



Ottawa, Wednesday, June 26, 2002

Expiry Review No. RR-2001-004

IN THE MATTER OF an expiry review, under subsection 76.03(3) of the *Special Import Measures Act*, of the finding made by the Canadian International Trade Tribunal on June 27, 1997, in Inquiry No. NQ-96-004, concerning:

**CONCRETE PANELS, REINFORCED WITH FIBERGLASS MESH,
ORIGINATING IN OR EXPORTED FROM THE UNITED STATES OF
AMERICA AND PRODUCED BY OR ON BEHALF OF CUSTOM BUILDING
PRODUCTS, ITS SUCCESSORS AND ASSIGNS, FOR USE OR CONSUMPTION
IN THE PROVINCE OF BRITISH COLUMBIA OR ALBERTA**

ORDER

On October 15, 2001, the Canadian International Trade Tribunal gave notice that, pursuant to subsection 76.03(3) of the *Special Import Measures Act*, it would initiate an expiry review of its finding made on June 27, 1997, in Inquiry No. NQ-96-004, concerning concrete panels, reinforced with fiberglass mesh, originating in or exported from the United States of America and produced by or on behalf of Custom Building Products, its successors and assigns, for use or consumption in the province of British Columbia or Alberta.

In the course of its review, the Canadian International Trade Tribunal concluded that the demand in Alberta and British Columbia is now, to a substantial degree, supplied by producers of like goods located elsewhere in Canada. Consequently, the Canadian International Trade Tribunal finds that British Columbia and Alberta no longer constitute a regional market and that the necessary precondition for a determination under subsection 76.03(10) of the *Special Import Measures Act*, i.e. that the expiry of the finding in Inquiry No. NQ-96-004 is likely to result in injury to the domestic industry, is no longer met.

Pursuant to subparagraph 76.03(12)(a)(ii) of the *Special Import Measures Act*, the Canadian International Trade Tribunal hereby rescinds the finding made in Inquiry No. NQ-96-004 concerning the above-mentioned goods.

Pierre Gosselin
Pierre Gosselin
Presiding Member

James A. Ogilvy
James A. Ogilvy
Member

Ellen Fry
Ellen Fry
Member

Michel P. Granger
Michel P. Granger
Secretary

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Special Import Measures Act – Whether to rescind or continue, with or without amendment, the finding made by the Canadian International Trade Tribunal on June 27, 1997, in Inquiry No. NQ-96-004.

Date of Order and Reasons: June 26, 2002

Tribunal Members: Pierre Gosselin, Presiding Member
James A. Ogilvy, Member
Ellen Fry, Member

Director of Research: Réal Roy

Research Manager: Simon Glance

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Registrar Officer: Natalie Lowe

Participants:

for Victoria Bazan
Bed-Roc Industries Limited

(Domestic Producer)

Jeffrey S. Thomas
Angus M. Gunn
Michael Scott Kerwin
for Custom Building Products of Canada Ltd.

for Denis Gascon
Westroc Inc.

Riyaz Dattu
Orlando E. Silva
for CGC Inc.

(Importer/Exporter/Other Party)



Ottawa, Wednesday, June 26, 2002

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TRIBUNAL: PIERRE GOSSELIN, Presiding Member
JAMES A. OGILVY, Member
ELLEN FRY, Member

STATEMENT OF REASONS

BACKGROUND

This is an expiry review, under subsection 76.03(3) of the *Special Import Measures Act*¹ of the finding made by the Canadian International Trade Tribunal (the Tribunal) on June 27, 1997, in Inquiry No. NQ-96-004, concerning concrete panels, reinforced with fiberglass mesh, originating in or exported from the United States of America and produced by or on behalf of Custom Building Products, its successors and assigns, for use or consumption in the province of British Columbia or Alberta.

On August 24, 2001, the Tribunal issued a notice of expiry pursuant to subsection 76.03(2) of SIMA, informing interested parties that its finding made on June 27, 1997, was scheduled to expire on June 26, 2002.²

On October 15, 2001, the Tribunal issued a notice of expiry review pursuant to subsection 76.03(3) of SIMA. As a result, the Commissioner of the Canada Customs and Revenue Agency (the Commissioner) commenced an investigation on October 16, 2001, to determine whether the expiry of the aforementioned finding is likely to result in the continuation or resumption of dumping of the subject goods. As part of its investigation, the Canada Customs and Revenue Agency (the CCRA) issued questionnaires to producers, distributors, importers and exporters of concrete panels and other tile backer boards.

