



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Dumping and Subsidizing

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## ORDER AND REASONS

Interim Review Nos. RD-2011-001  
and RD-2011-003

Aluminum Extrusions

*Order issued  
Thursday, November 15, 2012*

*Reasons issued  
Thursday, November 29, 2012*

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IN THE MATTER OF an interim review, pursuant to paragraph 76.01(1)(b) of the *Special Import Measures Act*, of the findings made by the Canadian International Trade Tribunal on March 17, 2009, in Inquiry No. NQ-2008-003, as amended by its determination made on February 10, 2011, in Inquiry No. NQ-2008-003R, concerning:

**THE DUMPING AND SUBSIDIZING OF ALUMINUM  
EXTRUSIONS ORIGINATING IN OR EXPORTED FROM THE  
PEOPLE'S REPUBLIC OF CHINA**

**ORDER**

The Canadian International Trade Tribunal, pursuant to paragraph 76.01(1)(b) of the *Special Import Measures Act*, has conducted an interim review of its findings made on March 17, 2009, in Inquiry No. NQ-2008-003, as amended by its determination made on February 10, 2011, in Inquiry No. NQ-2008-003R, concerning the dumping and subsidizing of aluminum extrusions produced via an extrusion process of alloys having metallic elements falling within the alloy designations published by The Aluminum Association commencing with 1, 2, 3, 5, 6 or 7 (or proprietary or other certifying body equivalents), with the finish being as extruded (mill), mechanical, anodized or painted or otherwise coated, whether or not worked, having a wall thickness greater than 0.5 mm, with a maximum weight per metre of 22 kg and a profile or cross-section which fits within a circle having a diameter of 254 mm, originating in or exported from the People's Republic of China.

Pursuant to paragraph 76.01(5)(b) of the *Special Import Measures Act*, the Canadian International Trade Tribunal hereby makes no amendment to its findings.

Jason W. Downey

Jason W. Downey  
Presiding Member

Serge Fréchette

Serge Fréchette  
Member

Stephen A. Leach

Stephen A. Leach  
Member

Dominique Laporte

Dominique Laporte  
Secretary

The statement of reasons will be issued within 15 days.

Place of Hearing: Ottawa, Ontario  
Dates of Hearing: April 10 to 12, 2012

Tribunal Members: Jason W. Downey, Presiding Member  
Serge Fréchette, Member  
Stephen A. Leach, Member

Research Director: Matthew Sreter

Senior Economist: Simon Glance

Counsel for the Tribunal: Alain Xatruch

Manager, Registrar Programs and Services: Michel Parent

Registrar Officer: Cheryl Unitt

**PARTICIPANTS:****Domestic Producers**

Almag Aluminum Inc.  
Apel Extrusions Limited  
Can Art Aluminum Extrusions Inc.  
Dajcor Aluminum Ltd.  
Extrudex Aluminum  
Metra Aluminum Inc.  
Sapa Canada Inc.  
Signature Aluminum Canada Inc.  
Spectra Aluminum Products Ltd./Spectra  
Anodizing Inc.

**Counsel/Representatives**

Ronald C. Cheng  
Devin Doyle

**Importers/Exporters/Others**

Acme Glass Ltd.  
Aluminart Products Limited  
  
Formex Building Products Inc.  
LIV Outdoor International Inc.  
MAAX Bath Inc.  
  
Pacific Shower Doors (1995) Ltd.  
Regal Ideas Inc.

**Counsel/Representatives**

Lakhwinder Sahota  
  
Gordon LaFortune  
Vincent Routhier  
  
Dale Rivers  
  
Cyndee Todgham Cherniak  
  
Gordon LaFortune  
Vincent Routhier  
  
Jules Frederick Wilkins  
  
Gordon LaFortune

**WITNESSES:**

Mario Albert  
Vice-President, Purchasing and Supply Chain  
Management  
MAAX Bath Inc.

Frank Raponi  
President & CEO  
Aluminart Products Limited

Jules Frederick Wilkins  
President  
Pacific Shower Doors (1995) Ltd.

Bob Peacock  
President  
Almag Aluminum Inc.

Mike Flynn  
President  
Apel Extrusions Limited

Mike Kilby  
President  
Dajcor Aluminum Ltd.

Martin Gingras  
Director, Purchasing and Outsourcing  
Metra Aluminum Inc.

Anubhav (Anu) Agarwal  
Vice-President, Finance  
Aluminart Products Limited

Vito Smolenski  
Corporate Purchaser  
Aluminart Products Limited

Maurizio Bertato  
President  
LIV Outdoor International Inc.

Jeffrey S. Henderson  
Director of Marketing and Business Development  
Sapa Extrusions

B. David Hudson  
President & CEO  
Spectra Aluminum Products Ltd.

Kevin Blades  
Director, Engineering & Design  
Dajcor Aluminum Ltd.

Lothar Stiem  
Controller  
Can Art Aluminum Extrusions Inc.

Please address all communications to:

The Secretary  
Canadian International Trade Tribunal  
333 Laurier Avenue West  
15th Floor  
Ottawa, Ontario  
K1A 0G7

Telephone: 613-993-3595  
Fax: 613-990-2439  
E-mail: [secretary@citt-tcce.gc.ca](mailto:secretary@citt-tcce.gc.ca)

## STATEMENT OF REASONS

### BACKGROUND

1. On June 29, 2011, the Canadian International Trade Tribunal (the Tribunal) received a request from MAAX Bath Inc. (MAAX Bath) for an interim review, pursuant to section 76.01 of the *Special Import Measures Act*,<sup>1</sup> of the Tribunal's findings made in Inquiry No. NQ-2008-003,<sup>2</sup> as amended by the Tribunal's determination made in Inquiry No. NQ-2008-003R<sup>3</sup> (the findings), concerning the dumping and subsidizing of aluminum extrusions produced via an extrusion process of alloys having metallic elements falling within the alloy designations published by The Aluminum Association commencing with 1, 2, 3, 5, 6 or 7 (or proprietary or other certifying body equivalents), with the finish being as extruded (mill), mechanical, anodized or painted or otherwise coated, whether or not worked, having a wall thickness greater than 0.5 mm, with a maximum weight per metre of 22 kg and a profile or cross-section which fits within a circle having a diameter of 254 mm, originating in or exported from the People's Republic of China (China) (the subject goods).
2. MAAX Bath specifically requested that the Tribunal exclude from the scope of the findings certain aluminum extrusions imported by MAAX Bath for use in the assembly of shower enclosures. These aluminum extrusions consist of aluminum parts developed by MAAX Bath since the findings were issued, aluminum parts that would be subject to an existing product exclusion but which have been amended slightly to change their colour and/or finish with the result that they no longer qualify for the product exclusion, aluminum parts that are imported as parts of kits and aluminum parts transferred to Canada from MAAX Bath's facility in Southampton, Pennsylvania.
3. In the alternative, MAAX Bath requested that the Tribunal exclude from the scope of the findings all aluminum extrusions imported by MAAX Bath from any Chinese producer for use in the assembly of shower enclosures. MAAX Bath also requested that the product exclusions be granted with retroactive effect.
4. On July 12, 2011, the Tribunal determined that the request for an interim review was properly documented in the manner prescribed by subrule 70(1) of the *Canadian International Trade Tribunal Rules*<sup>4</sup> and, on July 13, 2011, in accordance with subrule 70(2), it informed all parties to *Aluminum Extrusions* and *Aluminum Extrusions Remand* of its receipt of the request and gave them an opportunity to make representations concerning the request.
5. On July 28, 2011, Almag Aluminum Inc. (Almag), Apel Extrusions Limited (Apel), Can Art Aluminum Extrusions Inc. (Can Art), Extrudex Aluminum (Extrudex), Metra Aluminum Inc. (Metra), Signature Aluminum Canada Inc. (Signature) and Spectra Aluminum Products Ltd./Spectra Anodizing Inc. (Spectra) collectively filed submissions opposing the request for an interim review filed by MAAX Bath.
6. On August 11, 2011, MAAX Bath filed reply submissions to the submissions of the above-mentioned domestic producers.

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1. R.S.C. 1985, c. S-15 [*SIMA*].

2. *Aluminum Extrusions* (17 March 2009) (CITT) [*Aluminum Extrusions*].

3. *Aluminum Extrusions* (10 February 2011) (CITT) [*Aluminum Extrusions Remand*].

4. S.O.R./91-499 [*Rules*].

7. On September 28, 2011, the Tribunal received a request from Aluminart Products Limited (Aluminart) for an interim review, pursuant to section 76.01 of *SIMA*, of the findings. Aluminart specifically requested that the Tribunal exclude from the scope of the findings certain aluminum extrusions imported by Aluminart for use in the production of finished goods, including entry doors, storm doors and retractable screens. In the alternative, Aluminart requested that the Tribunal exclude from the scope of the findings all aluminum extrusions imported from China by Aluminart for use in the production of finished goods. Aluminart also requested that the product exclusions be granted with retroactive effect.

8. On October 24, 2011, the Tribunal determined that the request for an interim review received from Aluminart was properly documented in the manner prescribed by subrule 70(1) of the *Rules* and, on October 26, 2011, in accordance with subrule 70(2), it informed all parties to *Aluminum Extrusions* and *Aluminum Extrusions Remand* of its receipt of the request and gave them an opportunity to make representations concerning the request.

9. On November 10, 2011, Almag, Apel, Can Art, Dajcor Aluminum Ltd. (Dajcor), Extrudex, Metra, Signature and Spectra collectively filed submissions opposing the request for an interim review filed by Aluminart.

10. On November 24, 2011, Aluminart filed reply submissions to the submissions of the above-mentioned domestic producers.

11. On the basis of the submissions received regarding the requests filed by MAAX Bath and Aluminart, the Tribunal decided that an interim review of the findings was warranted and, on January 11, 2012, issued a notice of commencement of interim review.<sup>5</sup> Having regard to the fact that the requests dealt with the same domestic industry and that they essentially raised the same issues, and having regard to its desire to optimize its access to the best evidence available and reduce unnecessary duplication, the Tribunal decided, pursuant to rule 6.1 of the *Rules*, to combine both requests for an interim review and to proceed with a single interim review. The Tribunal also decided, pursuant to paragraph 25(a) of the *Rules*, to proceed with this interim review by way of an oral hearing.

12. The Tribunal indicated, in its notice of commencement of interim review, that the purpose of the interim review was to determine if the findings should be amended to exclude the products for which MAAX Bath and Aluminart requested exclusions. Submissions already filed by parties were placed on the record of the interim review. The Tribunal asked that any further submissions by parties address all factors relevant to the interim review, including the criteria that the Tribunal should use in determining the level of integration that is necessary for suppliers to be able to meet MAAX Bath and Aluminart's specific requirements, the domestic industry's ability to meet these requirements and the date on which the exclusions, should they be granted, should become effective. Submissions and reply submissions were received from a number of parties.

13. A hearing with public and *in camera* testimony was held in Ottawa, Ontario, from April 10 to 12, 2012. Aluminart, LIV Outdoor International Inc. (LIV), MAAX Bath, Pacific Shower Doors (1995) Ltd. (PSD) and Regal Ideas Inc. (Regal) filed submissions, provided evidence and made arguments in support of product exclusions.<sup>6</sup> All these parties, save for Regal, presented witnesses at the hearing. Acme Glass Ltd.

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5. C. Gaz. 2012.I.76.

6. The Tribunal notes that, during the course of the present interim review, it received separate requests from PSD, Regal and LIV for a further interim review of the findings to exclude certain additional aluminum extrusions. These requests are being held in abeyance pending the outcome of the present interim review.

