CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Monday, August 21, 2000

Request for Interim Review No.: RD-2000-001

IN THE MATTER OF a request for an interim review of the order made by the Canadian International Trade Tribunal on April 21, 1997, in Review No. RR-96-004, continuing, with amendment, its finding made on April 21, 1992, in Inquiry No. NQ-91-006, as amended on February 11, 1994, by the Tribunal's determination on remand (NQ-91-006 Remand [2]), in respect of review proceedings before the Binational Panel (Canadian Secretariat File No. CDA-92-1904-02), concerning:

MACHINE TUFTED CARPETING WITH PILE PREDOMINANTLY OF NYLON, OTHER POLYAMIDE, POLYESTER OR POLYPROPYLENE YARNS, EXCLUDING AUTOMOTIVE CARPETING AND FLOOR COVERINGS OF AN AREA LESS THAN FIVE SQUARE METRES, ORIGINATING IN OR EXPORTED FROM THE UNITED STATES OF AMERICA

ORDER

On April 15, 2000, Shaw Industries, Inc. filed, with the Canadian International Trade Tribunal, a request for an interim review of the above-mentioned order. Shaw Industries, Inc. was seeking an exclusion for custom-designed machine tufted carpeting which is made to order to the customers' specifications in respect of design, pattern and colour, manufactured using the patented Zimmer Chromojet jet dye technology and exported to Canada by Shaw Industries, Inc., and area rugs exceeding five square metres which are manufactured using the patented Zimmer Chromojet jet dye technology and exported to Canada by Shaw Industries, Inc. The Tribunal has decided, pursuant to subsections 76.01(3) and (4) of the *Special Import Measures Act*, not to conduct an interim review.

Pierre Gosselin
Pierre Gosselin
Presiding Member

Patricia M. Close
Patricia M. Close
Member

Zdenek Kvarda
Zdenek Kvarda
Member

Michel P. Granger
Michel P. Granger
Secretary

333 Laurier Avenue West
Ottawa, Ontario K1A 0G7
(613) 990-2452 Fax (613) 990-2439

333, avenue Laurier ouest
Ottawa (Ontario) K1A 0G7
(613) 990-2452 Téléc. (613) 990-2439

CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Monday, August 21, 2000

Request for Interim Review No.: RD-2000-001

IN THE MATTER OF a request for an interim review of the order made by the Canadian International Trade Tribunal on April 21, 1997, in Review No. RR-96-004, continuing, with amendment, its finding made on April 21, 1992, in Inquiry No. NQ-91-006, as amended on February 11, 1994, by the Tribunal's determination on remand (NQ-91-006 Remand [2]), in respect of review proceedings before the Binational Panel (Canadian Secretariat File No. CDA-92-1904-02), concerning:

MACHINE TUFTED CARPETING WITH PILE PREDOMINANTLY OF NYLON, OTHER POLYAMIDE, POLYESTER OR POLYPROPYLENE YARNS, EXCLUDING AUTOMOTIVE CARPETING AND FLOOR COVERINGS OF AN AREA LESS THAN FIVE SQUARE METRES, ORIGINATING IN OR EXPORTED FROM THE UNITED STATES OF AMERICA

STATEMENT OF REASONS

BACKGROUND

On April 21, 1997, the Canadian International Trade Tribunal (the Tribunal) issued an order in Review No. RR-96-004 continuing, with amendment, its finding made on April 21, 1992, in Inquiry No. NQ-91-006, as amended on February 11, 1994, by the Tribunal's determination on remand (NQ-91006 Remand [2]), in respect of review proceedings before the Binational Panel (Canadian Secretariat File No. CDA-92-1904-02), concerning machine tufted carpeting with pile predominantly of nylon, other polyamide, polyester or polypropylene yarns, excluding automotive carpeting and floor coverings of an area less than five square metres, originating in or exported from the United States of America.

On April 15, 2000, Shaw Industries, Inc. (Shaw) filed with the Tribunal, a request for an interim review of the above-mentioned order. Shaw was seeking an exclusion for "[c]ustom designed machine tufted carpeting, which is made to order to the customers' specifications in respect of design, pattern and colour manufactured using the patented Zimmer Chromojet jet dye technology and exported to Canada by Shaw Industries, Inc., and area rugs exceeding five square metres which are manufactured using the patented Zimmer Chromojet jet dye technology and exported to Canada by Shaw Industries, Inc.". The request for interim review was made pursuant to paragraph 76.01(1)(*b*) of the *Special Import Measures Act*.[1]

