolanski
for Unipath North America, a Division of U L Canada Inc.
Unipath Limited

(Importer/Exporter)

Gregory O. Somers
for Fisher Scientific Limited

(Importer)



Ottawa, Monday, June 17, 1996

Inquiry No.: NQ-95-004

**BACTERIOLOGICAL CULTURE MEDIA ORIGINATING IN OR EXPORTED
FROM THE UNITED STATES OF AMERICA AND PRODUCED BY OR
ON BEHALF OF BECTON DICKINSON AND COMPANY OR PRODUCED BY
OR ON BEHALF OF DIFCO LABORATORIES, THEIR RESPECTIVE
SUCCESSORS AND ASSIGNS, AND BACTERIOLOGICAL CULTURE MEDIA
ORIGINATING IN OR EXPORTED FROM THE UNITED KINGDOM
AND PRODUCED BY OR ON BEHALF OF UNIPATH LIMITED,
ITS SUCCESSORS AND ASSIGNS**

Special Import Measures Act - Whether the dumping of the aforementioned goods has caused material injury or retardation 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 bacteriological culture media originating in or exported from the United States of America and produced by or on behalf of Becton Dickinson and Company or produced by or on behalf of Difco Laboratories, their respective successors and assigns, and of bacteriological culture media originating in or exported from the United Kingdom and produced by or on behalf of Unipath Limited, its successors and assigns, has not caused material injury to the domestic industry and is not threatening to cause material injury to the domestic industry.

Place of Hearing:	Ottawa, Ontario
Dates of Hearing:	April 29 to May 3, 1996
Date of Findings:	May 31, 1996
Date of Reasons:	June 17, 1996
Tribunal Members:	Arthur B. Trudeau, Presiding Member Anthony T. Eyton, Member Desmond Hallissey, Member
Director of Research:	Marcel J.W. Brazeau
Research Manager:	Richard Cossette
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Participants:

Robert J. Bertrand, Q.C.
Jean-Claude Thivierge
for Quélab Laboratories Inc.

(Domestic Producer)

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Debbie L. Wolanski
for Unipath North America, a Division of U L Canada Inc.
Unipath Limited

(Importer/Exporter)

Gregory O. Somers
for Fisher Scientific Limited

(Importer)

Witnesses:

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President
Quélab Laboratories Inc.

Carole Leroux
Certified Management Accountant Intern
Quélab Laboratories Inc.

Ron Torland
Chief Executive Officer
PML Microbiologicals

Douglas R. Johnstone
Manager, Corporate Marketing and
Service Product Systems
Becton Dickinson Canada Inc.

Paul André Gagnon
Head, Department of Pathology
Anna Laberge Hospital

Paul Poitras
Quélab Laboratories Inc.

Louise Desrosiers
Head, Microbiology and Pathology Module
Maisonneuve Rosemont Hospital

Dr. Robert P. Rennie
Clinical Microbiologist
University of Alberta Hospital

Phil Kelly
Key Account Manager
Microbiology Products
Becton Dickinson Canada Inc.

Jeannine Robitaille
Université Laval Hospital

Julie A. Fawcett
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Department of Agriculture

John C. Fanaras
President
Nucro-Technics Inc.

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Health and Social Services
Approvisionnement - Montréal

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Country Manager
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Marcus Jones
Manager and Chief Technologist
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and Regulatory Compliance
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U L Canada Inc.

Luc Massicotte
Laboratoire de Santé publique du Québec

Gerald A. Moore
President and Chief Executive Officer
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U L Canada Inc.

Ian E. Newman
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U L Canada Inc.

Mark Baldwin
Head of Customer Services
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Michael J. Smith
Vice-President, Clinical Diagnostics
Unipath Limited

Helene Guilmette
Market Manager
Fisher Scientific Limited

Lillian Berryman
Chief Technologist
Microbiology
Québec Saint-François d'Assise Hospital

Gerald J. Zamarka
Controller
Difco Laboratories

David H. Brookman
Laboratory Director
SGS - Laboratoires Alimentaires Bio-Lalonde
Une Division des Services de Surveillance SGS Inc.

David M. Burnett, Jr.
Vice-President, Manufacturing
Difco Laboratories

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Canadian International Trade Tribunal
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Ottawa, Monday, June 17, 1996

Inquiry No.: NQ-95-004

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

BACTERIOLOGICAL CULTURE MEDIA ORIGINATING IN OR EXPORTED FROM THE UNITED STATES OF AMERICA AND PRODUCED BY OR ON BEHALF OF BECTON DICKINSON AND COMPANY OR PRODUCED BY OR ON BEHALF OF DIFCO LABORATORIES, THEIR RESPECTIVE SUCCESSORS AND ASSIGNS, AND BACTERIOLOGICAL CULTURE MEDIA ORIGINATING IN OR EXPORTED FROM THE UNITED KINGDOM AND PRODUCED BY OR ON BEHALF OF UNIPATH LIMITED, ITS SUCCESSORS AND ASSIGNS

TRIBUNAL: ARTHUR B. TRUDEAU, Presiding Member
 ANTHONY T. EYTON, Member
 DESMOND HALLISSEY, 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*¹ (SIMA), has conducted an inquiry following the issuance by the Deputy Minister of National Revenue (the Deputy Minister) of a preliminary determination of dumping² dated January 31, 1996, and of a final determination of dumping³ dated April 26, 1996, respecting the importation into Canada of bacteriological culture media originating in or exported from the United States of America and produced by or on behalf of Becton Dickinson and Company or produced by or on behalf of Difco Laboratories, their respective successors and assigns, and of bacteriological culture media originating in or exported from the United Kingdom and produced by or on behalf of Unipath Limited, its successors and assigns.

On February 2, 1996, the Tribunal issued a notice of commencement of inquiry.⁴ In that notice, the Secretary of the Tribunal invited persons to notify the Tribunal whether they intended to make representations on the question of public interest, if the Tribunal made a finding of injury or threat of injury.

As part of the inquiry, the Tribunal sent detailed questionnaires to domestic producers, importers, purchasers and purchasing agents of bacteriological culture media. Respondents provided production, import, sales, pricing, financial, export and market information, as well as other information relating to

1. R.S.C. 1985, c. S-15, as amended by S.C. 1994, c. 47.
2. *Canada Gazette* Part I, Vol. 130, No. 7, February 17, 1996, at 525.
3. *Ibid.*, No. 19, May 11, 1996, at 1392.
4. *Ibid.*, No. 6, February 10, 1996, at 484.

bacteriological culture media, for the years from 1992 to 1995. From replies to the questionnaires and other sources, the Tribunal's research staff prepared public and protected pre-hearing staff and pricing reports.

Public and *in camera* hearings were held in Ottawa, Ontario, from April 29 to May 3, 1996. Quélab Laboratories Inc. (Quélab) was the only domestic producer which was represented by counsel and appeared at the public hearing. Difco Laboratories, Unipath Limited and Becton Dickinson and Company (exporters) and Unipath North America, a Division of U L Canada Inc., Becton Dickinson Canada Inc. and Fisher Scientific Limited (importers) were also represented by counsel at the hearing.

PRODUCTS

The Deputy Minister's preliminary and final determinations of dumping define the subject goods as bacteriological culture media originating in or exported from the United States of America and produced by or on behalf of Becton Dickinson and Company (Becton) or produced by or on behalf of Difco Laboratories (Difco), their respective successors and assigns, and bacteriological culture media (hereinafter referred to as BCM) originating in or exported from the United Kingdom and produced by or on behalf of Unipath Limited (Unipath), its successors and assigns.

BCM are preparations composed of chemical and organic materials such as agar, starch and casein. BCM are used to grow, detect and identify bacteria. Although there are some 800 different BCM, a very limited number of items account for the majority of sales. Each bacteriological culture medium has a unique composition and a distinct name and also differs by the method of utilization. The nature and dosage of the ingredients used in the preparation of each medium are public knowledge. The dosage of ingredients can vary somewhat from one manufacturer to the next. When mixed together, the ingredients lose their individual identity and form a powdery mixture ("dehydrated" form), to which water or, in some cases, an enriching supplement, such as blood, serum, antibiotics, etc., is added before use ("prepared" form). BCM are sold in both prepared form and dehydrated form.

To produce dehydrated BCM, each of the ingredients which goes into a formulation must undergo quality control testing, and the results must be similar to previous lots which were judged to be satisfactory. Once this stage is completed, the ingredients are pulverized into a fine powder. After the weighing of defined quantities, the ingredients are mixed according to a defined order and a pre-determined time frame. The mixture is then quarantined until the quality control department is satisfied with the lot. The BCM are then packaged according to demand.

At this stage, dehydrated BCM can be sold to producers of prepared BCM or to users, such as hospitals and laboratories, that are equipped and have the necessary expertise to make their own prepared BCM.