On February 12, 2002, pursuant to paragraph 76.03(7)(a) of SIMA, the CCRA issued its determination that the expiry of the finding was likely to result in the continuation or resumption of dumping of the subject goods.

1. R.S.C. 1985, c. S-15 [hereinafter SIMA].
2. C. Gaz. 2001.I.3295.

On April 19, 2002, the Tribunal gave notice that the public hearing, scheduled to take place in Vancouver, British Columbia, on May 6, 2002, had been cancelled.

The record of this expiry review consists of all relevant documents, including the CCRA's *Protected Expiry Review Report* and *Statement of Reasons*, with supporting documentation, the protected and public replies to the Tribunal's and the CCRA's questionnaires, and the public and protected pre-hearing staff reports from Inquiry No. NQ-96-004 and this review. All public exhibits were made available to interested parties, while protected exhibits were provided only to counsel who had filed a declaration and undertaking with the Tribunal in respect of confidential information.

PRODUCT

Product Definition and Description

Concrete panels, commonly referred to as tile backer boards, are used mainly in the construction industry as backing boards for ceramic tile installations around showers, tubs and other wet areas and as an underlayment for ceramic tile, slate and marble floors and countertops. Concrete panels are also used for exterior sheathing and for wall shields and floor protectors around fireplaces, wood stoves and heaters.

Production Process

Bed-Roc Industries Limited (Bed-Roc), the sole regional market producer of concrete panels in British Columbia and Alberta, produces concrete panels by placing a metal frame on a fiberglass form and then laying the fiberglass mesh inside the frame. A thin layer of cement slurry is spread evenly over the fiberglass mesh, which is then cut to length. The core mix, consisting of formulated amounts of aggregate, cement and water, is troweled onto the panel, and a second layer of fiberglass is laid on top of the mixture. Finally, cement slurry is spread over the fiberglass, which is then cut to length. Throughout the production process, the panels are subjected to various quality control procedures to ensure that any defects are eliminated and that the required thickness is produced. The finished panels are cured overnight in a drying room, stamped with product identifiers and strapped in pallets of 20 or 40 sheets. Bed-Roc manufactures the panels in various sizes and thicknesses, although panels measuring 3 ft. x 5 ft. and 7/16 in. thick account for the bulk of production.

PAST PROCEEDINGS

Summary of the Finding in Inquiry No. NQ-96-004

Bed-Roc argued that the dumping of the subject goods had caused and was threatening to cause material injury. Custom Building Products of Canada Ltd. (Custom Canada), an importer, and Custom Building Products (Custom US), the named exporter, argued for a finding of no injury and no threat of injury.

With respect to regional market considerations, the Tribunal noted that Bed-Roc was the sole producer of like goods in British Columbia and Alberta and that it sold its entire production of like goods in those two provinces. Unifix Inc. (Unifix), located in Bromont, Quebec, which was the only other domestic producer of concrete panels in Canada, did not sell any of its production of concrete panels in either British Columbia or Alberta. Therefore, the Tribunal concluded that British Columbia and Alberta formed a regional market for the purposes of the inquiry.

In considering whether there was a concentration of dumped imports in the regional market, the Tribunal noted that both the distribution test and ratio test indicated that there was a concentration of dumped imports in the regional market.

In looking at injury, the evidence suggested that Bed-Roc, in spite of its transportation advantage, only marginally participated in the robust growth in market demand. While the company was able to maintain sales volumes, it did so at a considerable cost. In the Tribunal's view, Bed-Roc got caught in the crossfire of price reductions initiated by Custom Canada, to which CGC Inc. (CGC), an importer of non-subject goods, responded. Bed-Roc had been the low-price supplier in the regional market, but was forced to lower its prices even further in response to these price reductions. The effect of this price erosion and price suppression was clearly shown in the financial results reported by Bed-Roc for its 1997 fiscal year, which showed declining revenues and gross margins resulting in a significant net financial loss. The evidence also indicated that Bed-Roc had been injured in its ability to invest in new equipment and systems and that new investments planned for 1997 had been postponed and were in jeopardy unless the company's financial results were reversed.