On May 5, 2000, pursuant to subrule 70(2) of the *Canadian International Trade Tribunal Rules*,[2] the Tribunal informed each party to review No. RR-96-004 of its receipt of the request and provided a copy of it to parties. Submissions concerning the request were to be filed by May 22, 2000. In response to the request, public and confidential submissions were filed on behalf of the Canadian Carpet Institute (CCI) and one of its member companies, objecting to an interim review. Subsequent to the filing of a declaration and

1. R.S.C. 1985, c. S-15 [hereinafter SIMA].
2. S.O.R. 91-499 [hereinafter Rules].

333 Laurier Avenue West
Ottawa, Ontario K1A 0G7
(613) 990-2452 Fax (613) 990-2439

333, avenue Laurier ouest
Ottawa (Ontario) K1A 0G7
(613) 990-2452 Téléc. (613) 990-2439

undertaking with the Tribunal in respect of the use, disclosure, reproduction, protection and storage of the confidential information on the record of the proceedings, as well as the disposal of such confidential information at the end of the proceedings or in the event of a change of counsel, submissions filed by the CCI were made available to counsel for Shaw. On June 22, 2000, Shaw filed a response to the CCI's submissions.

On June 30, 2000, the Tribunal requested supplementary information from the CCI. This information was provided by the CCI on July 10, 2000. On July 25, 2000, Shaw filed a reply submission.

POSITION OF PARTIES

Shaw

In its submission, Shaw requested an interim review for the purpose of obtaining an exclusion according to the same terms as the exclusion granted by the Tribunal to Durkan Patterned Carpet, Inc. (Durkan) and Bentley Mills Inc. (Bentley) in its order of April 21, 1997. In October 1998, Shaw acquired Queen Carpet Corporation (Queen), a large U.S. producer and exporter of machine tufted carpeting. In June 1998, Queen had purchased a Zimmer Chromojet machine.

Shaw submitted that the Zimmer Chromojet jet dye technology permits it to custom design and manufacture machine tufted carpeting of very large dimensions without repeating a pattern or containing a seam. The only other technology capable of producing similar carpeting is the Millitron dyeing and etching technology. Shaw noted that the Tribunal, in its 1992 finding, granted an exclusion to Milliken and Company, Inc. (Milliken) in respect of Millitron printed products. Shaw stated that no Canadian mill has a full-size production Zimmer machine as used by Shaw, Durkan and Bentley, nor a Millitron dyeing and etching machine as used by Milliken.

Shaw claimed that its carpeting produced on a Zimmer Chromojet machine was not harming the domestic industry, a fact demonstrated by the presence of Bentley, Durkan and Milliken for up to a decade in this Canadian niche market. According to Shaw, an exclusion for its imports would not only be equitable but provide the additional benefit of further competition and, consequently, lower prices for Canadian consumers.

In reply to the CCI's submissions, Shaw submitted that an interim review was warranted and that a hearing was required in order to address the issues raised in its request and to properly weigh the submissions by the CCI. In particular, Shaw questioned the sales forecasts provided by the CCI with respect to the production in Canada of goods for which the exclusion is requested. Shaw submitted that these forecasts were based only on intentions and sheer speculation of future production. Shaw also submitted that, notwithstanding the intention of a Canadian producer to manufacture the goods for which the exclusion is sought, it is most unlikely that domestic production of these goods for domestic consumption could be materially affected if the exclusion requested by Shaw were granted.

CCI

It was submitted by the CCI that an interim review was not warranted. It noted that the notice of expiry of the order made in Review No. RR-96-004 is expected to be issued in about one year with a new order to be issued in April 2002. Therefore, it would prefer to avoid the time and expense of an interim review at this time.

The CCI claimed that Shaw's request was very different from that of Durkan and Bentley, which are small specialty mills. Shaw, on the other hand, is generally perceived to be the largest supplier of tufted carpeting to the Canadian market. Moreover, Shaw's request contained no evidence that its products, patterned and coloured using the Zimmer Chromojet jet dye technology , were being underpriced in Canada by the Durkan or Bentley products, which are exempted from anti-dumping duties. If Shaw is seeking an exclusion in the absence of underpricing by competitors, the CCI suggests that Shaw may be preparing for aggressive price action against others.

The CCI also claimed that one of its member companies has purchased a Zimmer Chromojet production printer. That member company intends to manufacture the products for which an exclusion is sought by Shaw. These claims were supported by a confirmed purchase order and by business plans, including sales forecasts.