To produce prepared BCM, dehydrated BCM are weighed, hydrated with purified water and heated until complete dissolution. The subsequent liquid is sterilized, cooled and dispensed into pre-sterilized plastic Petri dishes (also referred to as "plates"). Supplements, such as animal blood and antibiotics, are added subsequent to sterilization and prior to dispensing. The prepared BCM in plates are packaged in bags and boxed for shipment.

Prepared BCM in tubes are produced in a similar fashion, except that, in most cases, the liquid BCM are dispensed into tubes and then sterilized. Quality control samples are pulled from the production batches and tested for sterility, performance, color, pH, etc. The BCM are stored in a quarantined area until released by the quality control department, after which they are warehoused in cold storage before shipment.

Dehydrated BCM are generally sold in quantities of 100 g, 125 g, 500 g, 2.5 kg or 10 kg. The most popular size is 500 g. Prepared BCM are generally sold in Petri dishes. This type of container is widely used in the industry and is of a standard size of 100 mm or 150 mm, with the 100-mm size considered the most popular. Prepared BCM are also available in tubes, bottles or vials.

Shelf life is an important consideration when storing and shipping BCM. Prepared BCM have a short shelf life (1 to 16 weeks) and are fragile products to store and deliver, since they can tolerate only a limited variation in temperature. Deliveries to customers can be as frequent as every few days. A different situation exists for dehydrated BCM, given their longer shelf life (between 3 and 5 years). Users of dehydrated BCM can thus stock up and purchase less frequently.

Because of the importance and sensitivity of a proper and timely diagnosis by users of BCM, quality and service are key considerations in the purchasing decision. Compliance with industry standards such as those of the National Committee for Clinical Laboratory Standards (NCCLS), while not mandatory for manufacturers in Canada, may also be required in laboratory applications, particularly in the industrial sector.

MARKETING AND DISTRIBUTION

BCM are used primarily in hospitals, but are also used in microbiology laboratories, research centres, private clinics and quality control laboratories in the agri-food, pharmaceutical and environmental industries.

Importers of BCM either sell directly to users or market the products through distributors for the Canadian market. Domestic producers sell directly to users, using their own sales force, or through distributors.

A significant proportion of sales by domestic producers and importers are made through the tendering process. Another important feature of the marketplace is the existence of hospital buying groups in Ontario and Quebec and of large national accounts. Because hospitals are major users of BCM, they often band together and mandate a purchasing agent to issue calls for tender and negotiate prices and other terms of sale. For example, the Montréal buying group represents 37 hospitals in the Montréal metropolitan region. Similarly, HealthPRO Procurement Services Inc., the amalgamation of the Hospital Purchasing Plan (HPP) and the Greater Toronto Health Care Purchasing Association (GTHCPA), represents close to 300 hospitals. The degree of adherence on the part of individual hospitals to such joint contract negotiations varies. Other large customers include private laboratories, such as Dynacare Laboratories, A Division of The Dynacare Health Group Inc. (Dynacare) and MDS Laboratory Services, a Division of MDS Health Group (MDS), that centralize purchasing for their multiple laboratories and for the hospitals which they manage across the country. A limited number of these buying groups and national accounts make up a very large proportion of the markets for dehydrated BCM and prepared BCM. The duration of a supply contract for an award may vary from one to several years. Multi-year contracts often contain pre-determined price escalation clauses.

DOMESTIC INDUSTRY

There are six domestic producers of BCM: Quélab, PML Microbiologicals (PML), Bio-Media Unlimited Ltd. (Bio-Media), Dalynn Laboratory Products Ltd., Kelran Microbiologicals and Medprep. Quélab and Bio-Media are the only producers of both dehydrated BCM and prepared BCM, while the four other producers produce only prepared BCM. In value terms, Quélab accounts for virtually all of the production of dehydrated BCM, while PML and Quélab are the two largest producers of prepared BCM, currently constituting well over 80 percent of domestic production.

Quélab, located in Montréal, Quebec, was founded in 1974. It commenced production of BCM in 1974. In 1989, Quélab acquired Frappier Diagnostic Inc., a wholly owned subsidiary of the Armand Frappier Institute, which, at that time, was Quélab's only competitor in Quebec in the prepared BCM market. Quélab produces or is capable of producing more than 800 different BCM at its manufacturing plant in Montréal. It also imported significant volumes of dehydrated BCM. In addition to BCM, Quélab manufactures other products, such as transport media, fertility products, hemoculture bottles, animal products, supplements, colorants and reactive products. Quélab also distributes laboratory equipment and supplies to the biomedical trade.

The BCM produced by Quélab are used principally in hospitals, but are also used in microbiology laboratories, research centres, private clinics and quality control laboratories in the agri-food, pharmaceutical and environmental industries. Quélab sells directly to users, using its own sales representatives in Quebec, Ontario and the Maritimes, while in Western Canada, Quélab sells BCM through distributors. Since the beginning of this year, sales to the Maritimes have been made through a reseller.

PML's U.S. parent company (PML U.S.) was founded in 1969 as Prepared Media Laboratory to manufacture and distribute prepared BCM. It was incorporated in Oregon in 1972 as Prepared Media Laboratory Inc. In the late 1970s, it began operating under the name "PML Microbiologicals." PML U.S. opened a manufacturing plant in Richmond, British Columbia, in 1982 and another manufacturing plant in Mississauga, Ontario, in 1985. Both Canadian plants are designed to manufacture prepared BCM and are set up to operate as branches of PML U.S. In December 1992, PML U.S. was acquired by Meda, Inc., a public company whose only operating entity is PML U.S.

PML U.S. has headquarters in Portland, Oregon, and also has a manufacturing facility in Tualatin, Oregon. PML manufactures a full line of prepared BCM in plates and in tubes and laboratory specimen collection kits at its Mississauga plant. The Richmond plant produces high-volume prepared BCM in plates, agar dilution plates and parasitology fixatives/transport vials.

PML sells its domestically produced and its imported BCM primarily to hospitals, private laboratories and industrial users, such as pharmaceutical companies, and makes only a limited use of distributors. It has two sales representatives in Canada, one in the east and one in the west.

In addition to Quélab and PML, there are four smaller producers of prepared BCM in Canada. These producers are, for the most part, local producers of BCM. They include: Bio-Media, North York, Ontario; Kelran Microbiologicals, Prince Albert, Saskatchewan, a company which produced in 1995 and stopped producing in early 1996; Dalynn Laboratory Products Ltd., Calgary, Alberta; and Medprep, a joint

venture formed between Unipath North America, a Division of U L Canada Inc. (Unipath Canada) and the London Health Sciences Centre, London, Ontario, which began operations in March 1995.

EXPORTERS AND IMPORTERS

The Deputy Minister's preliminary determination of dumping targeted three specific exporters of BCM, two in the United States and one in the United Kingdom.

The Department of National Revenue (Revenue Canada) identified five importers of BCM from the named exporters over the period of investigation, including Quélab and PML. Additional importers of BCM from the named exporters and importers of BCM from non-subject foreign suppliers were identified by the Tribunal's staff, and their imports are included in the import and market tables contained in the pre-hearing staff reports.

The three named exporters, i.e. Becton, Difco and Unipath, exported significant amounts of BCM over the period of inquiry. Becton exported both dehydrated BCM and prepared BCM over the period, while Difco and Unipath exported only dehydrated BCM. Other large exporters included Acumedia Manufacturing Inc. (Acumedia), in the United States, and PML U.S. Acumedia was the second largest U.S. exporter of dehydrated BCM after Difco and sold mostly to PML and Quélab, while PML U.S. was the largest exporter of prepared BCM in each of the last four years.

RESULTS OF THE DEPUTY MINISTER'S INVESTIGATION

The Deputy Minister's investigation covered shipments of BCM from the named exporters from January 1 to June 30, 1995. Given the large number of different BCM involved and the high volume of domestic sales to consider, the investigation covered only a sample of BCM shipped during the period. Each exporter was asked to provide information on the largest selling products until at least 60 percent of the value of their total shipments to Canada was covered for the period of investigation.

Approximately 97 percent of the value of the sampled BCM exported to Canada during the period of investigation were found to have been dumped. In the case of dehydrated BCM, the weighted average margin of dumping was 45.8 percent for Becton, 41.1 percent for Difco and 44.0 percent for Unipath. In the case of prepared BCM, the weighted average margin of dumping for Becton, the only exporter of prepared BCM over the period, was 19.0 percent.