(Acme) and Formex Building Products Inc. (Formex) also filed submissions in support of product exclusions, but did not appear at the hearing. Almag, Apel, Can Art, Dajcor, Extrudex, Metra, Sapa Canada Inc. (Sapa), Signature and Spectra (the domestic extruders) filed submissions, provided evidence and made arguments opposing the granting of product exclusions. All these parties, save for Extrudex and Signature, presented witnesses at the hearing.

14. Before proceeding with its analysis, the Tribunal believes that, in order to gain a proper understanding of the issues that are relevant in the context of the present interim review, it is necessary to review how it handled the requests for product exclusions made by MAAX Bath and Aluminart in *Aluminum Extrusions* and how it later handled MAAX Bath's request in *Aluminum Extrusions Remand*. The Tribunal will also address its decision to conduct an interim review.

### **Tribunal's Inquiry in *Aluminum Extrusions***

15. On November 18, 2008, the Tribunal, pursuant to section 42 of *SIMA*, initiated an inquiry to determine whether the dumping and subsidizing of the subject goods had caused injury or retardation or were threatening to cause injury to the domestic industry. In its notice of commencement of inquiry,<sup>7</sup> the Tribunal indicated that it would proceed by way of written submissions with respect to requests for product exclusions and would not hear oral testimony and argument on those requests. During the course of the inquiry, both MAAX Bath and Aluminart filed requests for product exclusions.<sup>8</sup>

16. On March 17, 2009, at the conclusion of the inquiry, the Tribunal found that the dumping and subsidizing of the subject goods had caused injury to the domestic industry. As part of its injury analysis, the Tribunal considered whether factors other than the dumping and subsidizing might have been responsible for the injury experienced by the domestic industry. One of the factors considered was the alleged lack of integration in the range of services, such as finishing and fabrication, offered by the domestic industry. The Tribunal stated the following:

224. In light of the above, the Tribunal is of the view that the domestic industry has integrated to meet purchasers' most frequent requests for custom-shaped extrusions. Due to the infrequency of requests for certain services, the Tribunal is of the view that it is reasonable to use subcontractors to fulfil special or infrequently requested demands.

225. Nonetheless, the Tribunal notes that there is evidence that certain purchasers have specific requirements that would be better fulfilled by a fully integrated extruder and that a domestic extruder that is not integrated to a certain level may not be suitable. Therefore, the Tribunal does acknowledge that the domestic industry may have lost sales due to service limitations and that these losses would not be inconsequential. However, the Tribunal has not attributed to the dumping and subsidizing of the subject custom shapes any injury resulting from these lost sales and does not consider that any impact of service limitations on the performance of the domestic producers during the [period of inquiry] negates the injury caused by imports of the subject custom shapes.

17. Although the Tribunal went on to exclude certain products from its injury findings, it did not exclude those products for which MAAX Bath and Aluminart had requested exclusions. The Tribunal denied the requests made by MAAX Bath and Aluminart in the following manner:

361. The Tribunal denies the nine requests for product exclusions filed by Aluminart . . . , which concern various aluminum extrusions that are used in the production of aluminum storm

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7. C. Gaz. 2008.I.3071.

8. The Tribunal received a total of 119 requests for product exclusions from 34 different entities. Taken together, these requests covered over 2,000 individual products.



doors. . . . In reviewing the technical drawings submitted by the parties opposing the requests, it became clear that they have the capability to produce goods with similar revised thicknesses and tolerances as they likely should have appeared in the request. Furthermore, the Tribunal notes that Aluminart provided no evidence to support its claims that attempts were made to purchase, from the domestic producers, the products for which exclusions were requested.

. . .

368. The Tribunal denies the request for product exclusion filed by MAAX Bath, which concerns aluminum extrusions that are used in the assembly of shower enclosures. . . . the Tribunal considered the allegation of MAAX Bath that no single domestic producer has the capability to produce the full range of products that it requires. In this respect, MAAX Bath provided evidence demonstrating that, out of five domestic producers which were contacted, none were capable of producing the full range of products for which an exclusion is requested. However, as stated earlier, as long as domestic producers, as a whole, are capable of producing the requested products (including products which are sent to finishers and fabricators), the Tribunal should reject the request. No evidence was provided which would indicate that this is not the case. Moreover, the Tribunal notes that the parties opposing the request provided evidence that indicated that they supplied MAAX Bath prior to its sourcing of products from China. In the Tribunal's opinion, there is insufficient evidence to support the request for product exclusion and it is therefore denied, as it applies to those products that may be considered subject goods at the time of importation.

[Footnotes omitted]

18. In reaching these decisions, the Tribunal relied exclusively on the written submissions received from MAAX Bath, Aluminart and the domestic extruders as part of the product exclusion process.<sup>9</sup>

19. On April 15, 2009, MAAX Bath filed a notice of application for judicial review of the Tribunal's injury findings, including the denial of its request for product exclusions, with the Federal Court of Appeal (the Court). Aluminart did not, for its part, file any such notice nor did it participate in the proceeding instituted by MAAX Bath.

### **Judgment of the Court**

20. On February 16, 2010, the Court heard MAAX Bath's application for judicial review and, on February 24, 2010, it allowed the application in part.<sup>10</sup> While the Court stated that the Tribunal's injury findings had not been shown to be unreasonable, it did set aside the Tribunal's decision to deny MAAX Bath's request for product exclusions and referred the matter back to the Tribunal for reconsideration and re-determination.

21. The Court's reasons read as follows:

[51] The evidence adduced by the applicant before the Tribunal is that as a result of a change in its manufacturing strategy, it began to look for a single supplier capable of providing a range of services fulfilling its particular needs and was unable to identify such a source within the domestic industry. As a result, it resorted to a Chinese supplier having that capacity . . . . The Tribunal, in an apparent reference to this evidence (and that of others) (reasons, para. 215), explains earlier in its reasons – in identifying factors other than dumping which may have caused injury – the difficulty confronting purchasers with specific requirements given the absence of fully integrated extruders in the domestic industry (reasons, para. 225):

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9. *Aluminum Extrusions* at paras. 333, 342.

10. *MAAX Bath Inc. v. Almag Aluminum Inc.*, 2010 FCA 62 (CanLII) [*MAAX Bath Inc.*].

...

[52] I understand the Tribunal to be saying that the domestic industry may have lost meaningful sales due to the absence of fully integrated extruders, but that these losses have not been taken into account in assessing injury since they are due to a lack of capacity and hence cannot be attributed to dumping or subsidizing.

[53] To the extent that the applicant, as it argues, comes within the class of purchasers identified by the Tribunal in this passage and had to resort to its foreign supplier due to the absence of a fully integrated supplier in the domestic industry – a matter which the Tribunal is in the best position to determine – it was not open to the Tribunal to deny the exclusion claimed on the basis that the domestic industry “as a whole” is capable of fulfilling the applicant’s needs. In other words, the applicant on the one hand cannot be found to require the services of a fully integrated extruder when assessing the causes for injury and on the other hand be found to be adequately served by the industry “as a whole” when the time comes to assess the product exclusion.

[54] In the circumstances, the appropriate remedy is to remit the matter back to the Tribunal on this narrow issue so that the Tribunal may reconsider the question whether the applicant is entitled to the product exclusion which it claimed taking into account the finding made in paragraph 225 of its reasons.

[55] I would therefore allow the application for judicial review, set aside the decision of the Tribunal insofar as it relates to the product exclusion claimed by the applicant and refer the matter back to the Tribunal for reconsideration and re-determination in conformity with these reasons. The application for judicial review should otherwise be dismissed. . . .

### **Tribunal’s Determination in *Aluminum Extrusions Remand***

22. On February 10, 2011, following protracted remand proceedings during which MAAX Bath and a number of the domestic extruders filed additional submissions and information,<sup>11</sup> the Tribunal determined that MAAX Bath was entitled to the product exclusions that it had requested for certain aluminum extrusions used in the assembly of shower enclosures. The Tribunal therefore excluded these aluminum extrusions from its injury findings.

23. In its statement of reasons, the Tribunal explained that it understood the Court’s strict instructions as requiring it to determine whether MAAX Bath was a “certain purchaser” as described at paragraph 225 of its statement of reasons in *Aluminum Extrusions* and that, if MAAX Bath was found to be such a purchaser, it then could not deny the requested product exclusions based on the fact that the domestic industry “as a whole” was capable of fulfilling MAAX Bath’s needs.<sup>12</sup>

24. In order to determine whether MAAX Bath was a “certain purchaser”, the Tribunal took the following approach:

28. Therefore, in order to determine whether MAAX Bath is a “certain purchaser” as described in its statement of reasons, the Tribunal must determine (1) whether MAAX Bath has specific requirements that would be better fulfilled by a fully integrated extruder and (2) whether there is an integrated domestic extruder that is capable of fulfilling MAAX Bath’s needs by providing it with the full range of fabrication and finishing services that it requires. Related to these determinations is also the question of whether MAAX Bath’s Chinese supplier is a fully integrated extruder. . . .

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11. The Tribunal notes that these remand proceedings were conducted exclusively by way of written submissions.

12. *Aluminum Extrusions Remand* at para. 25.

25. The Tribunal then answered these questions as follows:

31. The Tribunal accepts MAAX Bath's claim that it has specific requirements that would be better fulfilled by a fully integrated extruder. MAAX Bath has made it clear that the aluminum extrusions that are the subject of its request for product exclusions are produced in multiple types of coatings and finishes and are for use in the assembly of its high-end shower enclosures, which require high-quality standards with respect to consistency of fit and finish. In order to meet these high standards, MAAX Bath argued that it cannot mix and match aluminum extrusions from various producers—they must be provided by a single fully integrated extruder. . . .

. . .

34. The Tribunal also accepts MAAX Bath's claim that no single domestic extruder is fully integrated such that it can offer the full range of fabrication and finishing services that MAAX Bath requires. In this respect, MAAX Bath provided the Tribunal with a confidential table which outlines all of the finishing and fabrication services offered by the domestic extruders and MAAX Bath's Chinese supplier [i.e. China Square]. On the basis of this information, which was not contradicted by any evidence submitted by the domestic extruders, it is clear that no single domestic extruder can offer the full range of fabrication and finishing services that MAAX Bath requires for high-end products.

35. MAAX Bath submitted convincing accounts of how it attempted, on more than one occasion, to source its requirements domestically but was unable to do so. . . .

. . .

39. In the absence of any submissions by the domestic extruders and on the basis of the information provided by MAAX Bath, the Tribunal determines that China Square is a fully integrated extruder. . . .

40. In light of the foregoing, the Tribunal determines that MAAX Bath is a "certain purchaser" as described at paragraph 225 of its statement of reasons. . . .

[Footnotes omitted]

26. Having determined that MAAX Bath was a "certain purchaser", the Tribunal next set out to determine whether MAAX Bath was entitled to the product exclusions that it requested, keeping in mind that it could not deny the exclusions based on the fact that the domestic industry "as a whole" was capable of fulfilling MAAX Bath's needs. The Tribunal determined as follows:

44. In the Tribunal's view, it is clear that MAAX Bath purchases the aluminum extrusions contained in the exclusion list from China Square because no single domestic extruder can offer the full range of fabrication and finishing services that it requires. Therefore, it follows that, when these extrusions are purchased from China Square by MAAX Bath, any resulting injury to the domestic industry cannot be attributed to the dumping and subsidizing of the subject goods. In these circumstances, it cannot be said that the request is too broad or lacks distinctiveness. The aluminum extrusions covered by the request must be considered as a group of extrusions that are to be purchased from a single fully integrated extruder. . . .