REASONS FOR DECISION

Subsection 76.01(1) of SIMA provides that the Tribunal may conduct an interim review of a finding or order. Such an interim review may concern the whole finding or order or any aspect of it. Pursuant to subsection 76.01(3), the Tribunal shall not conduct an interim review unless the requester satisfies the Tribunal that the review is warranted. Paragraph 72(*a*) of the Rules provides, in part, that, in order to decide whether an interim review is warranted, the Tribunal may request the parties to provide information concerning whether changed circumstances or new facts have arisen since the making of the order or finding. Similarly, the Tribunal's guideline on interim reviews indicates that an interim review may be warranted where there is a reasonable indication that sufficient new facts have arisen or that there has been a sufficient change in the circumstances that led to the order or finding.

In the Tribunal's opinion, interim reviews should only be undertaken when there are sufficiently compelling reasons to persuade the Tribunal to do so. New facts or a change of circumstances are not, in and of themselves, enough to warrant an interim review. In the Tribunal's opinion, the information on file in respect of a request must indicate a likelihood that an amendment to the order or finding would occur if an interim review were conducted. To initiate interim reviews on a lesser threshold would create an unacceptable level of uncertainty in the duration and durability of a finding or order and would be costly for the parties involved. Proceedings under SIMA are often complex and burdensome, and it would not be reasonable to permit the reopening of a case, or part of one, on a lesser standard.

In the present case, since the last order, new facts have arisen on both the exporter and domestic industry sides. On the exporter side, Shaw now has a Zimmer Chromojet production printer at its disposition through its acquisition of Queen. Shaw would, therefore, like to benefit from an exclusion similar to the one granted in 1997 to Durkan and Bentley for the production of their carpets using the Zimmer Chromojet jet dye technology. These exclusions were granted by the Tribunal in 1997 because the domestic industry did not have this technology at that time and, therefore, could not produce the patterned carpeting covered by the exclusion.

However, on the domestic industry side, a domestic producer has recently ordered a Zimmer Chromojet production printer. According to the evidence, the domestic producer will be using this technology in less than a year to produce goods for which Shaw is requesting an exclusion. Moreover, planned production levels are significant. These new facts on the domestic industry side are no less significant to the Tribunal's deliberations on this matter than the new facts brought by the exporter. In considering a product exclusion such as that requested by Shaw, it has been the Tribunal's practice, in injury

inquiries or expiry reviews, to grant them only under exceptional circumstances.[3] In past cases of this type, the main criterion relied on by the Tribunal in determining whether to exclude a particular product has been whether the domestic industry produces the product.[4] The Tribunal has also considered such factors as whether there is any domestic production of substitutable or competing products[5] and whether the domestic industry is an "active supplier" of the product.[6] In short, where the domestic industry produces goods that are considered to be the same as or directly competitive with the goods for which an exclusion is requested, the request has typically been denied. Where these circumstances were present, the Tribunal has not, generally, proceeded to consider specifically the question as to whether the products covered by the exclusion requested had caused or would cause injury to the domestic industry. For the purpose of determining whether an interim review is warranted, the Tribunal considers it appropriate to take into account the principles developed with respect to product exclusions in conducting injury inquiries or expiry reviews.

The Tribunal notes that the above-cited cases deal with current production, whereas the present case deals with pending production. However, in the Tribunal's opinion, where future production is imminent and well-documented, as it is in this case, the principles and considerations enunciated in the above cases continue to be relevant. In this context, Shaw's request to obtain an exclusion for goods that are about to be produced domestically is similar to requests that have been regularly denied in the past. This does not indicate a likelihood that an amendment to the order would be made if an interim review were conducted.

For the foregoing reasons, the Tribunal does not consider that there are sufficient grounds to warrant an interim review. Accordingly, the Tribunal will not conduct an interim review.

Pierre Gosselin
Pierre Gosselin
Presiding Member

Patricia M. Close
Patricia M. Close
Member

Zdenek Kvarda
Zdenek Kvarda
Member

3. *Certain Corrosion-resistant Steel Sheet Products*, *Finding* (29 July 1994), *Statement of Reasons* (15 August 1994), NQ-93-007 (CITT); and *Certain Oil and Gas Well Casing Made of Carbon Steel*, *Finding* and *Statement of Reasons* (5 July 1996), RR-95-001 (CITT).
4. *Ibid*.
5. See, for example, *Machine Tufted Carpeting, Finding* (21 April 1992), *Statement of Reasons* (6 May 1992), NQ-91-006 (CITT).
6. See, for example, *Certain Hot-rolled Carbon Steel Plate and High-strength Low-alloy Plate, Heat-treated or Not, Findings* (6 May 1993), *Statement of Reasons*, (21 May 1993) NQ-92-007 (CITT).