SUMMARY OF POSITION OF PARTIES

Domestic Industry

Counsel for Quélab argued that, in this case, the main issue is one of price suppression caused by dumping. To this end, counsel reviewed the evidence relating to a number of important accounts, such as MDS, Dynacare, the Montréal buying group, the HPP and the GTHCPA, and concluded that, were it not for the dumped prices quoted by the named exporters, both Quélab and PML would have obtained higher prices for their BCM or retained more business. Counsel claimed that the predatory pricing practices of the named exporters have had the effect of almost eliminating the domestic industry, which has incurred major financial losses.

Counsel for Quélab noted that the final determination of dumping covered one class of goods. In their view, dehydrated BCM and prepared BCM are not sufficiently different to consider them as two separate classes of goods. However, counsel argued that, in the event that the Tribunal finds that there are two classes of BCM, it must conclude that Quélab is the only domestic producer of dehydrated BCM and that it has suffered material injury in the form of lost sales and market share, price suppression, reduced gross margins and net losses. According to counsel, there are two major producers of prepared BCM, Quélab and PML, that have both suffered material injury, mainly in the form of price suppression, reduced gross profit margins and net losses.

Counsel for Quélab claimed that counsel for the importers and for the exporters raised a number of false issues in order to detract from the real issue before the Tribunal. They noted that motions were filed relating to the availability of confidential information to them and the issue of whether or not Quélab represented the domestic industry for purposes of the inquiry. This had the effect of delaying the availability of the record to counsel for Quélab and, therefore, left little time to prepare for the hearing. It was argued that counsel for the importers and for the exporters wrongly compared Quélab to large multinationals, such as Becton and Difco, in terms of production know-how, technical expertise, adherence to certain standards, etc. It was conceded that Quélab cannot perform as do the large international producers in many of these areas, but that Quélab has the capability of producing acceptable dehydrated BCM and that it was not engaged simply in the re-packaging of dehydrated BCM, as suggested by counsel for the importers and for the exporters.

Counsel for Quélab argued that the evidence did not show that Quélab had major quality and service problems. Furthermore, according to counsel, the evidence did not show that the changing of buying patterns by users of BCM from the named exporters due to budget constraints was the cause of Quélab's problems. All of these, counsel argued, were false issues aimed at detracting from the real issue, that of dumping by the named exporters.

Finally, counsel for Quélab submitted that PML clearly supported its position before the Tribunal.

Exporters and Importers

Counsel for Becton took the position that low prices in the Canadian market and Quélab's financial difficulties were not attributable to dumping and that additional duties would not help Quélab. They argued that Quélab's problems were caused by changing purchasing trends in the market, quality and service issues unique to Quélab and financial difficulties of a historical nature dating back to the purchase of Frappier Diagnostic Inc. in 1989. According to counsel, cutbacks in government spending for health care, the development of concentrated buying groups, the increased use of tenders and the trend towards long-term contracts all contributed to maintain downward pressures on prices. Furthermore, the scale of complaints about Quélab's quality and servicing of BCM was evidence of a major problem. Counsel also noted the lack of capital investments at Quélab and argued that the facts of the case do not support its claims of lost sales, underutilization of capacity, price suppression and price erosion due to dumping.

Counsel for Becton reviewed the requirements of section 42 of SIMA and argued that there was not a major proportion of the domestic industry before the Tribunal. They noted that PML did not participate in the proceedings, except as a Tribunal witness, and offered no evidence of injury attributable to dumping. Counsel, therefore, argued that there was no material injury to a major proportion of the domestic industry.

Counsel for Becton noted that there was no significant increase in imports of BCM from the named exporters and, therefore, no market erosion, but that imports of BCM from non-subject foreign suppliers had grown significantly, while the market share of Becton Dickinson Canada Inc. (Becton Canada) remained steady. They noted that, although compliance with standards such as those of the NCCLS was not mandatory for domestic producers, many buyers require compliance with such standards. They pointed to the MDS and Dynacare contracts as examples of intra-domestic price competition and to price leadership by the domestic producers. They argued that these factors led prices downward. Finally, counsel argued that there was only one class of goods and that, in the event of a finding of injury, the Tribunal should direct Revenue Canada to commence an investigation against imports of BCM from non-subject suppliers in the United States, notably Acumedia and PML U.S., as there was evidence of dumping by these firms.

Counsel for Difco and counsel for Unipath submitted that there was no evidence on the record of production of dehydrated BCM by Quélab. They pointed to the evidence which showed that former employees and some users were not aware of any such production and that Quélab had not registered as a producer, as required under the *Medical Devices Regulations*.⁵ According to counsel, Quélab was not sufficiently transforming imported dehydrated BCM to make them new products, but was merely modifying and repackaging them. Counsel cited various court decisions in support of their position. They also noted that such alleged production accounted for a very small proportion of Quélab's total reported production.

Counsel for Difco and counsel for Unipath then argued that dehydrated BCM are a class of goods separate from prepared BCM, on the grounds that they do not have the same physical and market characteristics. This position, according to counsel, was supported by prior decisions of the Tribunal. Moreover, the evidence shows that most members of the industry treat dehydrated BCM and prepared BCM as separate and distinct classes of goods. If, however, the Tribunal were to find that there was only one class of goods, counsel argued that dehydrated BCM should be excluded, on the grounds that there is no domestic production. Counsel suggested that all of the domestic producers, except Quélab, want an exclusion for dehydrated BCM.

Contrary to counsel for Quélab, counsel for Unipath argued that the evidence showed that there existed a definite trend in the industry from dehydrated BCM to prepared BCM. Counsel also argued that there was no evidence of price suppression and price erosion. They submitted that PML's degree of commitment and support for Quélab's position was far from clear. Counsel added that an analysis of alleged lost sales of dehydrated BCM reveals that the impact of Difco and Unipath on Quélab's performance was negligible.

Counsel for Unipath argued that, if the Tribunal finds that there are two classes of goods, it ought not to find injury with respect to dehydrated BCM. In the event that the Tribunal does find injury with respect to dehydrated BCM, counsel argued that Difco and Unipath should be excluded from the finding, on the grounds that any injury to Quélab was not caused by these companies. Counsel noted that the witness for Quélab admitted this fact in cross-examination. In support of this request for producer exclusions, counsel referred to prior decisions of the Tribunal. According to counsel, when there is an exporter-specific case brought by the domestic industry, the industry has to make a case against each exporter.

5. C.R.C. 1978, c. 871.

As to the future, counsel for Unipath suggested that there is no basis for finding threat of injury in light of the evidence regarding market share patterns and participation in the dehydrated BCM market by Quélab.

Counsel for Fisher Scientific Limited (Fisher), an importer of dehydrated BCM from Difco, supported the arguments of counsel for Difco on the issues of classes of goods and domestic production of dehydrated BCM. He argued that the case law and the facts of the case suggested that, in the event of a finding of injury, there was no reason to distinguish between Difco imports and Acumedia imports, given their similar price levels, and that the Tribunal should advise the Deputy Minister accordingly pursuant to section 46 of SIMA. He claimed that losses of BCM sales by Quélab were insignificant and were not lost because of price. There is, therefore, no causal link between the dumping and any lost sales. He contended that the actual causes of injury to Quélab are not related to dumping, but to factors such as market perception of the Quélab's BCM, competition from PML, the negative impact of the abandonment of profitable distribution lines and the consequences of the acquisition of Frappier Diagnostic Inc. As regards the future, various issues, again not relating to dumping, such as the recent lack of improvement in price levels, PML's recent increase in capacity, its role in the marketplace and the continuing shift from dehydrated BCM to prepared BCM, come into play.

Counsel for Fisher maintained that, on the basis of the evidence, the Tribunal should find no injury, but that if it does find injury, it should exclude Difco.

REASONS FOR DECISION

Pursuant to section 42 of SIMA, as amended by the *World Trade Organization Agreement Implementation Act*,⁶ the Tribunal is required to "make inquiry ... as to whether the dumping or subsidizing of goods [to which the preliminary determination applies] ... has caused injury or retardation or is threatening to cause injury."⁷ "Injury" is defined in subsection 2(1) of SIMA as "material injury to a domestic industry." "Domestic industry" is defined, subject to certain exceptions, 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." In arriving at its decision, the Tribunal must therefore determine what are the "like goods" and, subsequently, identify the domestic producers of these goods that constitute the "domestic industry."

The Tribunal must then determine whether the domestic industry has suffered material injury and whether there is a causal link between the material injury suffered and the dumping of BCM from the named exporters. In the event that the Tribunal makes a finding of no injury, it must go on to consider the evidence relating to threat of injury and make a finding in respect of that question.

6. S.C. 1994, c. 47.

7. For a more detailed discussion of the Tribunal's views on the impact of the amendments to SIMA, see *Caps, Lids and Jars Suitable for Home Canning, Whether Imported Separately or Packaged Together, Originating in or Exported from the United States of America*, Inquiry No. NQ-95-001, Finding, October 20, 1995, Statement of Reasons, November 6, 1995.