45. As the Tribunal is aware of no other valid basis, in the context of this remand, upon which the request for product exclusions should be denied, the Tribunal determines that MAAX Bath is entitled to the product exclusions that it requested.

27. Finally, the Tribunal determined the terms upon which the exclusions were to be granted. It stated as follows:

51. The Tribunal has generally held that any exclusion to a finding should be defined as generically as possible to avoid potential trade distortions and unfair competitive advantages.

However, in the specific and unique circumstances of this case, which are the result of the Court's remand, the Tribunal is of the view that the exclusions should be granted on a firm-specific basis. In the Tribunal's view, to do otherwise would pose significant risks of circumvention, which could result in injury to the domestic industry. Accordingly, the Tribunal will grant exclusions for those aluminum extrusions contained in the exclusion list that are purchased by MAAX Bath from China Square for use in the assembly of shower enclosures. . . .

[Footnote omitted]

### **Tribunal's Decision to Conduct an Interim Review**

28. Subsection 76.01(1) of *SIMA* states that, at any time after the making of an order or finding described in any of sections 3 to 6, the Tribunal may, on its own initiative or at the request of the Minister of Finance, the President of the Canada Border Services Agency (CBSA) or any other person or government, conduct an interim review of (a) the order or finding, or (b) any aspect of the order or finding. Further, subsection 76.01(3) states that the Tribunal shall not conduct an interim review at the request of any person or government unless the person or government satisfies the Tribunal that the interim review is warranted.

29. In determining whether an interim review is warranted, the Tribunal usually considers whether there is a reasonable indication that sufficient new facts have arisen since the making of the order or finding, or that there has been a sufficient change in the circumstances that led to the order or finding.<sup>13</sup> It also may consider whether there are sufficient facts that, although in existence, were not put into evidence during the previous expiry review or inquiry and were not discoverable by the exercise of reasonable diligence at that time.<sup>14</sup>

30. In its request for an interim review, MAAX Bath alleged that there were changed circumstances or new facts that warranted an interim review and amendment of the findings to exclude the four categories of aluminum extrusions covered by its request. In particular, it submitted that it could not have foreseen the need to seek product exclusions for these aluminum extrusions during the Tribunal's injury inquiry as, at that time, they either did not exist, were believed to be non-subject goods or were not intended to be imported. It further submitted that the Tribunal's determination in *Aluminum Extrusions Remand* that MAAX Bath was a "certain purchaser" also constituted a changed circumstance that warranted an interim review.

31. In its request for an interim review, Aluminart submitted that the Tribunal's determination in *Aluminum Extrusions Remand*, which it claimed fully defined the term "certain purchaser", introduced the changed circumstances that justified an interim review and amendment of the findings to exclude the aluminum extrusions covered by its request. It submitted that, as it is itself a "certain purchaser", it is in an equivalent position to all other "certain purchasers" and should thus be entitled to treatment equivalent to that accorded by the Tribunal to these other "certain purchasers".

32. After reviewing the requests filed by MAAX Bath and Aluminart, and taking into consideration the submissions received from parties opposed to the initiation of an interim review, the Tribunal was satisfied that sufficient new facts had arisen or that there had been a sufficient change in circumstances, such that an interim review of the findings was warranted. It therefore initiated an interim review, pursuant to paragraph 76.01(1)(b) of *SIMA*, to determine if the findings should be amended to exclude the products for which MAAX Bath and Aluminart requested exclusions.

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13. See rule 72 of the *Rules* and the Tribunal's *Guideline on Interim Reviews*.

14. *Ibid.*

33. However, before proceeding any further, the Tribunal would like to address a few of the arguments made by the domestic extruders opposing the initiation of an interim review. With respect to MAAX Bath, the domestic extruders submitted that its request for an interim review, insofar as it pertained to two of the four categories of aluminum extrusions covered by the request, was both premature and inappropriate because it attempted to circumvent the remedial procedure established in sections 56 to 62 of *SIMA* for disputes dealing with whether imported goods are subject to a Tribunal order or finding. In their view, section 76.01 of *SIMA* only provides the Tribunal jurisdiction to consider a request for an interim review after the statutory scheme established in the aforementioned sections has been exhausted by a party to a dispute with the CBSA on whether imported goods are subject to an existing Tribunal order or finding.<sup>15</sup>

34. The Tribunal disagrees. The re-determination and appeal process provided for under sections 56 to 62 of *SIMA*, which includes an appeal to the Tribunal under section 61 and a further appeal to the Court under section 62, allows importers to challenge determinations made by the CBSA regarding whether imported goods are of the same description as goods to which an order of finding of the Tribunal applies (i.e. whether they are subject to an order or finding), and regarding the normal value and export price of, or the amount of subsidy on, imported goods. On the other hand, interim reviews conducted pursuant to section 76.01 allow the Tribunal to review its orders or findings, or any aspect thereof. Tribunal orders and findings concern matters of injury, including threat of injury and likely injury, to domestic producers of goods caused by the dumping or subsidizing of similar goods. As requests for product exclusions are, in essence, based on claims that the importation of certain goods does not cause injury to domestic producers, they can be made by way of requests for interim reviews.<sup>16</sup>

35. On the basis of the foregoing, it is clear that the re-determination and appeal process set out under sections 56 to 62 of *SIMA* and interim reviews conducted pursuant to section 76.01 pertain to entirely different matters. While they both have the potential to be used by importers to achieve the same end result (i.e. to have certain goods imported free of anti-dumping and countervailing duties), this does not change the fact that they are fundamentally different in nature. Accordingly, the Tribunal can see no reason why it should find that a party must exhaust one process before engaging the other. Indeed, there are no provisions under *SIMA* which require or indicate that an importer, in seeking a product exclusion, must first proceed by way of the re-determination and appeal process. Had Parliament intended for this to be the case, it could have said so expressly.

36. The Tribunal notes that the issue of whether the aluminum extrusions for which MAAX Bath requested exclusions are of the same description as the goods to which the findings apply was clearly not raised in the context of the current interim review. The CBSA considers those aluminum extrusions as being subject to the findings, and MAAX Bath has not argued otherwise in this interim review. In fact, MAAX Bath's only claim in this interim review is that the importation of those aluminum extrusions does not cause injury to the domestic industry and that they should thus be excluded from the findings. Such a claim could never have been addressed by way of the process set out under sections 56 to 62 of *SIMA*.<sup>17</sup>

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15. In support of their position that persons engaged in a remedy process provided by statute must exhaust their rights and remedies under that process before attempting to seek any other remedy, the domestic extruders relied on a number of court decisions, including *Toyota Tsusho America Inc. v. Canada (Canada Border Services Agency)*, 2010 FC 78 (CanLII), *Toyota Tsusho America Inc. v. Canada (Border Services Agency)*, 2010 FCA 262 (CanLII), and *Canada (Border Services Agency) v. C.B. Powell Limited*, 2010 FCA 61 (CanLII).

16. However, requests for product exclusions are more commonly made during injury inquiries and expiry reviews.

17. See *Levolor Home Fashions Canada v. President of the Canada Border Services Agency* (22 May 2012), AP-2011-015 (CITT) at para. 18.

37. Finally, the case law cited by the domestic extruders, which stands for the general proposition that recourse to judicial review can only be had after all adequate remedial recourses in the administrative process have been exhausted, is not relevant in this instance. An interim review is clearly not a judicial review of decisions made under sections 56 to 62 of *SIMA*. Furthermore, as seen above, the re-determination and appeal process under sections 56 to 62 and interim reviews under section 76.01 are unrelated processes which pertain to different matters.

38. With respect to Aluminart, the domestic extruders submitted that the Tribunal's determination in *Aluminum Extrusions Remand* did not constitute a new fact or changed circumstance upon which Aluminart could base its request for an interim review. They submitted that, unlike MAAX Bath, Aluminart did not make submissions in *Aluminum Extrusions* that it was a "certain purchaser" and did not seek judicial review of the Tribunal's decision to deny its requests for product exclusions. Thus, in their view, Aluminart's request for an interim review was simply a second attempt at obtaining product exclusions after failing to obtain them in *Aluminum Extrusions*.

39. In *Aluminum Extrusions*, the Tribunal denied Aluminart's requests for product exclusions because the evidence demonstrated that the domestic extruders had the capability to produce goods with the wall thicknesses and tolerances required by Aluminart.<sup>18</sup> However, Aluminart's requests did suggest that it was claiming to be in a position similar to MAAX Bath (i.e. that it was a "certain purchaser" that had specific requirements that would be better fulfilled by a single fully integrated extruder). More specifically, Aluminart claimed that the products for which it requested exclusions had to be produced by a single fully integrated extruder to ensure a perfect fit and finish and that attempts at procuring such products from domestic producers had not been successful due to their inability to meet all its requirements.<sup>19</sup>

40. The Court's decision in *MAAX Bath Inc.* made it clear that, to the extent that MAAX Bath was a "certain purchaser", the Tribunal could not deny an exclusion on the basis that the domestic industry "as a whole" could fulfill MAAX Bath's needs.<sup>20</sup> In *Aluminum Extrusions Remand*, the Tribunal then determined that MAAX Bath was a "certain purchaser" (i.e. that its specific requirements could not be met domestically by a single fully integrated extruder) and that it was therefore entitled to the product exclusions that it had requested.

41. As Aluminart had, for all intents and purposes, raised the same arguments as MAAX Bath in its requests for product exclusions during the injury inquiry, the Tribunal's determination in *Aluminum Extrusions Remand* provided a changed circumstance insofar as it indicated that Aluminart's requests could now potentially lead to the granting of exclusions. Therefore, although Aluminart's request for an interim review did, strictly speaking, constitute a second attempt at obtaining product exclusions, given the aforementioned changed circumstance, the initiation of an interim review was warranted.

42. Moreover, the fact that Aluminart decided not to seek judicial review of the Tribunal's decision to deny its requests for product exclusions is irrelevant, as the changed circumstance brought about by the Tribunal's determination in *Aluminum Extrusions Remand* was sufficient to justify the initiation of an interim review. The Tribunal also notes that section 76.01 of *SIMA* provides it with a great deal of discretion in determining whether to conduct an interim review.

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18. *Aluminum Extrusions* at para. 361.

19. Tribunal Exhibit NQ-2008-003-36.27, Administrative Record in *Aluminum Extrusions*, Vol. 1.4C at 7, 9; Tribunal Exhibit NQ-2008-003-40.11, Administrative Record in *Aluminum Extrusions*, Vol. 1.4I at 173.

20. *MAAX Bath Inc.* at para. 53.

## POSITIONS OF PARTIES

### MAAX Bath

43. MAAX Bath submitted that the findings should be amended retroactively<sup>21</sup> to exclude certain specific aluminum extrusions that it imports for use in the assembly of high-quality shower enclosures or, in the alternative, all aluminum extrusions that it imports from any Chinese producer for such use.<sup>22</sup> It submitted that, since these aluminum extrusions are essentially the same as those that have already been excluded by the Tribunal in *Aluminum Extrusions Remand*, the granting of exclusions for these aluminum extrusions will not cause injury to the domestic industry that is attributable to the effect of dumping or subsidizing.

44. MAAX Bath submitted that, in *Aluminum Extrusions Remand*, the Tribunal determined that it was a “certain purchaser”, as it had specific requirements that would be better fulfilled by a fully integrated extruder, and that no single domestic extruder was sufficiently integrated such that it could fulfill MAAX Bath’s needs by providing it with the full range of fabrication and finishing services that it required. It submitted that it is still a “certain purchaser” because its specific requirements have not changed and that no domestic extruder has made the investments necessary in order to become fully integrated or attempted to sell to MAAX Bath.