The Tribunal also reviewed allegations that any injury suffered by Bed-Roc was caused by factors other than dumping, including claims that Bed-Roc was a single product company and that it was producing the wrong product for the marketplace. It was also alleged that Bed-Roc did not offer the same level of marketing and customer support that was offered by Custom Canada and CanWel Distribution Ltd. (a distributor of the subject goods) and that CGC's market gains had been a major contributor to any injury suffered by Bed-Roc. Finally, Custom Canada alleged that Bed-Roc's loss of the Home Depot account and Home Depot's selling prices were major influences on the domestic industry's performance.

On the whole, the Tribunal recognized that these other factors played a role in Bed-Roc's performance during the inquiry period. However, in the Tribunal's opinion, their effects were minimal in comparison to the materially injurious effect of the dumping.

PRELIMINARY MATTERS

During the course of the review, the Tribunal received evidence that indicated that British Columbia and Alberta might no longer meet the requirements necessary for a "regional market". The data obtained through the Tribunal's investigation revealed that, since the finding in 1997, the regional market had begun to be supplied by Unifix.³

Since the volume of sales reported by Unifix raised questions about the continued existence of a regional market, the Tribunal sought supplemental information from Unifix on its participation in the regional market and submissions from parties on the issue.⁴

On March 27, 2002, the Tribunal also sought submissions from the parties on whether there was currently a regional market for Alberta and British Columbia within the meaning of subsection 2(1.1) of SIMA. Submissions were received from Bed-Roc and Custom Canada.

3. *Protected Pre-hearing Staff Report*, 25 March 2002, Tribunal Exhibit RR-2001-004-06 (protected), Administrative Record, Vol. 2A at 25.

4. Tribunal Exhibit RR-2001-004-20.02A (protected), Administrative Record, Vol. 4.2 at 17-19.

Bed-Roc

In its submissions, Bed-Roc referred the Tribunal to the definition of “like goods” in subsection 2(1) of SIMA. Bed-Roc first argued that, in light of the definition of “like goods”, the goods manufactured by Unifix are not “like goods” in relation to the concrete panels produced by Bed-Roc and that the Tribunal cannot include these goods in its regional market analysis test. More specifically, Bed-Roc argued that the products sold by Unifix are substantially different from its products and the subject goods in composition, size and end use. It was argued that Unifix’s products are made of polymer-modified concrete rather than the Portland cement used by Bed-Roc and Custom US. Bed-Roc further argued that the subject goods are only available in a width of 36 in., while certain of Unifix’s products are available in a width of 48 in., a dimension that is more suitable for use as wallboard. And, lastly, Bed-Roc submitted that certain of Unifix’s products are flexible and suitable for roofing support and other curved-surface applications. Bed-Roc submitted that these differences support a finding that all or some of the products sold by Unifix are not “like goods” within the meaning of subsection 2(1).

Referring the Tribunal to the regional market analysis test in subsection 2(1.1) of SIMA, Bed-Roc argued that Unifix had not supplied the regional market to any substantial degree. It argued that the first condition of the regional market test is met because it sold almost all of its products in the regional market during the period of review. Bed-Roc further argued that the second condition of subsection 2(1.1) is met if certain products sold by Unifix are removed from the regional market analysis test because these goods are not “like goods”. Finally, it argued that, if some or all of Unifix’s products are included in the regional market analysis test, the second condition of subsection 2(1.1) of SIMA is met based on a closer examination of what constitutes “substantial demand”.