Like Goods

The Tribunal must address two issues with respect to like goods in this case. First, it must determine which domestically produced goods are like BCM from the named exporters. Second, the Tribunal must determine whether those like goods should be divided into two classes or treated as one class of like goods.

Subsection 2(1) of SIMA defines “like goods,” in relation to any other 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.

Clearly, domestically produced goods meeting the description of BCM from the named exporters, as defined by the Deputy Minister in the final determination of dumping, constitute like goods that are identical in all respects to BCM from the named exporters. For purposes of this inquiry, the Tribunal finds that BCM, whether dehydrated or prepared, meeting the Deputy Minister’s definition and produced by the domestic industry constitute like goods to BCM from the named exporters.

In the preliminary and final determinations of dumping, the Deputy Minister identified only one class of goods, BCM. At the request of the Tribunal, the Deputy Minister provided separate margins of dumping for dehydrated BCM and prepared BCM. At the beginning of the hearing, the Tribunal indicated that it would hear evidence on the issue of two possible classes of goods, namely, dehydrated BCM and prepared BCM. The Tribunal recognizes that, if it finds that there is more than one class of goods, it must conduct separate analyses and make a decision with respect to each class.

In considering whether there is more than one class of goods, the Tribunal typically considers the characteristics of the goods, including their physical characteristics, such as appearance, their method of manufacture or composition, and their market characteristics, such as substitutability, pricing and distribution channels, and whether the goods fulfil the same customer needs.⁸

In the Tribunal’s view, the evidence shows that there are obvious and fundamental differences between dehydrated BCM and prepared BCM. Physically, they are clearly different. They have different shelf lives and different chemical compositions. Prepared BCM are subject to transportation difficulties, as they are sensitive to temperature variations.⁹ The evidence also shows that dehydrated BCM and prepared BCM do not compete directly with one another and cannot be substituted one for the other.¹⁰ Indeed, the evidence shows that the major users of dehydrated BCM are research laboratories which engage in non-clinical microbiology testing, while the major users of prepared BCM are hospitals and private laboratories which perform their testing in a clinical setting.

8. See, for example, *Sarco Canada Limited v. The Anti-dumping Tribunal*, [1979] 1 F.C. 247.

9. Exporter’s Exhibit D-1 at 24, Administrative Record, Vol. 13A.

10. Transcript of Public Hearing, Vol. 4, May 2, 1996, at 732; and Importer’s Exhibit B-1 at 4, Administrative Record, Vol. 13.

The evidence also shows that, while dehydrated BCM are used in the production of prepared BCM, the reverse is not true.¹¹ As noted earlier, dehydrated BCM are produced by combining certain chemical and organic materials, such as peptones, agar and casein. Each ingredient which is added must undergo quality control testing. Once this is completed, the ingredients are pulverized into a fine powder, weighed and mixed. Dehydrated BCM can be sold as is or be used as raw materials in the production of prepared BCM. The cost of dehydrated BCM represents a small percentage of the total cost of production of prepared BCM.¹² The production of prepared BCM involves a complex process of transformation of dehydrated BCM requiring trained laboratory technicians who perform various tasks, including the addition of distilled water to the dehydrated BCM, the boiling of the mixture, sterilization, the dissolution of the base medium, the addition of other ingredients or enrichments and quality testing.¹³

In sum, the Tribunal concludes that the present inquiry involves two classes of goods, namely, dehydrated BCM and prepared BCM. Accordingly, the question of whether dumping has caused or is threatening to cause material injury to the domestic industry must be considered separately for each class.

Domestic Industry

In a preliminary motion and, subsequently, at the hearing, counsel for the importers and for the exporters argued that there existed no grounds for finding “injury” to the “domestic industry” as defined in SIMA, since Quélab, the only domestic producer that appeared before the Tribunal to support a finding of injury, did not represent a major proportion of the total domestic production of like goods. According to counsel, the “complaint” was not made or supported by the “domestic industry,” nor could there be any evidence of “injury” to the domestic industry or a major proportion thereof. In the Tribunal’s view, this raised the issue of Quélab’s standing in this inquiry, as well as certain evidentiary issues.

The Tribunal ruled that SIMA does not provide that the Tribunal must find material injury exclusively to the domestic producers that support a finding of injury. The Tribunal was of the view that, unlike subsection 31(2) of SIMA, subparagraph 42(1)(a)(i) does not require “support” by domestic producers to trigger the Tribunal’s jurisdiction. Although, prior to the World Trade Organization (WTO) amendments to SIMA, the Tribunal did, in most cases, treat the “major proportion” issue as a standing requirement, it is of the view that the recent inclusion of a specific standing requirement before Revenue Canada in subsection 31(2) of SIMA now makes it clear that there is no such requirement before the Tribunal. In other words, the relevant provisions of SIMA go to the issue of injury and not standing.

As stated earlier, subparagraph 42(1)(a)(i) of SIMA provides that the Tribunal shall inquire into whether the dumping to which the preliminary determination applies has caused injury or retardation or is threatening to cause injury. The term “injury” is defined in subsection 2(1) of SIMA as “material injury to a domestic industry.” The term “domestic industry” is defined in subsection 2(1) of SIMA¹⁴ as follows:

11. Importer’s Exhibit B-1 at 4, Administrative Record, Vol. 13.

12. Importer/Exporter’s Exhibit E-3 at 9, Administrative Record, Vol. 13A.

13. Exporter’s Exhibit D-1 at 25, Administrative Record, Vol. 13A.

14. This definition incorporates Article 4.1 of the *WTO Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* and Article 16.1 of the *WTO Agreement on Subsidies and Countervailing Measures*.

“domestic industry” means, other than for the purposes of section 31 and subject to subsection (1.1), the domestic producers as a whole of the like goods or those domestic producers whose collective production of the like goods constitutes a major proportion of the total domestic production of the like goods except that, where a domestic producer is related to an exporter or importer of dumped or subsidized goods, or is an importer of such goods, “domestic industry” may be interpreted as meaning the rest of those domestic producers.

The Tribunal must, therefore, assess injury against the domestic producers as a whole, or those domestic producers whose production represents a major proportion of the total production of like goods. Having found that there are two classes of goods, the Tribunal must identify the domestic producers that constitute the “domestic industry” for each class.

Counsel for Difco and counsel for Unipath argued that there is no significant domestic production of dehydrated BCM. They argued that mere modification of an original manufacturer’s dehydrated BCM, which, according to the evidence, is what Quélab does, cannot be considered to be domestic production for purposes of SIMA. They also argued that any claims that Quélab has made to the effect that it produces dehydrated BCM “from scratch” must be carefully considered in light of its insignificant production volumes, the lack of proper equipment and quality control protocols, and the lack of market awareness or acceptance of its dehydrated BCM.

The evidence shows that Quélab adds certain ingredients to dehydrated BCM imported from Difco and Acumedia and that it performs a series of grinding, weighing, blending and quality control functions that give the modified product certain distinct qualities.¹⁵ The evidence also shows that Quélab produced very little dehydrated BCM “from scratch” over the period of inquiry¹⁶ and that it has the equipment and the know-how to produce such goods.¹⁷ In the Tribunal’s view, these activities are sufficient to constitute domestic production of dehydrated BCM.

For dehydrated BCM, the figures show that Quélab produced virtually all of the dehydrated BCM during the period of inquiry¹⁸ and, thus, represents a major proportion of the domestic industry. The Tribunal also notes that Bio-Media produced a minimal amount in 1994 and 1995.¹⁹

For prepared BCM, the figures show that Quélab and PML are the two largest producers of prepared BCM, representing well over 80 percent of domestic production.²⁰ As such, Quélab and PML represent a major proportion of the domestic industry. The fact that Quélab was the only domestic producer that was represented by counsel and appeared at the hearing to present evidence of material injury and causation is relevant to the weight to be attributed to the evidence in the Tribunal’s record relating to injury to the domestic industry.

15. Manufacturer’s Exhibit A-4 (protected), Administrative Record, Vol. 12.

16. Transcript of Public Hearing, Vol. 1, April 29, 1996, at 147 and 295-97.

17. Importer’s Exhibit B-4 (protected) at 10, Tab 4, Administrative Record, Vol. 14.

18. Protected Pre-Hearing Staff Report, April 2, 1996, Tribunal Exhibit NQ-95-004-7 (protected), Administrative Record, Vol. 2A at 14.

19. *Ibid.*

20. Public Pre-Hearing Staff Report, April 2, 1996, Tribunal Exhibit NQ-95-004-6, Administrative Record, Vol. 1A at 10.

In sum, the Tribunal finds that the requirement that it assess injury against at least a major proportion of the total domestic production of like goods has been met with respect to both dehydrated BCM and prepared BCM.