45. In this regard, MAAX Bath submitted that it still requires that its aluminum extrusions, which are integral and visible parts of the shower enclosures that it produces, have a high degree of fit and finish and that this cannot be achieved by “mixing and matching” aluminum extrusions from different suppliers. It submitted that “mixing and matching” will result in differences in fit and finish that are not acceptable to MAAX Bath or its customers. It further submitted that it continues to contact domestic extruders in an effort to find an alternative source of supply but that, to date, it has not been able to find a domestic extruder that is sufficiently integrated to meet all its requirements (i.e. to supply all the aluminum extrusions that it requires, as a group, without recourse to outsourcing). It added that the domestic extruders have either failed to provide any evidence to the contrary or have provided evidence that is not credible.

46. MAAX Bath claimed that, as a result, it continues to have no choice but to obtain the aluminum extrusions that it requires from China Square Industrial Ltd. (China Square)—its Chinese supplier. It therefore submitted that any injury that may be caused to the domestic industry by the importation of the aluminum extrusions for which it requested exclusions cannot be attributed to the effect of dumping or subsidizing. It submitted that any injury suffered by the domestic industry is instead self-inflicted due to the domestic extruders’ individual decisions not to make the necessary investments to become sufficiently integrated and supply MAAX Bath.

### Aluminart

47. Aluminart submitted that the findings should be amended retroactively to exclude certain specific aluminum extrusions that it imports for use in the production of finished products, including entry doors,

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21. MAAX Bath and Aluminart submitted that the Tribunal has the discretion to grant product exclusions with retroactive effect if it considers that it is warranted in the circumstances. In their view, the circumstances in this case warrant the granting of product exclusions with retroactive effect.

22. According to MAAX Bath, the granting of a blanket exclusion for all aluminum extrusions that it imports from any Chinese producer for use in the assembly of high-quality shower enclosures would eliminate the need for it to file constant requests for interim reviews to seek additional exclusions for aluminum extrusions that are required for new shower enclosures that are introduced over time.

storm doors and retractable screens, or, in the alternative, all aluminum extrusions that it imports, or may import, from China for such use.<sup>23</sup>

48. Aluminart submitted that, like MAAX Bath, it is also a “certain purchaser” because it has specific requirements that are better fulfilled by a fully integrated extruder and that no domestic extruder is sufficiently integrated such that it can fulfill its needs by providing it with the full range of fabrication and finishing services that it requires. It therefore submitted that it should be granted the product exclusions that it requested in the same manner as the Tribunal granted product exclusions to MAAX Bath in *Aluminum Extrusions Remand*.

49. Aluminart submitted that, because all the aluminum extrusions that it uses in the production of its finished products must be consistently made to the same high standards for fabrication and finish, they must be purchased from a single, fully integrated extruder capable of extruding, fabricating and finishing all the aluminum extrusions that it requires. It submitted that obtaining aluminum extrusions from different producers and outsourced suppliers (i.e. by “mixing and matching”) would result in unacceptable differences in the fit and finish of its finished products, which will be perceived as inferior by its customers and therefore rejected.

50. Aluminart submitted that its specific requirements with respect to fabrication, which include low minimum wall thicknesses and tight tolerances, relate to how well the aluminum extrusions fit together on the finished product. With respect to finish, it submitted that it requires its aluminum extrusions to have a high-quality powder coat colour finish, which is certified by the American Architectural Manufacturers Association (AAMA) to meet their 2603 standard (“Voluntary Specification, Performance Requirements and Test Procedures for Pigmented Organic Coatings on Aluminum Extrusions and Panels”).

51. Aluminart claimed that it has to import the aluminum extrusions that it requires from Panasia Aluminum China Ltd. (Panasia) because no single domestic extruder is sufficiently integrated, or has made the necessary investments to become sufficiently integrated, such that it can extrude, fabricate and finish the full range of aluminum extrusions that it requires, as a group, without recourse to outsourcing. It added that no domestic extruder has provided any credible evidence that it is capable of consistently extruding to Aluminart’s required wall thicknesses and tolerances, and that it has also been certified by the AAMA to apply a powder coat colour finish to the AAMA 2603 standard. In this regard, it noted that, in *Aluminum Extrusions*, the Tribunal granted product exclusions to companies that required a powder coat finish meeting the AAMA 2603 standard.<sup>24</sup> Aluminart therefore submitted that any injury that may be caused to the domestic industry by the importation of the aluminum extrusions for which it requested exclusions cannot be attributed to the effect of dumping or subsidizing.

### **Other Parties in Support of Product Exclusions**

52. Regal, a company which imports and distributes high-quality fencing and railing systems for retail sale in Canada, submitted that MAAX Bath and Aluminart are both entitled to the product exclusions that they requested, as MAAX Bath has already been determined to be a “certain purchaser” by the Tribunal, and continues to be a “certain purchaser”, and Aluminart has submitted evidence which establishes that it is a “certain purchaser”.

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23. According to Aluminart, the granting of a blanket exclusion for all aluminum extrusions that it imports for use in the production of finished products would eliminate the need for it to constantly file requests for interim reviews to seek exclusions for aluminum extrusions that are required as a result of the development of new products.

24. See *Aluminum Extrusions* at paras. 363, 364, 366.



53. Regal also submitted that it considers itself a “certain purchaser” because the aluminum extrusions that are used in its fencing and railing systems must be designed, extruded, fabricated, finished (with a powder coat finish that is certified to meet the AAMA 2603 standard), packaged and labeled by a single, fully integrated supplier and that no domestic extruder is sufficiently integrated, or has taken steps to become sufficiently integrated, such that it can provide all the foregoing services that Regal requires.

54. PSD, a company which imports and sells shower doors in Canada through a network of dealers, submitted that the Tribunal should grant a generic exclusion for all aluminum extrusions that are used as shower door parts, as there is no domestic extruder that has full and current capacity to serve the shower door segment of the market. It submitted that, in order to supply this narrow segment of the market, domestic extruders must be fully integrated, as outsourcing certain aspects of the production process adds inefficiencies to the operation and introduces opportunity for product damage. It also submitted that a single extruder must be able to supply the entire line of shower door parts in order to avoid mismatched finishes. In its view, since none of the domestic extruders can currently meet those requirements, the granting of exclusions would not cause injury to the domestic industry.

55. LIV, a company which imports and distributes consumer-ready packaged outdoor decking parts, including painted aluminum balusters, for retail sale in Canada, requested that the Tribunal grant the product exclusion request filed by MAAX Bath and Aluminart. In terms of its own requirements, it submitted that it needs a manufacturer that can perform all the following tasks in an integrated manner: extrude, fabricate, cut-to-length and powder coat aluminum extrusions to the AAMA 2604 standard (“Voluntary Specification, Performance Requirements and Test Procedures for High Performance Organic Coatings on Aluminum Extrusions and Panels”); offer a lifetime warranty on the powder coating; design and manufacture/print packaging; and package the finished product in boxes along with instructions. It submitted that, in its own experience, and on the basis of the information on the record, none of the domestic extruders are capable of meeting these requirements.

56. LIV also requested that the Tribunal provide guidance to the CBSA and importers to help them better determine whether certain goods, such as consumer-ready packaged balusters, are covered by the findings and, hence, subject to the imposition of anti-dumping and countervailing duties. It submitted that small companies, such as itself, are unable to survive if there is confusion over whether certain imported goods can be considered finished goods and therefore outside the scope of the findings.

57. Formex, a company which imports aluminum extrusions for use in the production of finished products in Canada, including window screens, stated its support for the product exclusion requests filed by Aluminart. It submitted that, like Aluminart, Formex has developed specific requirements relating to the fabrication and finish of aluminum extrusions to ensure that its finished products are made to the high standards that its customers demand. In particular, it noted that it requires aluminum extrusions with wall thicknesses between 0.5 and 0.7 mm. It submitted that no single domestic extruder is capable of meeting these thickness requirements.

58. ACME, a company which manufactures shower doors in Canada, requested that it be granted exclusions for aluminum extrusions used in shower doors. It submitted that it is in the same situation as MAAX Bath, since it cannot find a domestic extruder that will meet its requirements.

### **Domestic Extruders**

59. The domestic extruders submitted that the Tribunal should refuse to grant the exclusions requested by MAAX Bath and Aluminart, as their granting would cause injury to the domestic industry. In this regard,

they referred to an earlier interim review in which they claim that the Tribunal stated that injury to the domestic industry remains the fundamental issue even in cases with unusual circumstances, such as a previous granting of similar exclusions.<sup>25</sup> They further submitted that there is no basis in fact or law for the exclusions, if granted, to be applied retroactively.

60. The domestic extruders submitted that both MAAX Bath and Aluminart have failed to establish that no single integrated domestic extruder can produce the aluminum extrusions that they require and have failed to provide any evidence indicating that no injury would result from the granting of the requested product exclusions. They submitted that they do in fact, and as demonstrated by the evidence on the record, have the ability and the desire to supply MAAX Bath and Aluminart with the aluminum extrusions that they require, including aluminum extrusions that have a low wall thickness and a powder coat finish which meets or exceeds the AAMA 2603 standard.

61. The domestic extruders submitted that Aluminart's claim that it requires its aluminum extrusions to have a powder coat finish which is certified by the AAMA to meet the AAMA 2603 standard is not credible, given that, although this requirement is alleged to have existed since 2007, it was not mentioned during the Tribunal's inquiry in 2008 and 2009 and that the evidence demonstrates that Aluminart's Chinese supplier was not certified by the AAMA until 2011.

62. The domestic extruders noted that, since the Tribunal issued its findings in 2009, a number of them have made investments to increase their capabilities. They further submitted that they have, in the past, supplied MAAX Bath and Aluminart, and currently supply their direct competitors, with aluminum extrusions that are identical or very similar to the ones for which exclusions are being sought.

63. With respect to the issue of "mixing and matching", the domestic extruders submitted that it is not a concern where a single domestic extruder supplies all the aluminum extrusions for which exclusions are requested. They submitted that, even when aluminum extrusions are sent to a single third-party finisher, there are no multiple providers of a single stage of production and, thus, the aluminum extrusions match just as exactly as if they were fully produced in-house. They noted that, in those cases, they remain solely responsible for the quality of the end product delivered to customers. They also submitted that the information on the record indicates that MAAX Bath purchases some of its aluminum extrusions from North American extruders that are not fully integrated, thereby undermining its claim that it has no choice but to obtain the aluminum extrusions that it requires from China Square. In this regard, they submitted that the information on the record indicates that China Square itself is not fully integrated, as powder coating operations are performed in a separate facility.

## ANALYSIS

64. As the Tribunal indicated in its notice of commencement of interim review, the purpose of this interim review is to determine if the findings should be amended to exclude the products for which MAAX Bath and Aluminart have requested exclusions.

65. In *Certain Stainless Steel Wire*,<sup>26</sup> the Tribunal summarized its views on the matter of product exclusions as follows:

*... The fundamental principle is that the Tribunal will grant product exclusions only when it is of the view that such exclusions will not cause injury to the domestic industry.* The Tribunal has granted

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25. *Fasteners* (11 May 2007), RD-2006-005 (CITT) [*Fasteners*].

26. (30 July 2004), NQ-2004-001 (CITT) at 22.

product exclusions for particular products in circumstances when, for instance, the domestic industry does not produce those particular products. The Tribunal also considers factors such as whether there is any domestic production of substitutable or competing goods, whether the domestic industry is an “active supplier” of the product or whether it normally produces the product or whether the domestic industry has the capability of producing the product.

