



Ottawa, Friday, October 16, 1998

Review No.: RR-97-008

IN THE MATTER OF a review, under subsection 76(2) of the *Special Import Measures Act*, of the finding made by the Canadian International Trade Tribunal on October 18, 1993, in Inquiry No. NQ-93-001, concerning:

CERTAIN SOLDER JOINT PRESSURE PIPE FITTINGS AND SOLDER JOINT DRAINAGE, WASTE AND VENT PIPE FITTINGS, MADE OF CAST COPPER ALLOY, WROUGHT COPPER ALLOY OR WROUGHT COPPER, ORIGINATING IN OR EXPORTED FROM THE UNITED STATES OF AMERICA AND PRODUCED BY OR ON BEHALF OF ELKHART PRODUCTS CORPORATION, ELKHART, INDIANA, NIBCO INC., ELKHART, INDIANA, AND MUELLER INDUSTRIES, INC., WICHITA, KANSAS, THEIR SUCCESSORS AND ASSIGNS

ORDER

The Canadian International Trade Tribunal, under the provisions of subsection 76(2) of the *Special Import Measures Act*, has conducted a review of its finding made on October 18, 1993, in Inquiry No. NQ-93-001.

Pursuant to subsection 76(4) of the *Special Import Measures Act*, the Canadian International Trade Tribunal hereby rescinds the above-mentioned finding.

Patricia M. Close
Patricia M. Close
Presiding Member

Peter F. Thalheimer
Peter F. Thalheimer
Member

Richard Lafontaine
Richard Lafontaine
Member

Michel P. Granger
Michel P. Granger
Secretary



Ottawa, Friday, October 16, 1998

Review No.: RR-97-008

CERTAIN SOLDER JOINT PRESSURE PIPE FITTINGS AND SOLDER JOINT DRAINAGE, WASTE AND VENT PIPE FITTINGS, MADE OF CAST COPPER ALLOY, WROUGHT COPPER ALLOY OR WROUGHT COPPER, ORIGINATING IN OR EXPORTED FROM THE UNITED STATES OF AMERICA AND PRODUCED BY OR ON BEHALF OF ELKHART PRODUCTS CORPORATION, ELKHART, INDIANA, NIBCO INC., ELKHART, INDIANA, AND MUELLER INDUSTRIES, INC., WICHITA, KANSAS, THEIR SUCCESSORS AND ASSIGNS

Special Import Measures Act — Whether to rescind or continue, with or without amendment, the finding made by the Canadian International Trade Tribunal on October 18, 1993, in Inquiry No. NQ-93-001.

Place of Hearing: Ottawa, Ontario
Dates of Hearing: August 18 to 21, 1998
Date of Order and Reasons: October 16, 1998
Tribunal Members: Patricia M. Close, Presiding Member
Peter F. Thalheimer, Member
Richard Lafontaine, Member
Director of Research: Peter Welsh
Lead Researcher: Ken Campbell
Economist: Iln Uhm
Statistical Officer: Lise Lacombe
Counsel for the Tribunal: Shelley Rowe
Registration and Distribution Officer: Pierrette Hébert

Participants: Darrel H. Pearson
Jeffery D. Jenkins
Peter Collins
for Cello Products Inc.
Richard S. Gottlieb
J. Peter Jarosz
for Bow Metallics Inc.

(Domestic Manufacturers)

Lawrence L. Herman
Y.K. Anne Kim
for Streamline Copper & Brass Ltd.

(Domestic Manufacturer/Importer)

Lawrence L. Herman
Y.K. Anne Kim
for Mueller Industries, Inc.

Riyaz Dattu
John W. Boscarior
for Nibco Inc.

(Exporters)

Witnesses:

Terry Aurini
President
Cello Products Inc.

Paul Petrie
Controller
Cello Products Inc.

Kim Bauer
President
Pinnacle Group

David J. Parker
Purchasing Director
Bow Metallics Inc.

Pat Chiasson
Executive Vice-President
Chief Operating Officer
Bow Metallics Inc.

Louis F. Pereira
General Manager
Streamline Copper & Brass Ltd.

John B. Hansen
Vice-President, Marketing
Standard Products Division
Mueller Industries, Inc.

Clifford E. Sarjeant
General Manager
NCI Marketing Inc.

Dennis Parker
Vice-President and Chief Financial Officer
Nibco Inc.