Background

In determining whether any injury resulted from the dumping of BCM from the named exporters, the Tribunal reviewed the key economic indicators over the period from 1992 to 1995 inclusive. The following table summarizes some of the key economic indicators in this inquiry. For reasons of confidentiality, only the index values of certain numbers have been released.

ECONOMIC INDICATORS (1992-95)				
	1992	1993	1994	1995
Total Production¹ (1992=100)				
Dehydrated	100	95	86	90
Prepared	100	125	158	191
Total Imports (\$000)				
Dehydrated ²	3,526	3,979	4,733	4,386
Prepared ³	1,593	1,524	1,700	2,205
Apparent Market (\$000)				
Dehydrated	3,562	3,733	3,754	3,993
% Change		5	1	6
Prepared	8,484	9,299	9,687	10,437
% Change		10	4	8
Total Employment¹ (1992=100)				
Employees	100	114	159	155
Hours Worked (000)	100	112	155	151
Capacity¹ (1992=100)				
Quélab - Dehydrated (500-g units)	100	100	100	100
- Prepared (plates)	100	100	100	100
PML (100-mm plates)	100	132	175	175

Source: Protected Pre-Hearing Staff Report, April 2, 1996, and revised April 22 and May 1, 1996, Tribunal Exhibits NQ-95-004-7, NQ-95-004-7A and NQ-95-004-7B (protected), Administrative Record, Vol. 2A at 2-76 and 76.1-76.5.

1. Represents index values, using 1992 as the base year.
2. Imports from the named exporters represented over two thirds of total imports of dehydrated BCM over the period.
3. Imports from Becton represented less than one half of total imports of prepared BCM over the period.

For dehydrated BCM, the Tribunal relied on production, import, sales, financial and pricing data from Quélab and on import, sales and pricing data from all known importers. For prepared BCM, the Tribunal relied on production, import, sales and pricing data from all known producers, on financial data supplied by Quélab and PML, and on import, sales and pricing data from all known importers. For both dehydrated BCM and prepared BCM, the Tribunal also relied on pricing data collected from purchasers and purchasing agents and on market characteristics data sought from producers, importers and purchasers/purchasing agents. Production, import and market data were compiled only on a value basis, given the fact that unit prices for both dehydrated BCM and prepared BCM vary significantly, due to the nature of the media and the variation in packages offered. In some instances in the following analysis, particularly with regard to dehydrated BCM, actual figures or specific details of contracts at certain accounts could not be released due to the confidentiality of the information.

Subsection 37.1(1) of the *Special Import Measures Regulations*²¹ (the Regulations) prescribes certain factors that the Tribunal may consider in determining whether a domestic industry has been injured by dumped or subsidized imports. These factors include the volume of dumped or subsidized goods and their effect on prices in the domestic market for like goods and the consequent impact of these imports on a number of economic factors, such as actual or potential declines in output, sales, market share, profits and return on investment.

Dehydrated BCM

Injury

In brief, counsel for Quélab argued that the dumping of dehydrated BCM from the named exporters had caused injury mainly in the form of lost market share, price suppression, lost sales and a reduction in gross margins and had caused the industry to incur net losses. Counsel for the exporters and for the importers disputed these claims and argued that Quélab's financial difficulties were due to factors unrelated to dumping.

Although imports of dehydrated BCM increased by 24 percent over the 1992-95 period, imports from the three named exporters made by importers other than the domestic producers increased by only 13 percent over the four-year period. Domestic producers of BCM, notably Quélab and PML, imported large quantities of dehydrated BCM from Acumedia over the period. They also imported sizeable quantities from Difco. Virtually all of Quélab's and PML's imports of dehydrated BCM were used for further transformation into either modified dehydrated BCM or prepared BCM. In terms of import share, imports from the named exporters made by importers other than the domestic producers declined by 7 percentage points over the period, while imports made by the domestic producers increased by roughly 7 percentage points.²² The combined share of all remaining imports, which consisted of imports from small exporters located in the United States (such as Anarobe Systems and Life Technologies, Inc.) and imports from Germany and France, remained relatively constant over the period and accounted for a very small share of total imports.

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

22. Protected Pre-Hearing Staff Report, April 2, 1996, Tribunal Exhibit NQ-95-004-7 (protected), Administrative Record, Vol. 2A at 50 and 51.

In value terms, the apparent market for dehydrated BCM rose by over \$0.4 million over the period of inquiry, an increase of about 12 percent. Demand for dehydrated BCM accounted for about 28 percent of the BCM market in 1995, with the remaining share held by prepared BCM. The major users of dehydrated BCM, according to the survey of purchasers conducted by the Tribunal's staff, are research laboratories engaged in non-clinical microbiology testing, in contrast to the prepared BCM market, where the majority of users are hospitals or private laboratories testing in a clinical setting. Unipath Canada and Fisher, the principal importer from Difco, are significant suppliers to the industrial sector of the BCM market, a segment in which Quélab has only a very limited presence. A majority of Becton Canada's BCM sales were made to the clinical sector over the period.²³

Only a small proportion of Quélab's BCM sales were made to the dehydrated BCM market in 1995. Further, Quélab's sales to the dehydrated BCM market comprised only a small fraction of the overall market, with the overwhelming share supplied by imports, particularly those from the three named exporters. Quélab's share of the dehydrated BCM market declined by 2 percentage points over the period of inquiry, while imports from the three named exporters increased their market share by 5 percentage points.²⁴

With regard to Quélab's claim of price suppression, the Tribunal considers that a key indicator is whether the traditional price spread between unit selling prices and unit costs is being maintained. The information indicates that Quélab's average unit selling price increases have closely matched increases in the unit cost of production over the last four years.²⁵ Because such average unit selling price and cost comparisons might be affected by product mix considerations, the Tribunal also looked at the specific pricing of certain high-volume items sold to the Montréal, Sherbrooke and Laurentides buying groups, which is based on Quélab's own data.²⁶ It is clear from this evidence that prices of high-volume dehydrated BCM have risen by healthy percentages in a significant number of cases, not only over the 1991-95 period but also in 1995 over 1994. In the Tribunal's view, Quélab's claim of price suppression, insofar as dehydrated BCM are concerned, is not founded.

Turning to allegations of lost sales, the Tribunal notes that only a small number of claims were made. Further, these claims covered only hospital buying groups located in Quebec. Quélab admitted that its case was more against Becton, which had entered the marketplace in 1990-91, while competition from Difco and Unipath was a relatively recent phenomenon.²⁷ A close examination of these claims reveals that Quélab had overstated their magnitude. For example, some of the sales claimed as lost by Quélab to dumped imports were not, in fact, lost. It was also noted that certain member hospitals of a buying group sometimes express a preference for BCM from a specific supplier. In these instances, the buying group must accommodate such a preference, regardless of price. In such cases, the link between lost sales and dumped prices is not obvious.

23. Protected Pre-Hearing Staff Report, April 2, 1996, Tribunal Exhibit NQ-95-004-7 (protected), Administrative Record, Vol. 2A at 33.

24. Protected Pre-Hearing Staff Report, April 2, 1996, Tribunal Exhibit NQ-95-004-7 (protected), Administrative Record, Vol. 2A at 53.

25. Tribunal Exhibit NQ-95-004-10.4A (protected), Administrative Record, Vol. 4 at 202 and 205.

26. Exporter's Exhibit D-13, Administrative Record, Vol. 13A.

27. Manufacturer's Exhibit A-4 (protected), paragraph 32, Administrative Record, Vol. 12; and Transcript of Public Hearing, Vol. 1, April 29, 1996, at 279-80.

There is no doubt that Quélab, after allowing for the foregoing factors, can show some losses at certain accounts over the period. However, as is the case in any market, particularly in one that has gone extensively to the open bidding process, all suppliers win and lose business. The net effect of any lost sales is best shown in the overall sales lost in a given year. In this regard, turning to Quélab's market sales, the Tribunal notes that its net loss of sales averaged less than 1 percent of the dehydrated BCM market in 1994 and 1995.²⁸ The Tribunal also believes that any increase in sales by imports of BCM from the named exporters to some of these accounts might well have been in response to Quélab's inability to adequately supply its customers due to its severe financial constraints. For example, Quélab has been excluded from the bidding process on dehydrated BCM to the Montréal buying group for 1996, on the basis of supply problems to some of the member hospitals experienced earlier.²⁹

Further, an analysis of evidence filed by purchasers does not establish a clear case of lost sales due to dumped prices at other accounts. In this regard, in response to the Tribunal's market characteristics questionnaires, it was stressed that quality was, by far, the most important factor affecting the purchasing decision, followed by price and security of supply.³⁰

The Tribunal also looked at responses to the other Tribunal questionnaires and to the testimony of user and industry witnesses to explain Quélab's inability to make or maintain sales. Based on this evidence, the Tribunal found many factors which place Quélab at a disadvantage against its competitors in the marketplace. For example, it notes that Quélab had a very limited sales force,³¹ which no doubt explains its lack of technical assistance to customers and complaint follow-up, which were the subject of much discussion during the hearing. Technical assistance through company representatives, technical information sheets, certificates indicating compliance with standards such as those of the NCCLS, certificates of analysis and technical manuals are very important to the BCM industry. Users of dehydrated BCM rely heavily on such aids to make their own prepared BCM, which may often require validation or accreditation.³² Quélab's shortcomings in these areas³³ contrast with the extensive technical assistance afforded by the three named exporters and their distributors.³⁴ It is not surprising that Quélab limited its claims of lost sales to Quebec, as it is not known by many industry observers and participants in Ontario and other parts of Canada to be a manufacturer of dehydrated BCM. The evidence also shows that Quélab is not cited as a reference in scientific literature and, thus, has limited scientific recognition. Finally, the Tribunal observes that a significant portion of Fisher's and Unipath Canada's sales were to the industrial sector,³⁵ a demanding sector in which Quélab has made no claims of lost business, given its limited presence.