[Footnotes omitted, emphasis added]

66. Thus, product exclusions are an extraordinary remedy that may be granted only when the Tribunal is of the view that such exclusions will not cause injury to the domestic industry. In the context of the present interim review, the Tribunal is of the view that the primary consideration in determining whether the granting of the product exclusions requested by MAAX Bath and Aluminart will cause injury to the domestic industry is whether the domestic industry has the capability to produce those products. As the Tribunal stated in *Aluminum Extrusions*, custom-shaped aluminum extrusions are not “off-the-shelf products”, and requiring domestic producers to have produced all shapes for which exclusions are requested would be unreasonable, as it would limit the protection afforded to the domestic industry to those goods which it has already produced.<sup>27</sup> The Tribunal also stated that such an approach would ignore the commercial reality of the market for aluminum extrusions and the fact that domestic producers have the capability of producing a large number of goods with their existing equipment or with limited investments of capital.<sup>28</sup>

67. Relying on the Tribunal’s decision in *Certain Fasteners*,<sup>29</sup> MAAX Bath and Aluminart submitted that, in determining whether the granting of the requested product exclusions will cause injury to the domestic industry, the Tribunal should instead consider whether the domestic industry actually produces and sells those products.

68. In *Certain Fasteners*, the Tribunal stated that a domestic industry’s capability to produce products which are identical to or substitutable for the products for which exclusions are requested is much less relevant in the context of an expiry review, as such a review takes place after anti-dumping and/or countervailing measures have been in place for almost five years, during which time it must be presumed that the domestic industry was not prevented from producing a product because of injury due to dumping and/or subsidizing.<sup>30</sup> The Tribunal went on to state that, if the domestic industry had not produced the products in question or substitutable products while measures were in place, it would be difficult to understand how it could be injured if it failed to sell those products in the future.<sup>31</sup>

69. The Tribunal is of the view that its reasoning in *Certain Fasteners* should not apply in the context of the current interim review for a number of reasons.

70. First, as stated above, custom-shaped aluminum extrusions are not “off-the-shelf products” and are therefore generally only produced when ordered by a purchaser. In *Certain Fasteners*, the Tribunal granted an exclusion for drywall screws because the domestic industry had, despite having the capability to do so, failed to actually produce those screws during the previous five years.<sup>32</sup> However, drywall screws are essentially an “off-the-shelf product”.

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27. *Aluminum Extrusions* at para. 341.

28. *Ibid.*

29. (6 January 2010), RR-2009-001 (CITT) [*Certain Fasteners*].

30. *Certain Fasteners* at paras. 246-47.

31. *Ibid.* at para. 248.

32. *Ibid.* at para. 279.

71. Second, the Tribunal is of the view that it would be unfair to require the domestic industry to have actually produced the exact products for which MAAX Bath and Aluminart have requested exclusions when it is clear that those parties have been attempting to obtain exclusions since the Tribunal's injury inquiry in 2008 and 2009. In other words, there is a concern that a party could purposely refrain from purchasing custom-shaped aluminum extrusions from the domestic industry and then claim that it should be granted exclusions because the domestic industry does not actually produce those same extrusions.

72. Finally, in *Certain Fasteners*, the expiry review took place after anti-dumping and countervailing measures had been in place for nearly five years. In the present case, the interim review was initiated less than three years after anti-dumping and countervailing measures were imposed.

73. Therefore, in the context of the present interim review, the Tribunal will determine whether the granting of the product exclusions requested by MAAX Bath and Aluminart will cause injury to the domestic industry by considering whether the domestic industry has the capability to produce those products. This requires the Tribunal to first determine MAAX Bath's and Aluminart's specific requirements with respect to the products for which they are requesting exclusions and then determine the domestic industry's ability to meet these requirements (i.e. whether it is capable of meeting these specific requirements). Should the domestic industry be unable to meet these specific requirements, then the requested product exclusions will be granted.

74. However, before the Tribunal proceeds with its analysis, it will address a few preliminary issues.

### **Preliminary Issues**

#### Use of the Term "Certain Purchaser"

75. The Tribunal notes that, further to the Court's direction in *MAAX Bath Inc.*, it determined, in *Aluminum Extrusions Remand*, whether to grant the product exclusions that had been requested by MAAX Bath by considering whether it was a "certain purchaser" as described at paragraph 225 of the Tribunal's statement of reasons in *Aluminum Extrusions*.<sup>33</sup> In order to determine whether MAAX Bath was a "certain purchaser", the Tribunal determined whether it had specific requirements that would be better fulfilled by a fully integrated extruder and whether there was an integrated domestic extruder that was capable of fulfilling its needs by providing it with the full range of fabrication and finishing services that it required.<sup>34</sup>

76. In the present interim review, MAAX Bath and Aluminart have argued that they are entitled to the product exclusions that they have requested because they are, or continue to be, "certain purchasers". Regal also claimed to be a "certain purchaser". The continued use of the term "certain purchaser" by both the Tribunal and parties appears to have given it a special or elevated status that, in the Tribunal's view, is not warranted.

77. It is clear that the Tribunal's use of the term "certain purchaser" in *Aluminum Extrusions* and *Aluminum Extrusions Remand*, as well as the Court's use in *MAAX Bath Inc.*, was simply a way of describing a purchaser that had specific requirements that could not be met by the domestic industry, the implication being that the granting of product exclusions to such a purchaser would not cause injury to the domestic industry.

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33. *Aluminum Extrusions Remand* at paras. 25-26.

34. *Ibid.* at para. 28.

78. Therefore, in reality, the use of the term “certain purchaser” was simply used to describe a set of particular circumstances where the granting of a specific product exclusion would not cause injury to the domestic industry. As such, rather than continue to use the term “certain purchaser”, the Tribunal will instead refer to the specific circumstances that warrant the granting of a product exclusion to a given party (e.g. a purchaser that has specific requirements that cannot be met by the domestic industry).

Weight to be Given to Previous Findings Made by the Tribunal

79. In *Aluminum Extrusions Remand*, the Tribunal determined that MAAX Bath had specific requirements that were better fulfilled by a fully integrated extruder and that there was not an integrated domestic extruder capable of fulfilling MAAX Bath’s needs. The Tribunal ultimately granted the product exclusions that MAAX Bath had requested. In this interim review, MAAX Bath has argued that nothing has changed since that time and that the products for which it is now requesting exclusions are essentially the same as those that have already been excluded.

80. In *Aluminum Extrusions*, the Tribunal granted a number of product exclusions to companies that required aluminum extrusions with a powder coat finish certified to meet the AAMA 2603 standard. In this interim review, Aluminart has argued that it should be granted the product exclusions that it requested because it also requires that its aluminum extrusions have a powder coat finish certified by the AAMA.

81. In *Fasteners*, the Tribunal stated the following regarding the prior exclusion of similar products:

7. Although the circumstances of this interim review are highly unusual in light of the argument that a similar product has already been excluded, the Tribunal emphasizes that, nonetheless, when considering requests for product exclusions, the fundamental issue must remain whether the excluded products will be injurious to the domestic industry. Each request must be considered on its own merits. . . .

82. Thus, the fact that the products for which MAAX Bath and Aluminart have now requested exclusions may be similar, or made to the same specification, as those that have already been excluded by the Tribunal does not mean that they should automatically be excluded in the present interim review. The Tribunal must be satisfied, on the basis of the evidence on the record, that the granting of the exclusions will not cause injury to the domestic industry.

83. The Tribunal notes that, in this regard, the evidentiary record in the current interim review is far more complete than it was in *Aluminum Extrusions* and *Aluminum Extrusions Remand*. In *Aluminum Extrusions*, the Tribunal proceeded solely by way of written submissions with respect to requests for product exclusions. In *Aluminum Extrusions Remand*, the Tribunal made its determination on the basis of the existing record (i.e. the record in *Aluminum Extrusions*) and the additional written submissions and information provided by the parties in the context of the remand proceedings.

84. In the present interim review, the Tribunal requested that submissions from parties address certain specific factors relevant to the interim review, including the criteria that the Tribunal should use in determining the level of integration that is necessary for suppliers to be able to meet MAAX Bath’s and Aluminart’s specific requirements and the domestic industry’s ability to meet these requirements. In addition, the Tribunal advised parties that it had decided to proceed with the interim review by way of an oral hearing. During the hearing, which spanned almost three full days, the Tribunal heard from 14 witnesses. These witnesses were cross-examined and asked questions by the Tribunal.

85. The Tribunal notes that subsection 76.01(2) of *SIMA* expressly allows it to re-hear any matter in the conduct of an interim review. Therefore, to the extent that the evidence on the record in this interim review provides an adequate basis upon which to reach a conclusion that is different from or contrary to a previously reached conclusion, the Tribunal is not barred from doing so.<sup>35</sup> The Tribunal also notes that, with respect to MAAX Bath, reaching a different conclusion would not run counter to the Court's judgment in *MAAX Bath Inc.*, as the Court never directed the Tribunal to find that MAAX Bath was a "certain purchaser" and grant it product exclusions. The Court only directed the Tribunal to determine whether MAAX Bath was a "certain purchaser" and reconsider whether it was entitled to the product exclusions that it requested.

#### Burden of Proof

86. The Tribunal has previously held that, when it is requested to grant an exclusion, the onus is upon the requester to demonstrate that imports of the goods for which the exclusion is requested will not be injurious to the domestic industry.<sup>36</sup> In other words, the requester bears the burden of rebutting the presumption that the importation of *any* goods covered by an order or finding will cause injury to the domestic industry.

87. However, MAAX Bath and Aluminart submitted that, in light of the Tribunal's finding in *Aluminum Extrusions Remand* that no single domestic extruder was fully integrated such that it could meet MAAX Bath's specific requirements, the burden has shifted and that the domestic extruders must now establish that they are in fact fully integrated, such that they can meet MAAX Bath's specific requirements and that granting the requested product exclusions will cause injury to the domestic industry.

88. Provided MAAX Bath's specific requirements are found to be the same as they were in *Aluminum Extrusions Remand*, the Tribunal agrees that the domestic extruders would now bear the burden of establishing that they are fully integrated, such that they can meet those specific requirements. However, as noted above, it is open to the Tribunal, on the basis of the evidence in this interim review, to reach a conclusion that is different from or contrary to a conclusion that it reached in *Aluminum Extrusions Remand*. Therefore, if the Tribunal does reach a different conclusion regarding MAAX Bath's specific requirements, its previous finding regarding the absence of a single fully integrated domestic extruder would no longer be relevant and MAAX Bath would, in accordance with the Tribunal's previous pronouncements, bear the burden of rebutting the presumption that the importation of any goods covered by the findings will cause injury to the domestic industry.

#### Requests Made by Other Parties

89. The other parties in support of product exclusions, namely, Regal, PSD, LIV, Formex and ACME, all made submissions to the Tribunal stating that they have specific requirements with respect to the aluminum extrusions that they purchase and that these requirements cannot be met by the domestic industry. Some of these parties even requested that the Tribunal grant them product exclusions.

90. As indicated in the Tribunal's notice of commencement of interim review, the purpose of this interim review is to determine if the findings should be amended to exclude the products for which MAAX

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35. However, this does not imply that the Tribunal will completely discount its previous findings or conclusions. It just means that it can reconsider them in light of the evidence on the record in the present interim review.

36. See *Aluminum Extrusions* at para. 340; *Carbon Steel Welded Pipe* (20 August 2008), NQ-2008-001 (CITT) at para. 122; *Certain Fasteners* at para. 243.

Bath and Aluminart have requested exclusions. This interim review was clearly never intended to address requests for product exclusions made by parties other than MAAX Bath and Aluminart. Therefore, the Tribunal will not address such requests. However, the Tribunal notes that these other parties' submissions will be taken into consideration to the extent that they are found useful for determining whether product exclusions should be granted to MAAX Bath and Aluminart.