Address all communications to:

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



Ottawa, Friday, October 16, 1998

Review No.: RR-97-008

IN THE MATTER OF a review, under subsection 76(2) of the *Special Import Measures Act*, of the finding made by the Canadian International Trade Tribunal on October 18, 1993, in Inquiry No. NQ-93-001, concerning:

CERTAIN SOLDER JOINT PRESSURE PIPE FITTINGS AND SOLDER JOINT DRAINAGE, WASTE AND VENT PIPE FITTINGS, MADE OF CAST COPPER ALLOY, WROUGHT COPPER ALLOY OR WROUGHT COPPER, ORIGINATING IN OR EXPORTED FROM THE UNITED STATES OF AMERICA AND PRODUCED BY OR ON BEHALF OF ELKHART PRODUCTS CORPORATION, ELKHART, INDIANA, NIBCO INC., ELKHART, INDIANA, AND MUELLER INDUSTRIES, INC., WICHITA, KANSAS, THEIR SUCCESSORS AND ASSIGNS

TRIBUNAL: PATRICIA M. CLOSE, Presiding Member
PETER F. THALHEIMER, Member
RICHARD LAFONTAINE, Member

STATEMENT OF REASONS

BACKGROUND

This is a review, under subsection 76(2) of the *Special Import Measures Act*¹ (SIMA), of the finding of material injury made by the Canadian International Trade Tribunal (the Tribunal), in Inquiry No. NQ-93-001,² concerning certain solder joint pressure pipe fittings and solder joint drainage, waste and vent pipe fittings, made of cast copper alloy, wrought copper alloy or wrought copper, in diameters up to 6 in. and the metric equivalent, for use in heating and plumbing applications, originating in or exported from the United States of America and produced by or on behalf of Elkhart Products Corporation (Elkhart), Elkhart, Indiana, Nibco Inc. (Nibco), Elkhart, Indiana, and Mueller Industries, Inc. (Mueller), Wichita, Kansas, their successors and assigns.

Pursuant to subsection 76(2) of SIMA, the Tribunal initiated a review of the finding and issued a notice of review³ on March 20, 1998. This notice was forwarded to all known interested parties.

As part of this review, the Tribunal sent questionnaires to Canadian producers, importers, purchasers and the three named foreign manufacturers of copper pipe fittings. From the replies to these questionnaires and other sources, the Tribunal's research staff prepared public and protected pre-hearing staff reports.

-
1. R.S.C. 1985, c. S-15, as amended by S.C. 1994, c. 47.
 2. *Finding and Statement of Reasons*, October 18, 1993.
 3. *Canada Gazette* Part I, Vol. 132, No. 13, March 28, 1998, at 702.

The record of this review consists of all relevant documents, including the finding in Inquiry No. NQ-93-001, the notice of review and public and confidential replies to the questionnaires for the 1998 review, and the public and protected pre-hearing staff reports for the 1993 inquiry and the 1998 review. All public exhibits were made available to interested parties, while protected exhibits were provided only to independent counsel who had filed a declaration and confidentiality undertaking with the Tribunal.

Public and *in camera* hearings were held in Ottawa, Ontario, from August 18 to 21, 1998.

The domestic producers, Cello Products Inc. (Cello) and Bow Metallics Inc. (Bow), were represented by counsel at the hearing. Evidence was presented and arguments were made in support of continuing the finding. Streamline Copper & Brass Ltd. (Streamline), a domestic producer/importer, was represented by counsel who submitted evidence and made arguments in support of rescinding the finding.

Mueller and Nibco of the United States were also represented by counsel at the hearing. Evidence was presented and arguments were made by their counsel in support of rescinding the finding.

At the Tribunal's request, a representative of NCI Marketing Inc. (NCI), an importer of the subject goods, appeared as a witness at the hearing. Although Elkhart declined the Tribunal's invitation to appear as a witness, the company did provide written responses to questions considered by the Tribunal to be relevant in the review.⁴

During the course of the review, the Tribunal issued decisions with respect to several procedural and substantive issues, including the following: (1) whether to permit a university professor who was not a lawyer to act as counsel for a party and to grant him disclosure of confidential information;⁵ (2) whether to grant an extension of time to file submissions;⁶ (3) the requests for information to which parties should be directed to respond;⁷ (4) whether parties' replies to requests for information complied with the Tribunal's directions;⁸ (5) whether the designation of certain information in exhibits as confidential was warranted and whether there was sufficient disclosure of allegations of injury to permit responses by other parties;⁹ and (6) the matters, in notices of matters arising, about which witnesses were to be prepared to answer questions at the hearing and whether they were to bring to the hearing related documents and/or other written information.¹⁰

4. Tribunal Exhibits RR-97-008-41 and RR-97-008-41A, Administrative Record, Vol. 1A at 138-40 and 142-49 respectively and Tribunal Exhibit RR-97-008-41B (protected), Administrative Record, Vol. 2 at 119-26.

5. Motion for an order disqualifying Professor G. Franklin Mathewson from acting as counsel of record for Amcast Industrial Ltd. and Elkhart and for a further order denying him access to the confidential information on the record of the proceedings in Review No. RR-97-008, *Decision of the Tribunal and Reasons for Decision*, June 9, 1998, Administrative Record, Vol. 23A.