28. Protected Pre-Hearing Staff Report, April 2, 1996, Tribunal Exhibit NQ-95-004-7 (protected), Administrative Record Vol. 2A at 53.

29. Testimony of Mr. Brouillard, Transcript of Public Hearing, Vol. 3, May 1, 1996, at 450-69.

30. Protected Pre-Hearing Staff Report, April 2, 1996, Tribunal Exhibit NQ-95-004-7 (protected), Administrative Record, Vol. 2A at 39.

31. Testimony of witness for Quélab, Transcript of Public Hearing, Vol. 1, April 29, 1996, at 313.

32. Exporter's Exhibit D-1 at 18-20, Administrative Record, Vol. 13A.

33. Transcript of Public Hearing, Vol. 4, May 2, 1996, at 708-709; and Importer/Exporter's Exhibit E-10 at 3, Administrative Record, Vol. 13A.

34. Importer's Exhibit B-17 at 4, Administrative Record, Vol. 13; Exporter's Exhibit D-1 at 18-20, Administrative Record, Vol. 13A; and Importer/Exporter's Exhibit E-7 at 5, Administrative Record, Vol. 13A.

35. Protected Pre-Hearing Staff Report, April 2, 1996, Tribunal Exhibit NQ-95-004-7 (protected), Administrative Record, Vol. 2A at 33.

In sum, while Quélab has lost some sales to each of the three named exporters, the Tribunal does not consider these losses to be significant. Further, the Tribunal is not convinced that dumping played a decisive role in many of the lost sales to the accounts cited by Quélab nor to other accounts analyzed by the Tribunal, given the number and importance of non-price factors, such as quality, security of supply and technical assistance, at play in the marketplace.

In assessing whether dumping has caused material injury to a domestic industry, the Tribunal also focusses closely on the industry's financial performance over a given period. Despite repeated requests, Quélab was unable to provide an income statement respecting sales of dehydrated BCM for the period of inquiry. The Tribunal carefully examined the record to find evidence relating to Quélab's financial performance regarding its sales of dehydrated BCM. The evidence that it could find was scant and consisted of *pro forma* income statements for seven top selling BCM for 1994³⁶ and derived gross margin calculations prepared by counsel for the exporters and for the importers.³⁷ The only conclusions that can be drawn are that Quélab appears to have suffered losses on certain high-volume BCM in 1994 and that its gross margins appear to have declined slightly in 1995 over 1994. In the Tribunal's view, such evidence is insufficient to enable it to clearly determine the financial impact of the dumping of dehydrated BCM from the named exporters on the industry's financial performance.

As noted earlier, Quélab stated that it manufactures a significant portion of its dehydrated BCM by modifying dehydrated BCM which it purchases from Difco and Acumedia, two U.S. companies. It adds certain ingredients to dehydrated BCM and performs a series of grinding, weighing, blending and quality control functions to impart to the modified dehydrated BCM the characteristics which distinguish Quélab's dehydrated BCM from those of other manufacturers. It does not appear from the evidence that there was very much production of dehydrated BCM "from scratch" over recent years, i.e. from the grinding, weighing and blending of raw ingredients. In the Tribunal's view, this method of producing modified dehydrated BCM on a relatively small scale, by repeating some of the steps already performed by the suppliers of dehydrated BCM, does not appear to be an economical way of producing dehydrated BCM.

Another factor that affected Quélab's financial performance, and which is unrelated to dumping, is the precarious financial situation that it has faced since the acquisition in 1989 of Frappier Diagnostic Inc., a wholly owned subsidiary of the Armand Frappier Institute. The acquisition of those assets was largely financed by debt, which was not matched by an increase in sales which that company had preceding the acquisition and which Quélab had hoped to obtain.³⁸ The loss of anticipated sales in relation to its large contracted debt caused Quélab to suffer losses soon after the acquisition.³⁹

While Quélab argued that Becton had started to export BCM in 1990-91, the Tribunal is unable to assess the role that any imports of dehydrated BCM might have played in Quélab's difficulties or whether BCM were dumped at that time. In fact, the witness for Quélab noted that some of the unrealized sales were

36. Manufacturer's Exhibit A-32 (protected), Administrative Record, Vol. 12.

37. Exporter's Exhibit D-9 (protected), Administrative Record, Vol. 14A, which is based on Quélab's response to the Tribunal's manufacturer's questionnaire, Tribunal Exhibit NQ-95-004-10.4A (protected), Administrative Record, Vol. 4 at 202 and 205.

38. Transcript of In Camera Session, Vol. 1, April 30, 1996, at 104-106; Manufacturer's Exhibit A-36 at 5, Administrative Record, Vol. 11; and Manufacturer's Exhibit A-4 (protected) at 11 and 12, Administrative Record, Vol. 12.

39. Manufacturer's Exhibit A-4 (protected) at 12, Administrative Record, Vol. 12.

due to transition problems arising from the acquisition.⁴⁰ The continued financial squeeze on Quélab eventually forced it to file a bankruptcy proposal in 1993, which limited its liquidity position and led it to curtail certain activities, such as abandoning production of high-volume BCM “from scratch⁴¹” and reducing its sales force,⁴² which, in turn, reduced its ability to service its customers. The Tribunal also notes that the bankruptcy proposal did not sufficiently address Quélab’s debt problem and that Quélab still carries a sizeable portion of that initial debt.⁴³ Quélab’s lack of liquidity also forced it to limit sales of distributed products,⁴⁴ which were consistently more profitable than sales of BCM over the 1993, 1994 and 1995 fiscal periods.⁴⁵

In conclusion, the Tribunal finds that, even though Quélab experienced a small loss of market share, its claims of price suppression and lost sales due to dumping are largely unfounded. While Quélab appears to have suffered financial losses, the Tribunal is persuaded that these apparent losses are due to factors unrelated to dumping. Therefore, the Tribunal finds that the dumping of dehydrated BCM from the three named exporters has not caused material injury to the domestic industry.

Threat of Injury

Having found that the dumping of dehydrated BCM from the named exporters has not caused material injury to the domestic industry, the Tribunal turns to consider whether it is threatening to cause material injury to the domestic industry. Subsection 37.1(2) of the Regulations prescribes a number of factors that the Tribunal may consider in making this determination. These include: the nature of the subsidy in question and the effects that it is likely to have on trade; whether there has been a significant rate of increase of BCM from the named exporters into Canada; and whether there is sufficient freely disposable capacity, or an imminent, substantial increase in the capacity of, in this case, the three named exporters. In addition, the Tribunal notes that, to make a finding of threat of injury, subsection 2(1.5) of SIMA requires that the “circumstances in which the dumping or subsidizing of goods would cause injury ... [must be] clearly foreseen and imminent.”

In this case, the Tribunal finds that there are no new factors likely to arise that would lead to a conclusion different from that in the past. Imports of dehydrated BCM from the named exporters by importers other than the domestic producers have actually declined as a share of total imports over the period.⁴⁶ Furthermore, there was no evidence presented suggesting excess capacity at the Becton, Difco and Unipath production facilities. The Tribunal also notes that imports have been supplying almost all of the demand for dehydrated BCM over the last several years. Therefore, there is no reason to expect imports to rise significantly in the future. With regard to recent events, the fact that Quélab has been excluded from the

40. Transcript of Public Hearing, Vol. 1, April 29, 1996, at 308-11.

41. Transcript of Public Hearing, Vol. 1, April 29, 1996, at 272-74.

42. Testimony of witness for Quélab, Transcript of Public Hearing, Vol. 1, April 29, 1996, at 313.

43. Transcript of In Camera Session, Vol. 1, April 30, 1996, at 104-109; and Tribunal Exhibit NQ-95-004-10.4 (protected), Administrative Record, Vol. 4 at 136.