91. LIV also requested that the Tribunal provide guidance to the CBSA and importers to help them better determine whether certain goods, such as the consumer-ready packaged balusters imported by LIV, are covered by the findings. However, as noted above, the purpose of this interim review is to determine if the findings should be amended to exclude the products for which MAAX Bath and Aluminart have requested exclusions. Issues that pertain to the subjectivity of imported goods (i.e. whether imported goods are of the same description as goods to which an order or finding of the Tribunal applies) are properly addressed by the Tribunal in the context of an appeal under section 61 of *SIMA* in which the CBSA is the responding party. Therefore, even if the Tribunal were to provide guidance as requested by LIV in the context of the present interim review, it would be of no legal effect. For these reasons, the Tribunal will not accede to LIV's request.

92. Having dealt with the aforementioned preliminary issues, the Tribunal will now proceed with its analysis by first determining MAAX Bath's and Aluminart's specific requirements with respect to the products for which they are requesting exclusions. It will then determine whether the domestic industry is able to meet these specific requirements.

### **Requesters' Specific Requirements**

#### MAAX Bath

93. In *Aluminum Extrusions Remand*, the Tribunal summarized MAAX Bath's claimed requirements as follows:

29. MAAX Bath submitted that, in 2004, it adopted a change in manufacturing strategy in response to the decision by MAAX Bath's major Canadian supplier to stop supplying it with aluminum extrusions so that it could focus on a new market and MAAX Bath's decision to close its Anjou, Quebec, fabrication and finishing facility rather than make the investments that would have been necessary to continue to fabricate and finish domestically sourced aluminum extrusions on its own. *It submitted that, as a result of this change in manufacturing strategy, it developed specific requirements that could only be satisfied by a fully integrated extruder. It explained that it now requires fully fabricated and finished "ready-to-assemble" aluminum extrusions for use in the production of its shower enclosures and that these extrusions have to be produced in multiple types of coatings/finishes and meet certain quality standards with respect to consistency of fit and finish. It submitted that, in order to meet these standards, all the required fabrication and finishing services have to be provided by a single producer in-house and not outsourced.* MAAX Bath noted that it developed a reputation built on the quality of its shower enclosures which, in turn, is based on the consistently high quality of its parts.

[Emphasis added]

94. The Tribunal accepted MAAX Bath's claim that it had specific requirements with respect to the aluminum extrusions that are for use in the assembly of its high-end shower enclosures and that, in order to meet these requirements, all aluminum extrusions had to be provided by a single fully integrated extruder.<sup>37</sup>

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37. *Aluminum Extrusions Remand* at para. 31.

The Tribunal also accepted MAAX Bath's evidence that, while it did purchase aluminum extrusions from non-fully integrated extruders, including some domestic extruders, those purchases were for use in the production of other goods or entry-level shower enclosures for which no exclusions were requested or were made in an attempt to identify a source of supply other than China Square.<sup>38</sup>

95. In this interim review, MAAX Bath submitted that its specific requirements had not changed and that it still requires the services of a fully integrated extruder.<sup>39</sup> More particularly, the witness for MAAX Bath stated that it requires aluminum extrusions that have a consistent fit and finish<sup>40</sup>—especially for those aluminum extrusions that are bright dip anodized<sup>41</sup>—and aluminum extrusions that have had a number of operations performed, such as precision cutting and drilling, punching, bending, cleaning, polishing and pre-assembly with other parts, such as rollers and magnets.<sup>42</sup> He further stated that MAAX Bath requires an extruder that can meet its volume requirements.<sup>43</sup> In this regard, he noted that MAAX Bath currently purchases 2.2 million pounds of aluminum extrusions per year from China Square, which translates into a total of approximately 7,500 finished aluminum extrusion parts per day.<sup>44</sup> He also noted that China Square has very low rejection rates and individually packages its aluminum extrusions to prevent damage.<sup>45</sup>

96. The Tribunal accepts that the aluminum extrusions that MAAX Bath requires for use in the assembly of its high-end shower enclosures must be provided by a single extruder in order to ensure that they have a certain level of consistency with respect to fit and finish. It is entirely reasonable to assume that aluminum extrusions, even though produced to the same specification, may not match perfectly when produced by different extruders and third parties that may use different equipment, materials and processes to extrude, fabricate and finish the extrusions. As the witness for MAAX Bath explained, differences in fit and finish would not be acceptable to its customers.<sup>46</sup>

97. The Tribunal also accepts that MAAX Bath has specific requirements with respect to finishes applied to the aluminum extrusions (e.g. bright dip anodized and powder coated), fabrication operations performed (e.g. precision cutting and drilling, punching, bending, cleaning, polishing and pre-assembly with other parts), volume supplied on a yearly basis, packaging and rejection rates.

98. However, on the basis of the evidence on the record in this interim review, and contrary to its determination in *Aluminum Extrusions Remand*, the Tribunal does not accept that MAAX Bath's specific requirements can only be met by a single *fully integrated* extruder (i.e. by a single extruder that performs all operations under one roof).

99. In *Aluminum Extrusions Remand*, MAAX Bath stated that China Square was a fully integrated extruder.<sup>47</sup> In the absence of any submissions by the domestic extruders, and on the basis of the information provided by MAAX Bath, the Tribunal determined that China Square was fully integrated.<sup>48</sup> However, information on the record in this interim review now indicates that China Square was never fully integrated,

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38. *Aluminum Extrusions Remand* at para. 31.

39. Tribunal Exhibit RD-2011-001-01, Administrative Record, Vol. 1 at 31.

40. *Ibid.* at 32-33; *Transcript of Public Hearing*, Vol. 1, 10 April 2012, at 105-106.

41. *Transcript of Public Hearing*, Vol. 1, 10 April 2012, at 21, 46.

42. *Ibid.* at 21, 96.

43. *Ibid.* at 58-59.

44. *Ibid.* at 27, 38-39.

45. *Ibid.* at 47, 49, 94.

46. *Ibid.* at 101, 105-106.

47. *Aluminum Extrusions Remand* at para. 37.

48. *Ibid.* at para. 39.



as it outsources its powder coating requirements.<sup>49</sup> In the Tribunal's opinion, this severely undermines MAAX Bath's claim that it requires a single fully integrated extruder. As the Tribunal stated in *Aluminum Extrusions Remand*, "... a purchaser cannot legitimately claim that it requires an integrated extruder and, at the same time, successfully operate by sourcing its aluminum extrusions from a non-integrated extruder."<sup>50</sup>

100. The witness for MAAX Bath attempted to minimize the impact of this new information by stating that, while powder-coated aluminum extrusions once represented approximately 25 percent of its purchases from China Square, they now only represent approximately 10 percent.<sup>51</sup> He also stated that powder-coated aluminum extrusions are only used in mid- to low-end shower enclosures.<sup>52</sup> Nevertheless, the Tribunal notes that a significant number of the product exclusions that were granted to MAAX Bath in *Aluminum Extrusions Remand* were for powder-coated aluminum extrusions.<sup>53</sup> The Tribunal further notes that these aluminum extrusions were allegedly for use in the assembly of high-end shower enclosures.<sup>54</sup>

101. In the Tribunal's view, this effectively serves to demonstrate that MAAX Bath's requirement that all aluminum extrusions be produced by a single fully integrated extruder is not a legitimate one. Ultimately, MAAX Bath requires aluminum extrusions that meet certain standards in terms of quality and consistency of fit and finish. As long as there are no multiple providers of a single stage of production (i.e. as long as all aluminum extrusions are sent to the same outside contractor) and the proper precautions are taken with respect to packaging so as to prevent damage, it is possible to achieve a consistent fit and finish. Indeed, the witness for MAAX Bath acknowledged that, at least in theory, its requirements could be met by an extruder that is not fully integrated if the aluminum extrusions are carefully packaged when sent to an outside contractor or finisher.<sup>55</sup> That appears to actually have been the case with China Square for powder-coated aluminum extrusions.

102. Therefore, in these circumstances, the Tribunal finds that MAAX Bath's specific requirements are that its aluminum extrusions be provided by a single extruder (that may outsource certain operations to the same contractor) that can apply a number of finishes to the extrusions, perform certain fabrication operations, supply the required volume, provide individual packaging and ensure low rejection rates while maintaining certain quality standards with respect to consistency of fit and finish.

#### Aluminart

103. Aluminart submitted that, like MAAX Bath, it also requires the services of a single fully integrated extruder capable of extruding, fabricating and finishing the full range of aluminum extrusions that it requires.<sup>56</sup> More particularly, a witness for Aluminart stated that Aluminart requires aluminum extrusions that are consistently made to the same high standards for fabrication and finish.<sup>57</sup> With respect to

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49. Tribunal Exhibit RD-2011-001-23.09, Administrative Record, Vol. 1C at 350-51, 359; Tribunal Exhibit RD-2011-001-24.09 (protected), Administrative Record, Vol. 2E at 71-72, 115, 117-19; *Transcript of Public Hearing*, Vol. 1, 10 April 2012, at 29-30, 204.

50. *Aluminum Extrusions Remand* at note 27.

51. *Transcript of Public Hearing*, Vol. 1, 10 April 2012, at 30, 40.

52. *Ibid.* at 29.

53. *Aluminum Extrusions Remand* at 12-29.

54. *Ibid.* at para. 43.

55. *Transcript of Public Hearing*, Vol. 1, 10 April 2012, at 46-47, 62-65.

56. Tribunal Exhibit RD-2011-001-10.01, Administrative Record, Vol. 1A at 5.1, 6; Tribunal Exhibit RD-2011-001-23.03, Administrative Record, Vol. 1 at 93; Tribunal Exhibit RD-2011-003-01, Administrative Record, Vol. 1 at 33; *Transcript of Public Hearing*, Vol. 1, 10 April 2012, at 132.

57. Tribunal Exhibit RD-2011-001-23.03, Administrative Record, Vol. 1 at 93.

fabrication, he stated that Aluminart requires aluminum extrusions with low minimum wall thicknesses and tight tolerances.<sup>58</sup> With respect to finish, witnesses for Aluminart stated that Aluminart requires aluminum extrusions that have a high-quality powder coat finish, which is certified by the AAMA to meet the AAMA 2603 standard.<sup>59</sup> They further stated that Aluminart requires an extruder that can provide aluminum extrusions in the quantities that it needs.<sup>60</sup> One of these witnesses also noted that Panasia, its Chinese supplier, has very low rejection rates and individually packages its aluminum extrusions to prevent damage.<sup>61</sup>

104. The Tribunal accepts, as it did for MAAX Bath, that the aluminum extrusions that Aluminart requires for use in the production of finished products, including entry doors, storm doors and retractable screens, must be provided by a single extruder in order to ensure that they are consistently made to the same high standards for fabrication and finish. As noted above, aluminum extrusions, even though produced to the same specification, may not match perfectly when produced by different extruders and third parties. Indeed, as explained by a witness for Aluminart, variations in fit and finish, including variations in colour, would not be acceptable to its customers.<sup>62</sup>

105. The Tribunal also accepts that Aluminart has specific requirements with respect to the fabrication of aluminum extrusions (i.e. low minimum wall thicknesses and tight tolerances), the volume of aluminum extrusions that it needs on a yearly basis, packaging and rejection rates.