6. Letter dated June 23, 1998, to counsel and parties of record, Administrative Record, Vol. 23A.

7. Letter dated June 26, 1998, to counsel and parties of record, Administrative Record, Vol. 28.

8. Letter dated July 22, 1998, to counsel and parties of record, Tribunal Exhibit RR-97-008-I-2A, Administrative Record, Vol. 9A at 5-9, Tribunal Exhibit RR-97-008-I-3A, Administrative Record, Vol. 9B at 5-9 and Tribunal Exhibit RR-97-008-I-4B, Administrative Record, Vol. 9C at 9-13.

9. Letter dated July 17, 1998, to counsel and parties of record, Administrative Record, Vol. 23B.

10. Letters dated July 31, 1998, to counsel and parties of record and to Mr. Clifford Sarjeant, Administrative Record, Vol. 23B.

PRODUCTS

The products that are the subject of this review are defined as solder joint pressure pipe fittings and solder joint drainage, waste and vent pipe fittings, made of cast copper alloy, wrought copper alloy or wrought copper, in diameters up to 6 in. and the metric equivalent, for use in heating and plumbing applications, originating in or exported from the United States and produced by or on behalf of Elkhart, of Elkhart, Indiana, Nibco, of Elkhart, Indiana, and Mueller, of Wichita, Kansas, their successors and assigns, excluding:

- (i) the subject goods listed in Appendix A to the Tribunal's finding; and
- (ii) the subject goods identified on the basis of outside dimensions and destined for air conditioning and refrigeration applications.

Solder fittings may be either cast from copper ingots or wrought from copper tube. Wrought fittings, however, make up the vast majority of the market. Wrought and cast fittings may be in the form of either pressure solder fittings or drainage, waste and vent solder fittings.

Pressure solder fittings are used primarily in copper pipelines conveying a liquid, usually water, in commercial and residential applications. In Canada, pressure fittings are made in diameters ranging from 1/8 in. to 8 in. Residential applications involve primarily 1/2-in. to 3/4-in. fittings. Fittings from 1 in. and up are used in industrial, institutional, commercial or multi-unit residential construction.

Pressure solder fittings are fabricated from wrought copper in either tube or wire form, or cast from brass ingots in a foundry and machined to specifications. There are over 1,000 different types/sizes of pressure fittings which fall into six main configurations: couplings, bushings, elbows, tees, adapters, and flanges or unions.

Drainage, waste and vent solder fittings are used in systems that collect waste fluids and in systems that provide venting to waste systems. These drainage systems are not pressurized, and the fittings are generally made of a lighter construction than that used in pressure systems. Most copper drainage fittings are used in industrial, institutional, commercial or multi-unit residential buildings.

In addition to the configurations found in pressure systems, drainage, waste and vent fittings are produced in the following configurations: traps, ferrules, joint adapters, cleanouts and closet flanges.

All solder fittings are manufactured in Canada and the United States to ANSI¹¹ standards.

Although there are numerous types and configurations of solder copper fittings, the majority of the market is made up of 1/2-in. to 3/4-in. wrought elbows, 1/2-in. to 3/4-in. wrought couplings and 1/2-in. to 3/4-in. wrought tees.

DOMESTIC PRODUCERS

Copper pipe fittings are produced in Canada by Cello, Streamline and Bow. Cello, located in Cambridge, Ontario, was founded in 1946 and was acquired by its current Canadian owners in 1983. Cello currently manufactures essentially all of its cast pressure and cast drainage requirements, 100 percent of its

11. American National Standards Institute.

wrought drainage requirements and the majority of its wrought pressure requirements in sizes from 1/8 in. to 8 in. in diameter.

Cello markets its fittings mostly in Canada, with increasing foreign sales in the United States, Mexico and Chile. In Canada, Cello markets nationally principally to the wholesale market. Cello also sells to the buy-sell market which services the smaller wholesalers and to original equipment manufacturers (OEMs). On export sales, it markets through buy-sell representatives.

Streamline, located in Strathroy, Ontario, is a wholly owned subsidiary of its US parent, Mueller. Streamline began production of wrought fittings for the Canadian market in 1964 and metric sized wrought fittings for the export market in the early 1970s. It also imports copper pipe fittings from Mueller. Streamline markets fittings nationally through its own sales force and through commissioned agents. Sales are made to wholesalers, retailers and OEMs.

Bow is wholly owned by CEVA Industries Inc. of Montréal, Quebec. Prior to 1991, Bow manufactured only plastic pipe and plastic pipe fittings. In 1991, Bow acquired the Emco Canada (Emco) production facility in Dorchester, Ontario, where it manufactures a limited line of wrought copper pipe fittings. Bow markets the majority of its copper pipe fittings in Ontario and Quebec through a related company, Bow Plastics Ltd., as well as smaller volumes to Cello and an OEM.