44. Transcript of Public Hearing, Vol. 1, April 29, 1996, at 106-108.

45. Manufacturer’s Exhibit A-4 (protected) at 19, Administrative Record, Vol. 12.

46. Protected Pre-Hearing Staff Report, April 2, 1996, Tribunal Exhibit NQ-95-004-7 (protected), Administrative Record, Vol. 2A at 50.

bidding process on dehydrated BCM to the Montréal buying group for 1996 is due to reasons unrelated to dumping. For these reasons, the Tribunal finds that the dumping of dehydrated BCM is not threatening to cause material injury to the domestic industry.

Prepared BCM

Injury

In brief, counsel for Quélab argued that the dumping of prepared BCM from Becton had caused injury mainly in the form of lost market share, price erosion and suppression, lost sales and a reduction in gross margins and had caused the industry to incur net losses. Counsel for the exporters and for the importers disputed these claims and argued that Quélab's financial difficulties were due to factors unrelated to dumping. In its response to the Tribunal's questionnaire, PML made no specific claims of lost sales or price suppression or erosion, but did note that it experienced a compression of its gross margins due to dumping. PML did not file a notice of appearance as an interested party, but a representative of PML did appear as a Tribunal witness.

The apparent market for prepared BCM rose by almost \$2 million over the period of inquiry, an increase of about 23 percent. Quélab lost a sizeable share of this market over the 1992-95 period, while the combined market share held by other domestic producers of prepared BCM increased by almost the same amount. PML's market share from domestic production increased over the period, while its share from imports of prepared BCM remained constant. As noted earlier, Becton was the only exporter of the three named exporters that shipped prepared BCM over the period. The share of the market held by imports from Becton increased slightly over the period, while the combined share held by imports from all non-subject foreign suppliers remained relatively constant. A portion of the increase in Becton Canada's imports was in bottled prepared BCM, products which are not produced by Quélab and on which PML has made no claims of material injury. If Becton Canada's imports are reduced by the quantity of bottled prepared BCM imported over the period,⁴⁷ there is almost no change in its market share over the period. It should also be noted that PML's sales from imports of prepared BCM purchased from PML U.S. were consistently higher than Becton Canada's sales from its imports throughout the period.⁴⁸ Given the foregoing, the Tribunal is unable to conclude that the domestic industry suffered a loss of market share to dumped imports.

The Tribunal carefully examined the industry's allegations of price suppression and erosion. In this regard, it is important to note that PML, by far the largest domestic producer, was unable to cite any specific examples of price reductions or unsuccessful quotations due to dumped imports. Quélab, on the other hand, did provide, as part of its case, specific evidence of price suppression and erosion.

47. Tribunal Exhibit NQ-95-004-16.6A (protected), Administrative Record, Vol. 6A.1 at 168.5.

48. Protected Pre-Hearing Staff Report, April 2, 1996, Tribunal Exhibit NQ-95-004-7 (protected), Administrative Record, Vol. 2A at 54.

Turning to the evidence of price suppression, the Tribunal looked at the spread between unit selling prices and unit costs of production to verify whether a claim of price suppression could be made on prepared BCM. The evidence in this regard shows that, in Quélab's case, average unit selling price increases have closely matched increases in the unit cost of production over the last four years.⁴⁹ In the Tribunal's view, this evidence of average unit selling prices and unit costs of production does not lead to a conclusion of price suppression.

Turning to price erosion, Quélab provided price trend data for certain high-volume BCM to the Montréal buying group for the period from 1983 to mid-1995.⁵⁰ The information shows that prices fell steadily over the period from 1983 to mid-1992, but remained static over the period from mid-1992 to mid-1995. The Tribunal retains two points from this data; first, that prices fell over a period in which imports were absent from the Canadian marketplace (1983 to 1990); and second, prices to the Montréal buying group did not fall, but remained static between mid-1992 and mid-1995. However, the Tribunal notes that Quélab's prices to the Montréal buying group for the 1995-96 contract increased dramatically over the previous period.⁵¹

In further support of sales at a reduced price, Quélab also provided evidence of sales to two other accounts.⁵² The Tribunal found that these two claims were questionable. In one instance, the claim was exaggerated in terms of business lost, while in the other, the degree of price undercutting by Becton Canada was overstated by Quélab. In any event, the net amount of the value of price concessions claimed for these two accounts accounted for a minuscule portion of Quélab's total annual sales of prepared BCM in 1994 and 1995. Further, there are some examples of Quélab underbidding its competitors' prices at other accounts, as is discussed in the next paragraph.

In determining the role played by the dumping in eroding or suppressing prices, the Tribunal also looked to the specific pricing activity of the major suppliers of prepared BCM to establish any patterns in the bidding or which supplier initiated any price reductions. Pricing to the major customers is a strong indicator of such pricing behaviour. In this regard, the Tribunal looked at the bid levels of PML, Quélab, Becton Canada and any other bidders over the period from 1992 to the present to several accounts, including MDS, Dynacare, Excel Bestview, the Montréal buying group, the HPP, the GTHCPA, the Niagara buying group and the Sherbrooke buying group.⁵³ These accounts constitute almost one half of the prepared BCM market. The evidence shows clearly that it was more frequently PML (offering prepared BCM from its own domestic production or from its imports of prepared BCM from PML U.S.) and, to some extent, Quélab that were the price leaders in the bidding. In fact, Becton Canada was seldom the lowest bidder in the major accounts reviewed. Other suppliers, such as the smaller domestic producers, were sporadic bidders and were generally not successful in obtaining business at the large accounts.

49. Tribunal Exhibit NQ-95-004-10.4A (protected), Administrative Record, Vol. 4 at 202 and 205.

50. Manufacturer's Exhibit A-4 (protected) at 17, Administrative Record, Vol. 12.

51. Protected Pre-Hearing Pricing Report, April 2, 1996, Tribunal Exhibit NQ-95-004-36 (protected), Administrative Record, Vol.2A at 123.

52. Manufacturer's Exhibit A-20 (protected), Tables R-2 and R-3, Administrative Record, Vol. 12.

53. Details of these bid levels are found principally in the Protected Pre-Hearing Pricing Report, April 2, 1996, and the Addendum to the Protected Pre-Hearing Pricing Report, April 25, 1996, Tribunal Exhibits NQ-95-004-36 and NQ-95-004-36A (protected), Administrative Record, Vol. 2A at 96 and 137.1.

Counsel for the exporters and for the importers submitted that there are a number of trends in the domestic market that have contributed to maintaining downward pressures on prices in Canada. These factors include, first, the radical cutbacks in health care budgets implemented by the governments, second, the increased concentration of purchasing through buying groups, particularly in the clinical sector, third, the increased use of tenders, such as by the Montréal buying group, and the trend towards longer-term contracts,⁵⁴ and, finally, the trend towards greater purchasing on an item-by-item⁵⁵ basis, rather than awarding a tender on a total product category basis. The Tribunal turned to responses by purchasers and to the testimony of witnesses to confirm any strong trends in these market characteristics. It finds that the use of tenders rather than direct negotiations has been present for several years. However, there does appear to be an increased tendency, in recent years, to purchase through buying groups. For example, more individual hospitals have opted to purchase BCM through the Montréal buying group. The testimony suggests that the use of buying groups does appear to lead to lower prices.⁵⁶ The Tribunal also believes that government cutbacks have been particularly severe in recent years and have certainly exerted a strong negative effect on hospital budgets.⁵⁷ In the Tribunal's view, all of these factors were present over the period of inquiry in varying degrees and, together, contributed to keep a downward pressure on prices for prepared BCM. Given these numerous factors unrelated to dumping which have negatively affected market prices for prepared BCM, the Tribunal is unable to conclude that dumping played a major role in any price suppression or erosion experienced by the domestic producers.

In respect of lost sales, only Quélab provided specific claims of sales lost to dumped imports at specific accounts. PML was unable to cite any specific examples of lost sales. Quélab's allegations consisted of eight examples of lost or reduced sales to five accounts located in Quebec and Ontario.⁵⁸ The Tribunal closely examined each of the allegations to determine the role that dumped prices might have played in the purchasing decision. In one case, the business was lost to another domestic producer, while in two cases, Quélab was never a supplier over the period. In still another case, Quélab's share of the business actually increased between 1991 and 1995.⁵⁹

The Tribunal also found that, in some of these cases, non-price factors outweighed price in the purchaser's buying decision. For example, the Anna Laberge Hospital states that it stopped buying from Quélab because of quality concerns, while the Niagara buying group stated that Quélab had delivery and billing problems.⁶⁰ For the Montréal buying group contract, there was a switch from face-to-face negotiations (*gré à gré*) to a tendering process in 1995. For the 1995 tender to the Montréal buying group, Quélab roughly doubled its prices from the previous contract. These higher prices were, in fact, higher than

54. Transcript of Public Hearing, Vol. 1, April 29, 1996, at 82.

55. This practice, referred to as "cherry picking," involves comparing bids from various suppliers on an item-specific basis and selecting the successful suppliers of each of these items on the basis of the lowest bid price for each item.