106. However, the Tribunal does not accept that Aluminart's specific requirements can only be met by a single *fully integrated* extruder (i.e. by a single extruder that performs all operations under one roof). Although the evidence on the record does indicate that Panasia is a fully integrated extruder,<sup>63</sup> thus supporting Aluminart's position that its requirements can only be met by a single fully integrated extruder, the Tribunal believes that Aluminart's real requirements are that the aluminum extrusions that it purchases meet certain standards in terms of quality and consistency of fit and finish. Indeed, Aluminart claims to require a single fully integrated extruder in order to eliminate variations in fit and finish and damage caused by additional handling related to the use of an outside contractor.<sup>64</sup> Therefore, to the extent that an extruder, whether fully integrated or not, can provide aluminum extrusions that have a consistent fit and finish and that are free of any damage, Aluminart's requirements will have been met.

107. As noted above, as long as there are no multiple providers of a single stage of production (i.e. as long as all aluminum extrusions are sent to the same outside contractor) and the proper precautions are taken with respect to packaging to prevent damage,<sup>65</sup> it is possible to obtain a quality product and achieve a consistent fit and finish.

108. Also, while the Tribunal accepts that Aluminart requires aluminum extrusions that have a powder coat finish which meets the AAMA 2603 standard, it does not accept that the finish must necessarily be

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58. Tribunal Exhibit RD-2011-003-01, Administrative Record, Vol. 1 at 31-32.

59. Tribunal Exhibit RD-2011-001-10.02B, Administrative Record, Vol. 1A at 12; Tribunal Exhibit RD-2011-003-01, Administrative Record, Vol. 1 at 34; *Transcript of Public Hearing*, Vol. 1, 10 April 2012, at 128-29.

60. Tribunal Exhibit RD-2011-001-23.03, Administrative Record, Vol. 1 at 94; Tribunal Exhibit RD-2011-001-24.03 (protected), Administrative Record, Vol. 2D at 101; *Transcript of In Camera Hearing*, Vol. 1, 10 April 2012, at 20.

61. *Transcript of Public Hearing*, Vol. 1, 10 April 2012, at 151, 154.

62. Tribunal Exhibit RD-2011-003-01, Administrative Record, Vol. 1 at 32-33; Tribunal Exhibit RD-2011-001-23.03, Administrative Record, Vol. 1 at 93.

63. Tribunal Exhibit RD-2011-003-01, Administrative Record, Vol. 1 at 38.

64. *Ibid.* at 33.

65. *Transcript of Public Hearing*, Vol. 1, 10 April 2012, at 171.

certified *by the AAMA*. A witness for Aluminart stated that Aluminart requires the powder coat finish on its aluminum extrusions to meet the AAMA 2603 standard in order to give it the assurance that the powder coat finishing process will result in a consistent high-quality coating that will retain its look over time.<sup>66</sup> He stated that this allows Aluminart to offer a lifetime warranty on the finish of its storm doors.<sup>67</sup> Aluminart also emphasized the fact that it requires the powder coat finish to be certified by the AAMA itself to meet the AAMA 2603 standard rather than by a paint manufacturer or supplier.<sup>68</sup>

109. The evidence on the record indicates that, although Aluminart has required Panasia to be in compliance with the AAMA 2603 standard since December 1, 2007, Panasia was only certified by the AAMA to comply with this standard on May 11, 2011.<sup>69</sup> This only occurred after Aluminart learned, through discussions that it had with the CBSA in 2010, that Panasia was not certified *by the AAMA*.<sup>70</sup> The Tribunal notes that Aluminart did receive confirmation by Panasia on December 14, 2010, that it had been meeting the AAMA 2603 standard since 2000.<sup>71</sup> However, it is clear that Panasia only confirmed that it had been meeting the AAMA 2603 standard since 2000, not that it had been certified by the AAMA to meet the standard since that time.

110. In the Tribunal's view, these facts cast serious doubts over whether Aluminart actually required certification by the AAMA itself. If this had been such a critical requirement, one would assume that Aluminart would have taken steps to verify that actual certification by the AAMA had been obtained. The Tribunal also notes that the requests for product exclusions filed by Aluminart in *Aluminum Extrusions* were silent on the currently alleged requirement for AAMA certification. Moreover, according to a witness for the domestic extruders, Aluminart does not even mention on its Web site that its products have a powder coat finish which is certified by the AAMA to meet the AAMA 2603 standard.<sup>72</sup>

111. In light of the foregoing, the Tribunal believes that Aluminart's real requirement is that the aluminum extrusions that it purchases consistently have a high-quality powder coat finish. Indeed, this is confirmed by Aluminart's admission that it had no reason to believe that Panasia was not certified by the AAMA because it had experienced no quality issues.<sup>73</sup> As such, the Tribunal does not accept that Aluminart requires certification *by the AAMA*. The Tribunal notes that the evidence on the record indicates that it is common for extruders to be certified by paint manufacturers to meet AAMA standards, given that certification by the AAMA is an expensive process and seldom justified by the resulting sales and marketing exposure that one receives.<sup>74</sup>

112. Therefore, the Tribunal finds that Aluminart's specific requirements are that its aluminum extrusions be provided by a single extruder (that may outsource certain operations to the same contractor) that can apply a powder coat finish which meets the AAMA 2603 standard, provide low minimum wall thicknesses and tight tolerances, supply the required volume, provide individual packaging and ensure low rejection rates while maintaining the same high standards for fabrication and finish.

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66. Tribunal Exhibit RD-2011-003-01, Administrative Record, Vol. 1 at 34.

67. *Transcript of Public Hearing*, Vol. 1, 10 April 2012, at 130.

68. *Transcript of Public Hearing*, Vol. 3, 12 April 2012, at 491; *Transcript of Public Hearing*, Vol. 1, 10 April 2012, at 149-50.

69. Tribunal Exhibit RD-2011-003-01, Administrative Record, Vol. 1 at 34, 55, 58, 61.

70. *Transcript of Public Hearing*, Vol. 1, 10 April 2012, at 129, 145-46.

71. Tribunal Exhibit RD-2011-003-01, Administrative Record, Vol. 1 at 34, 64.

72. *Transcript of Public Hearing*, Vol. 2, 11 April 2012, at 256-57, 355.

73. *Transcript of Public Hearing*, Vol. 1, 10 April 2012, at 129.

74. *Transcript of Public Hearing*, Vol. 2, 11 April 2012, at 255-56; Tribunal Exhibit RD-2011-003-08.01, Administrative Record, Vol. 1 at 155.

### Domestic Industry's Ability to Meet the Requesters' Specific Requirements

113. The domestic extruders submitted that they all have the ability and the desire to supply MAAX Bath and Aluminart with the aluminum extrusions that they require. According to the witness for Almag, the process of extruding, fabricating and finishing aluminum is the same throughout the world, and Canadian extruders are able to meet any requirement either by doing all the work themselves or by subcontracting some portions to outside specialists.<sup>75</sup>

114. In *Aluminum Extrusions Remand*, the Tribunal found that no single domestic extruder was fully integrated such that it could offer, in house, the full range of fabrication and finishing services that MAAX Bath required.<sup>76</sup> Put simply, the Tribunal found that the domestic industry was not able to meet MAAX Bath's specific requirements, as they were found to exist at the time. However, as the Tribunal has now determined, in the context of the present interim review, that MAAX Bath's specific requirements can be met by a single extruder that is not fully integrated (i.e. a single extruder that may outsource certain operations), that prior finding is no longer relevant.

115. Moreover, the evidence on the record indicates that, since the Tribunal issued its findings in 2009, the domestic extruders have made a number of investments to increase their capabilities. For example, Almag acquired Byers Bush Powder Coating Inc.—a powder coating applicator,<sup>77</sup> Apel invested in a new \$6.5 million press and powder-coating equipment, and installed precision cutting equipment,<sup>78</sup> Can Art invested in a new anodizing plant in Mississauga and a precision cutting saw,<sup>79</sup> Spectra opened a new location to house new and existing fabrication equipment, brought on a second anodizing line at another location and purchased powder paint applicators,<sup>80</sup> Sapa installed a horizontal powder coat line in its Guelph, Ontario, facility and was certified by the AAMA to meet the AAMA 2603 standard,<sup>81</sup> and Metra installed automatic packaging equipment.<sup>82</sup> These investments no doubt increased the ability of the domestic extruders to meet purchasers' specific requirements.

116. MAAX Bath and Aluminart both submitted that, since the Tribunal issued its findings in 2009, they have made several attempts, either by way of making requests for quotations or by visiting the domestic extruders' facilities, to find a single domestic extruder capable of meeting all their specific requirements. They submitted that the quotations that they did receive (or did not receive), or the information that they obtained from their visits, made it clear that no single domestic extruder was capable of meeting all their specific requirements.

117. However, the Tribunal notes that the evidence on the record indicates that, throughout this process of obtaining quotations, there was a certain level of mistrust or apprehension between MAAX Bath and Aluminart on the one hand, and the domestic extruders on the other. For example, the witness for Apel testified that he was quite suspicious of the nature and validity of Aluminart's request and did not think that it was sincere or serious;<sup>83</sup> the witness for Metra testified that he thought that Aluminart's request was

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75. *Transcript of Public Hearing*, Vol. 2, 11 April 2012, at 246, 250-52.

76. *Aluminum Extrusions Remand* at paras. 34-35.

77. Tribunal Exhibit RD-2011-001-10.06, Administrative Record, Vol. 1A at 90.

78. Tribunal Exhibit RD-2011-001-10.05, Administrative Record, Vol. 1A at 86-87; *Transcript of Public Hearing*, Vol. 2, 11 April 2012, at 260.

79. Tribunal Exhibit RD-2011-001-23.07, Administrative Record, Vol. 1C at 336; *Transcript of Public Hearing*, Vol. 2, 11 April 2012, at 436.

80. Tribunal Exhibit RD-2011-001-10.06, Administrative Record, Vol. 1A at 90; Tribunal Exhibit RD-2011-001-23.09, Administrative Record, Vol. 1C at 350.

81. Tribunal Exhibit RD-2011-001-23.11, Administrative Record, Vol. 1C at 373; Tribunal Exhibit RD-2011-001-28, Administrative Record, Vol. 1D at 2; *Transcript of Public Hearing*, Vol. 2, 11 April 2012, at 254.

82. *Transcript of Public Hearing*, Vol. 2, 11 April 2012, at 261-62, 436.

83. *Ibid.* at 343, 398-99, 421.

suspicious and likened it to a fishing expedition;<sup>84</sup> the witness for Sapa testified that he did not believe that Sapa was truly being offered Aluminart's business;<sup>85</sup> and the witness for Spectra testified that he viewed the requests from MAAX Bath and Aluminart as unusual.<sup>86</sup>

118. This level of suspicion from the domestic extruders resulted in a lower level of effort being expended in responding to the requests for quotation or, in some cases, resulted in a lack of a response altogether.<sup>87</sup> This, in turn, appears to have resulted in MAAX Bath and Aluminart concluding that the domestic extruders were not capable of meeting all their specific requirements.

119. While the Tribunal believes that more open discussions and a higher level of transparency between parties surely would have allowed them to properly explore the feasibility of establishing business relationships, it recognizes that the context within which these communications took place was unusual. Indeed, these communications took place after the Tribunal issued its decision in *Aluminum Extrusions*, wherein it denied the requests for product exclusions made by MAAX Bath and Aluminart.

120. Nevertheless, the Tribunal notes that, in a number of cases, it appears as if MAAX Bath and Aluminart bore a greater responsibility for the discussions not continuing. According to the witnesses for Almag Spectra and Dajcor, MAAX Bath and Aluminart provided no response or feedback on the quotations that they received.<sup>88</sup> In the Tribunal's view, this could indicate that MAAX Bath and Aluminart preferred to read into the quotations a lack of capacity on the domestic extruders' part rather than continue the discussions.