Custom Canada

Custom Canada argued that Unifix’s products were “like goods” as defined by subsection 2(1) of SIMA. It further argued that SIMA does not require that two products be identical in every way in order to be considered “like goods”. Physical characteristics, method of manufacture, pricing, distribution and end uses are among the relevant considerations in determining “like goods”. Custom Canada also referred to the Tribunal’s statement of reasons in Inquiry No. NQ-96-004, which noted that Unifix was a producer of like goods. It argued that Unifix’s products have not changed since then and that the products remain “concrete panels reinforced with fiberglass mesh”. Custom Canada also stated, but did not concede, that Unifix’s flexible products could arguably be considered different from the “like goods” but that, given the minimal volumes that these products represent, it would not affect the percentage of Unifix’s market share.

Custom Canada also argued that Unifix supplied its products to the regional market of British Columbia and Alberta to a substantial degree and that, consequently, the regional market no longer existed. It also referred to the Tribunal’s past decisions in which regional markets were found to no longer exist when there were inflows of goods from other regions in Canada ranging between 11.5 and 29 percent.⁵ Custom Canada argued that, since Unifix’s share of the market falls within this range, there no longer exists a regional market within the meaning of subsection 2(1.1) of SIMA.

5. *Certain Hot Rolled Carbon Steel Concrete Reinforcing Bars, Bars and Structural* (1987), 15 C.E.R. 253 (CIT); *Solid Urea* (1987), 15 C.E.R. 277 (CIT); *Malt Beverages* (2 December 1994), RR-94-001 (CITT).

REASONS FOR DECISION

As noted earlier, the Commissioner made a determination under subsection 76.03(7) of SIMA that the expiry of the finding in respect of the subject goods was likely to result in the continuation or resumption of dumping. When the Commissioner makes such a determination, the Tribunal must determine, pursuant to subsection 76.03(10), whether the expiry of the finding in respect of the subject goods is likely to result in injury or retardation. In this case, to make a determination on the issue of a regional market, the Tribunal must first determine what are the “like goods”.

Like Goods

The Tribunal must determine which domestically produced goods are like goods to the subject goods.

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

- (a) goods that are identical in all respects to the other goods, or
- (b) in the absence of any goods described in paragraph (a), goods the uses and other characteristics of which closely resemble those of the other goods.

The Commissioner has defined the subject goods as concrete panels reinforced with fiberglass mesh.

In considering the issue of like goods, the Tribunal typically looks at a number of factors, including the physical characteristics of the goods, such as appearance, their method of manufacture, their market characteristics, such as substitutability, pricing and distribution, and whether the goods fulfil the same customer needs. In *Sarco Canada v. Anti-dumping Tribunal*,⁶ the Federal Court of Appeal accepted the Anti-dumping Tribunal’s (ADT) approach to the analysis of like goods, where the ADT stated that:

the question of whether goods are “like” is to be determined by market considerations. Do they compete directly with one another? Are the same consumers being sought? Do they have the same [end use] functionally? Do they fulfil the same need? Can they be substituted one for the other?⁷

The ADT also considered the physical characteristics, including similarities and dissimilarities of the goods, in determining whether they were like goods to each other. If the goods were seen to be readily substitutable one for the other, there was an inclination to consider them like goods.

In its submissions on the issue of the existence of a regional market, Bed-Roc argued that some or all of the concrete panels produced by Unifix and sold in British Columbia and Alberta were not like goods. Bed-Roc submitted that some products contained polymer-modified cement rather than the Portland cement used by Custom US and Bed-Roc. Other products produced by Unifix were in sizes that differed from those of the subject goods and, therefore, were more suitable for end uses other than as tile backer board. In addition, Bed-Roc submitted that certain other products sold by Unifix were different from the subject goods and its own product, in that they were flexible concrete panels.

In considering the issue of like goods, the Tribunal notes that the definition of the subject goods, i.e. concrete panels reinforced with fiberglass mesh, is general in nature, containing no size or compositional

6. [1979] 1 F.C. 247.

7. *Ibid.* at 251-52.

descriptions, or any other technical definitions. The evidence before the Tribunal also indicates that concrete panels produced by Unifix have the same or similar end uses as the subject goods.⁸

Therefore, the Tribunal finds it difficult to exclude Unifix's products from the definition of like goods on the basis of size or composition and finds that all concrete panels, reinforced with fiberglass mesh, produced in Canada and sold in the regional market are like goods to the subject goods. Although not identical to the subject goods, these domestically produced concrete panels, reinforced with fiberglass mesh, have physical characteristics that closely resemble those of the subject goods and generally have the same end uses. Therefore, the Tribunal finds that Unifix's products are like goods.