56. Refer, for example, to the testimony of Mr. Boulais, Transcript of Public Hearing, Vol. 1, April 29, 1996, at 83.

57. Transcript of Public Hearing, Vol. 1, April 29, 1996, at 84-86.

58. Manufacturer's Exhibit A-19 (protected), Administrative Record, Vol. 12.

59. The name of this account is protected information.

60. Importer's Exhibit B-19 at 2-3, Administrative Record, Vol. 13; and Protected Pre-Hearing Staff Report, April 2, 1996, Tribunal Exhibit NQ-95-004-7 (protected), Administrative Record, Vol. 2A at 65.

Becton Canada's prices adjusted to reflect the margin of dumping. In the Tribunal's view, one cannot possibly claim this as a lost sale due to dumping, given such a price increase. Moreover, Quélab may well have lost some of the business because of this substantial price increase. Finally, some lots were specifically designated by the member hospitals to be supplied by Becton Canada only. On balance, the Tribunal is of the view that Quélab's claims of lost sales due to dumping are largely unfounded.

The Tribunal did not restrict its analysis respecting lost business to only those accounts raised by Quélab. It also looked to the comprehensive evidence filed in response to its various questionnaires and to the testimony of witnesses to establish whether the domestic industry had suffered lost sales to other accounts in the marketplace due to dumping. A review of instances where there was a full or a partial shift in supply from one supplier to another reveals that factors unrelated to dumping often appeared to have outweighed the offering of dumped prices in the decision to switch. These factors included quality, service and supply considerations and large price increases.

There were a number of non-price factors that may also explain some of the lost sales claimed by Quélab. As noted earlier, quality is of paramount importance to the buyers. Technical assistance and delivery were also cited as important factors when purchasing prepared BCM. In this regard, the shortcomings of Quélab with regard to quality, customer service and technical assistance were discussed extensively during the hearing. The Tribunal accepts, on the basis of the evidence adduced at the hearing, that Quélab did fall short in many of these areas, as a consequence of its limited resources caused by its difficult financial position.

As was noted in the section dealing with dehydrated BCM, it is normal for all suppliers to win and lose business in a market relying heavily on the tendering process to purchase BCM. Quélab and PML not only lost sales but also gained some at the expense of their competitors. For example, PML increased its market share over the period, while Quélab captured the Dynacare account, one of the largest health care groups in Canada. Becton Canada also suffered lost sales to the domestic producers at some accounts over the period, including the Laurentides and Sherbrooke buying groups. The Tribunal also found that there exists a significant degree of intra-industry competition in the prepared BCM market. A prime example is the aforementioned Dynacare contract, which Quélab captured from PML for 1996. There was no evidence of undercutting domestic prices at this account by Becton Canada. Another example is the Montréal buying group 1996 contract, where PML bid aggressively against Quélab, Becton Canada and Medprep.⁶¹ PML also retained the MDS account in 1995, the largest in Canada, at prices lower than the prices quoted by Becton Canada.⁶²

In brief, the Tribunal found that Quélab's allegations of sales lost due to dumped prices were largely unfounded. For other accounts reviewed by the Tribunal, factors unrelated to dumping often appeared to outweigh price in the purchaser's decision to switch its source of supply. Therefore, the Tribunal is unable to conclude that dumping played a key role in any lost sales experienced by the domestic industry.

61. Protected Pre-Hearing Staff Report, April 2, 1996, Tribunal Exhibit NQ-95-004-7 (protected), Administrative Record, Vol. 2A at 123; and Importer's Exhibit B-12 (protected), Attachment 1, Administrative Record, Vol. 14.

62. Protected Pre-Hearing Pricing Report, April 2, 1996, Tribunal Exhibit NQ-95-004-36 (protected), Administrative Record, Vol. 2A at 111; and Protected Pre-Hearing Pricing Report, revised May 1, 1996, Tribunal Exhibit NQ-95-004-36B (protected), Administrative Record, Vol. 2A at 137.35.

The Tribunal examined the domestic industry's financial performance over the period of inquiry to assess whether dumping had caused material injury. In this regard, it focussed on the financial data filed by Quélab and PML, which together represented over 80 percent of the domestic production of prepared BCM over the period.⁶³

Quélab did not provide an income statement relating solely to sales of prepared BCM, but it did file an income statement respecting all sales of BCM. However, because prepared BCM sales represent such a significant portion of all BCM sales, the income statement represents, to a large extent, the financial performance on sales of prepared BCM. The income statement shows that gross margins did not vary by more than 2 percentage points over the period from fiscal year 1992-93 to the 1995-96 interim period.⁶⁴ In fact, gross margins were higher in the latest interim period than in fiscal year 1992-93. While Quélab suffered net losses over the entire period, such losses expressed as a percentage of sales remained relatively constant.

The Tribunal is of the view that Quélab's financial difficulties are due to factors unrelated to dumping. As noted earlier, the precarious financial situation that it has faced since the acquisition of Frappier Diagnostic Inc. still has an impact on its overall financial situation. It has permeated many aspects of its operations, by limiting its room to manoeuvre. Because this factor alone has significantly affected Quélab's financial performance, the Tribunal is unable to conclude that the losses reported by Quélab are due to the dumping of prepared BCM by Becton.

PML's only claim of material injury caused by dumping consisted of the allegation that it suffered a compression of gross margins over the period. However, PML was unable to provide specific financial data to support this claim. PML did provide an income statement for its total Canadian sales.⁶⁵ However, this statement included a significant amount of sales of goods other than BCM. These data alone are not sufficiently precise to enable the Tribunal to assess the financial effects of dumping on PML's sales of prepared BCM.

In conclusion, the Tribunal finds that the domestic industry's claims of lost market share, price erosion, price suppression and lost sales due to the dumping of prepared BCM are largely unfounded. While Quélab appears to have suffered financial losses, the Tribunal is persuaded that these apparent losses are due to factors unrelated to dumping. The data presented by PML are not sufficiently precise to enable the Tribunal to assess the financial effects of dumping on PML's sales of prepared BCM. Therefore, the Tribunal finds that the dumping of prepared BCM from Becton has not caused material injury to the domestic industry.

63. Protected Pre-Hearing Staff Report, April 2, 1996, Tribunal Exhibit NQ-95-004-7 (protected), Administrative Record, Vol. 2A at 15.

64. Protected Pre-Hearing Staff Report, April 2, 1996, Tribunal Exhibit NQ-95-004-7 (protected), Administrative Record, Vol. 2A at 21.

65. Protected Pre-Hearing Staff Report, April 2, 1996, Tribunal Exhibit NQ-95-004-7 (protected), Administrative Record, Vol. 2A at 23.

Threat of Injury

The Tribunal also finds that the dumping of prepared BCM by Becton is not threatening to cause material injury to the domestic industry. Imports from Becton (excluding bottled prepared BCM) have not increased in a significant measure. There are no new circumstances or events that are foreseen that could lead to a different conclusion. As well, there was no evidence presented regarding any excess capacity at Becton's U.S. production facilities. In terms of recent developments, it is noted that Quélab captured the large Dynacare contract, which should afford it some degree of plant loading for the next few years. For its part, PML testified that, as a result of its re-structuring and investments in plant equipment and technology at its Toronto plant, it has effected a financial turnaround.⁶⁶

CONCLUSION

In light of the foregoing, the Tribunal concludes that the dumping of dehydrated BCM originating in or exported from the United Kingdom and produced by or on behalf of Unipath, its successors and assigns has not caused material injury to the domestic industry and is not threatening to cause material injury to the domestic industry.

The Tribunal further concludes that the dumping of dehydrated BCM originating in or exported from the United States and produced by or on behalf of Becton or produced by or on behalf of Difco, their respective successors and assigns has not caused material injury to the domestic industry and is not threatening to cause material injury to the domestic industry.

Finally, the Tribunal concludes that the dumping of prepared BCM originating in or exported from the United States and produced by or on behalf of Becton, its successors and assigns has not caused material injury to the domestic industry and is not threatening to cause material injury to the domestic industry.

Arthur B. Trudeau

Arthur B. Trudeau
Presiding Member

Anthony T. Eyton

Anthony T. Eyton
Member

Desmond Hallissey

Desmond Hallissey
Member

66. Transcript of Public Hearing, Vol. 2, April 30, 1996, at 367.