121. In any event, it must be borne in mind that the requirements that were claimed by MAAX Bath and Aluminart during these discussions are not what the Tribunal has determined them to be in the context of the present interim review. As the Tribunal has determined that MAAX Bath's and Aluminart's specific requirements can be met by a single extruder that is not fully integrated and that Aluminart does not require a powder coat finish which is certified by the AAMA, many of the conclusions that appear to have been drawn by MAAX Bath and Aluminart, as a result of these discussions, are no longer valid.

122. In the Tribunal's view, the evidence on the record indicates that a number of the domestic extruders each seem to have the individual ability to meet all of MAAX Bath's and Aluminart's specific requirements, as the Tribunal has found them to exist in this interim review. Indeed, the witnesses for the domestic extruders filed statements with supporting documentary evidence and testified at length at the hearing regarding their facilities, the equipment that they possess, the types of customers that they have and their general ability to meet purchasers' specific requirements.

123. However, since a finding that at least one domestic extruder has the ability to meet MAAX Bath's and Aluminart's specific requirements provides a sufficient basis upon which to deny the requested product exclusions, the Tribunal deems it unnecessary to analyze each and every one of the domestic extruders' abilities. In this case, the Tribunal will focus on Spectra and Apel.

124. The evidence on the record demonstrates that both Spectra and Apel have the ability to meet all of MAAX Bath's and Aluminart's specific requirements, even without the need to outsource any operations.<sup>89</sup> Spectra and Apel can provide aluminum extrusions with an anodized finish and with a powder coat finish

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84. *Transcript of Public Hearing*, Vol. 2, 11 April 2012, at 444.

85. *Ibid.* at 352.

86. *Ibid.* at 402-403, 423-24.

87. *Ibid.* at 343, 352, 444.

88. *Ibid.* at 400-402, 405-407, 422; Tribunal Exhibit RD-2011-001-23.09, Administrative Record, Vol. 1C at 346-47, 349.

89. *Transcript of Public Hearing*, Vol. 2, 11 April 2012, at 409, 412.

which meets the AAMA 2603 standard.<sup>90</sup> They can produce aluminum extrusions with low minimum wall thicknesses and tight tolerances, and have the equipment to perform multiple fabrication operations<sup>91</sup>. They can also maintain low rejection rates, provide individual packaging and supply the volume required by MAAX Bath and Aluminart.<sup>92</sup>

125. The witness for MAAX Bath contended that Spectra is not fully integrated because its anodizing and extrusion lines are in separate buildings that are approximately 80 km apart, that, when he toured Spectra's extrusion facility, there were no machines that could be used for fabrication and that it was only interested in supplying some high-volume aluminum extrusions to MAAX Bath.<sup>93</sup>

126. As the Tribunal has already determined that domestic extruders need not perform all operations under "one roof" in order to meet MAAX Bath's and Aluminart's specific requirements, the fact that Spectra's anodizing line may be a certain distance away from its extrusion line does not diminish its capacity to supply MAAX Bath or Aluminart. As for the equipment or machines required to fabricate aluminum extrusions for MAAX Bath, the witness for Spectra was clear that Spectra possessed all of them.<sup>94</sup> The witness for Spectra also clarified that he did not feel that any North American extruder could, from one day to the next, take on all of MAAX Bath's requirements.<sup>95</sup> He stated that Spectra would propose a transition period where it would take on some high-volume aluminum extrusions and possibly some low-volume extrusions.<sup>96</sup> The Tribunal notes that the witness for MAAX Bath stated that a transition from China Square to a domestic extruder would have to be completed in under a year and would require MAAX Bath to increase its inventory during this period.<sup>97</sup> This serves to confirm the reasonability of Spectra's view that a transition of a large account from one extruder to another cannot be effected overnight.

127. The witness for Aluminart contended that Apel, when it was contacted by Aluminart, had not yet installed its powder-coating equipment in its Calgary, Alberta, plant and that both Apel and Spectra are not certified by the AAMA to meet the AAMA 2603 standard.<sup>98</sup> However, the evidence on the record indicates that Apel has now commissioned its new powder-coating equipment and that it has been certified by two paint manufacturers to meet the AAMA 2603 standard.<sup>99</sup> The evidence also indicates that Spectra claims to meet the AAMA 2603 standard.<sup>100</sup>

128. The Tribunal notes that there is some evidence on the record that Apel and Spectra have the ability to meet MAAX Bath's and Aluminart's specific requirements, as they currently supply their competitors. In particular, the witness for Apel testified that Apel currently supplies other screen door producers that

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90. Tribunal Exhibit RD-2011-001-23.06, Administrative Record, Vol. 1C at 331-32; Tribunal Exhibit RD-2011-001-23.09, Administrative Record, Vol. 1C at 347, 350-51; *Transcript of Public Hearing*, Vol. 2, 11 April 2012, at 312, 412.

91. Tribunal Exhibit RD-2011-001-23.09, Administrative Record, Vol. 1C at 346-47; *Transcript of Public Hearing*, Vol. 2, 11 April 2012, at 260, 271-72, 275-76, 312, 314, 316, 322-23.

92. *Transcript of Public Hearing*, Vol. 2, 11 April 2012, at 278, 285, 310, 317-18, 410.

93. Tribunal Exhibit RD-2011-001-23.02, Administrative Record, Vol. 1 at 79; *Transcript of Public Hearing*, Vol. 1, 10 April 2012, at 23-24, 53-54, 96-98.

94. *Transcript of Public Hearing*, Vol. 2, 11 April 2012, at 271-72, 314, 316.

95. *Ibid.* at 277-78.

96. *Ibid.* at 279, 301-302.

97. *Transcript of Public Hearing*, Vol. 1, 10 April 2012, at 103.

98. Tribunal Exhibit RD-2011-001-10.02B, Administrative Record, Vol. 1A at 14, 18; *Transcript of Public Hearing*, Vol. 1, 10 April 2012, at 135, 138.

99. Tribunal Exhibit RD-2011-001-23.06, Administrative Record, Vol. 1C at 331-32; Tribunal Exhibit RD-2011-001-24.06 (protected), Administrative Record, Vol. 2E at 18-19; *Transcript of Public Hearing*, Vol. 2, 11 April 2012, at 342, 344-45.

100. Tribunal Exhibit RD-2011-001-23.09, Administrative Record, Vol. 1C at 347.

compete directly with Aluminart.<sup>101</sup> The witness for Spectra testified that Spectra used to supply MAAX Bath and Aluminart and that it currently supplies their competitors in the shower door and storm door industries.<sup>102</sup> In the Tribunal's view, this confirms that Spectra and Apel have the ability to meet MAAX Bath's and Aluminart's specific requirements.

### Conclusion

129. In light of the foregoing, the Tribunal finds that the domestic industry has the ability to meet MAAX Bath's and Aluminart's specific requirements. Accordingly, the requested product exclusions will not be granted. Given this decision, the Tribunal need not consider MAAX Bath's and Aluminart's alternative requests to exclude all aluminum extrusions that they import from China.

### **Reconsideration of Previously Granted Exclusions**

130. During the hearing, the domestic extruders suggested that the Tribunal should reconsider the exclusions previously granted to MAAX Bath in *Aluminum Extrusions Remand*.<sup>103</sup> They submitted that, while the Tribunal does not usually expand the scope of a finding or order in the context of a review, such reconsideration is warranted under the circumstances, since it is now apparent that the Tribunal granted those exclusions on the basis of clearly erroneous facts. They submitted that the evidence on the record clearly indicates that China Square is not, and was not at the time of the Tribunal's injury inquiry, a fully integrated extruder performing all fabrication and finishing services required by MAAX Bath under one roof (i.e. in one location). In their view, a decision based on erroneous facts should not be permitted to stand, as all decision makers have a right to protect the integrity of their decision-making process.

131. MAAX Bath and Aluminart submitted that, while the evidence regarding China Square's alleged lack of full integration was filed with the Tribunal before the hearing, the domestic extruders only raised the issue of reconsidering previously granted exclusions on the final day of the hearing. They submitted that this was far too late in the process to raise such a serious issue.

132. As discussed above, the evidence on the record in the present interim review indicates that, contrary to what had been stated by MAAX Bath in *Aluminum Extrusions Remand*, China Square is not, and never was, a fully integrated extruder. This evidence has led the Tribunal to determine, in the context of the present interim review, that MAAX Bath's specific requirements could be met by a single extruder that is not fully integrated (i.e. a single extruder that may outsource certain operations).

133. Therefore, it is reasonable to assume that, if this evidence had been available in *Aluminum Extrusions Remand*, the Tribunal would have found that the domestic industry was able to meet MAAX Bath's specific requirements and that it would not have granted the product exclusions that had been requested by MAAX Bath. In the Tribunal's view, this casts a significant doubt on the integrity of its decision-making process in that case.

134. In these circumstances, the Tribunal believes that it would be appropriate to consider whether the product exclusions granted to MAAX Bath in *Aluminum Extrusions Remand* should be revoked. However, given that the issue of reconsidering previously granted product exclusions was only raised on the final day of the hearing, effectively denying MAAX Bath the opportunity to properly defend its interests, it would be unfair to consider whether those product exclusions should be revoked in the context of the present interim

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101. Tribunal Exhibit RD-2011-001-23.06, Administrative Record, Vol. 1C at 330; *Transcript of Public Hearing*, Vol. 2, 11 April 2012, at 276.

102. Tribunal Exhibit RD-2011-001-23.09, Administrative Record, Vol. 1C at 345, 347; *Transcript of Public Hearing*, Vol. 2, 11 April 2012, at 288, 324-25, 373, 388, 411.

103. *Transcript of Public Hearing*, Vol. 3, 12 April 2012, at 597-601.

review. For these reasons, the Tribunal should instead strongly consider initiating a new interim review to address this issue.

### **Separate Opinion of Member Leach on Reconsideration of Previously Granted Exclusions**

135. I agree with my colleagues that it is reasonable to assume that, if the Tribunal had known that China Square was not a fully integrated extruder in *Aluminum Extrusions Remand*, it would not ultimately have granted the product exclusions that had been requested by MAAX Bath. I also agree that this casts a significant doubt on the integrity of the Tribunal's decision-making process in that case.

136. However, I respectfully disagree with my colleagues that it would be unfair to consider whether the product exclusions granted to MAAX Bath in *Aluminum Extrusions Remand* should be revoked in the context of the present interim review. In my view, the uncontroverted evidence upon which the Tribunal can make a decision in this regard is on the record in this interim review. Moreover, MAAX Bath was not only aware of such evidence, it confirmed it.<sup>104</sup> In such circumstances, I fail to see how it would be unfair to MAAX Bath for the Tribunal to consider this evidence.

137. Further, I take the position that to wait for a new interim review to consider whether the product exclusions granted to MAAX Bath in *Aluminum Extrusions Remand* should be revoked would not only be unnecessary, but could call into question the integrity of the Tribunal's current process. Put simply, if, on the basis of the evidence currently before it, the Tribunal would not have granted the product exclusions requested by MAAX Bath in *Aluminum Extrusions Remand*, then its decision to grant those product exclusions is clearly no longer appropriate, and the Tribunal should remedy the situation by revoking the exclusions at the earliest opportunity.

### **DECISION**

138. For the foregoing reasons, pursuant to paragraph 76.01(5)(b) of *SIMA*, the Tribunal hereby makes no amendment to its findings.

Jason W. Downey  
Jason W. Downey  
Presiding Member

Serge Fréchette  
Serge Fréchette  
Member

Stephen A. Leach  
Stephen A. Leach  
Member

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104. *Transcript of Public Hearing*, Vol. 1, 10 April 2012, at 29.