Existence of a Regional Market

Subsection 2(1.1) of SIMA stipulates the circumstances in which a domestic industry may be based on a regional market. Subsection 2(1.1) states:

In exceptional circumstances, the territory of Canada may, for the production of any goods, be divided into two or more regional markets and the domestic producers of like goods in any of those markets may be considered to be a separate domestic industry where

- (a) the producers in the market sell all or almost all of their production of like goods in the market; and
- (b) the demand in the market is not to any substantial degree supplied by producers of like goods located elsewhere in Canada.

If either test is not met, then a regional market cannot be found to exist.

The first condition for a regional market refers to outflows of like goods from the regional market. The regional market on which the complaint was based was limited to British Columbia and Alberta. It is clear from the evidence that there were few shipments of concrete panels produced in the regional market and sold in the rest of Canada.⁹ Therefore, the Tribunal finds that the first condition is met.

The second condition refers to inflows of like goods into the regional market from the rest of Canada. As the evidence indicates, sales in the regional market by Canadian producers located outside the region accounted for more than one fifth of the apparent regional market in 2000 and the January 1 to September 30, 2001, period.¹⁰

In this case, the Tribunal is of the view that the demand in the regional market is, to a substantial degree, supplied by a producer located elsewhere in Canada. Even if the Tribunal were to accept Bed-Roc's submission that some of the goods produced by Unifix and imported into the regional market were not like goods, which it is not prepared to do, the volume of goods flowing into the regional market from the rest of Canada would still be such that the Tribunal would consider that the demand in the market is, to a substantial degree, supplied by a producer of like goods located elsewhere in Canada.

Bed-Roc argued that, even if some or all of Unifix's products were found to be like goods, the second condition in subsection 2(1.1) of SIMA would be met based on a closer examination of what constitutes substantial demand. It submitted that demand must be measured in the context of each particular

8. Tribunal Exhibit RR-2001-004-50, Administrative Record, Vol. 1 at 90.

9. *Protected Pre-hearing Staff Report*, 25 March 2002, Tribunal Exhibit RR-2001-004-06 (protected), Administrative Record, Vol. 2A at 25.

10. *Ibid.*

case. Demand can be substantial in terms of the percentage share of market supplied, but also in terms of the number of customers supplied. In Bed-Roc's submission, on this basis, the demand satisfied by Unifix's sales was restricted to a few customers, which favours a finding that the demand satisfied was not substantial.

The evidence before the Tribunal shows that Unifix's customers for concrete panels in British Columbia and Alberta were limited.¹¹ The Tribunal notes that the apparent market for concrete panels was measured at the distributor/wholesaler level of trade where producers and importers typically compete for sales. However, it recognizes that the demand for concrete panels is derived from construction activity, which represents the end use for the product. Sales to distributors and wholesalers represent a close proxy for this demand. Whether the demand for concrete panels is met through sales to a small number of larger distributors/wholesalers or by a more fragmented service sector, is not, in the Tribunal's opinion, indicative of whether a producer or importer supplies a substantial or insubstantial portion of the demand for the product.

In light of the above, the Tribunal finds that the demand for concrete panels in British Columbia and Alberta is, to a substantial degree, supplied by a producer of like goods located elsewhere in Canada and that there no longer exists a regional market for the purposes of this review. Accordingly, the Tribunal finds that there is no basis, under subsection 76.03(10) of SIMA, for the Tribunal to make a determination on the question of likelihood of injury or retardation.

CONCLUSION

In light of the foregoing, and pursuant to subparagraph 76.03(12)(a)(ii) of SIMA, the Tribunal hereby rescinds the finding made on June 27, 1997, in Inquiry No. NQ-96-004, concerning concrete panels, reinforced with fiberglass mesh, originating in or exported from the United States of America and produced by or on behalf of Custom Building Products, its successors and assigns, for use or consumption in the province of British Columbia or Alberta.

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11. Tribunal Exhibit RR-2001-004-20.02A, Administrative Record, Vol. 4.2 at 16.