None of the domestic producers manufacture the full line of copper pipe fittings. They outsource some of their fitting requirements by purchasing from other domestic producers or by importing fittings from the United States.

EXPORTERS/IMPORTERS

Elkhart, with its head office located in Elkhart, Indiana, is a wholly owned subsidiary of Amcast Industrial Corporation of Dayton, Ohio. Elkhart, established in 1940, is one of the world's largest manufacturers of wrought copper fittings with production facilities in Elkhart and Geneva, Indiana, and Fayetteville, Arkansas. Copper fittings are marketed by Elkhart's Plumbing Products Division to both national and international accounts. US sales are made to consigned warehouses, directly to large independent sales representatives or to OEMs.

The majority of Elkhart's sales to Canada are to Amcast Industrial Ltd. (Amcast), a wholly owned subsidiary. Amcast began importing copper pipe fittings in 1990. It markets the fittings nationally from its warehouse and distribution facility in Burlington, Ontario. Elkhart also sells directly to certain customers in Canada.

Mueller, with its head office in Memphis, Tennessee, is also a major manufacturer of copper pipe fittings and a range of other copper and aluminum products. Mueller has plants in the United States, Canada, France and Great Britain. Copper pipe fittings are manufactured in Mueller's plants in Covington, Tennessee, and Fulton, Mississippi, and by Streamline in Canada. Mueller manufactures wrought copper fittings and purchases cast fittings from Nibco.

Mueller's primary channels of distribution in the United States for the subject goods are plumbing wholesalers and buy-sell agents. Secondary channels include hardware wholesalers and retailers. Canadian sales are made primarily through Streamline. Cello is Mueller's only other Canadian account.

Nibco, a privately owned company with its head office in Elkhart, Indiana, was incorporated in 1904. It is the only US manufacturer of both wrought and cast fittings. Nibco also manufactures plastic fittings and plastic and metal valves for commercial and industrial uses. Copper pipe fittings are manufactured at its plants located in Stuarts Draft, Virginia, and South Glens Falls, New York. Nibco distributes fittings in the United States through wholesalers, retailers and agents.

Until January 1996, Nibco's Canadian sales were marketed through a subsidiary, Nibco Canada Inc. (Nibco Canada). In January 1996, Nibco Canada was sold to NCI, which has an exclusive distribution agreement with Nibco to distribute Nibco products. As a result of the sale, NCI has been deemed by the Department of National Revenue (Revenue Canada) to be at arm's length to Nibco. NCI distributes a full line of flow control devices, including both metal and plastic pipe, fittings and valves. NCI sells copper pipe fittings nationally through wholesalers.

In addition to the above-noted companies, copper pipe fittings are imported by BMI Canada Inc. (BMI) of Boisbriand, Quebec, and C-B Supplies Limited of Burnaby, British Columbia. BMI markets copper pipe fittings nationally from its purchases made from Asian sources and fittings purchased from a Canadian importer. C-B Supplies Limited also distributes nationally its purchases imported from European and Asian sources.

SUMMARY OF THE 1993 FINDING

On October 18, 1993, the Tribunal found that the dumping in Canada of certain copper pipe fittings for use in heating and plumbing applications, originating in or exported from the United States and produced by or on behalf of Elkhart, Nibco and Mueller, their successors and assigns, had caused, was causing and was likely to cause material injury to the production in Canada of like goods. Excluded from the finding of material injury were the subject goods listed in Appendix A to that finding, as well as the subject goods destined for air conditioning and refrigeration applications.

The Tribunal first determined that the production of like goods in Canada had suffered material injury. It noted that the Canadian market for copper fittings was in the midst of a recession in 1990. Cello, Emco and Streamline supplied about 60 percent of the market from domestic production and close to 20 percent with imports from the named exporters.

In 1991, market volume grew by 16 percent, but the value of sales remained static, reflecting intensified price competition and a drop in the price of copper. Total domestic production declined by 41 percent. The demand left unfilled by the domestic producers was mostly filled by imports. Cello had positive results in terms of sales volume and market share, but its profitability fell sharply. Streamline incurred substantial losses, and Bow also recorded losses.

In 1992, market volume was static, but the value of sales declined by 17 percent. Total domestic production decreased by 15 percent. Imports from the three named exporters continued to grow, reaching almost 75 percent of the market. Prices continued to be driven downward by fierce price competition. The price erosion impacted negatively on all market participants, with Cello incurring losses for the first time during part of the year and Streamline and Bow reporting significant losses.

The first half of 1993 saw a dramatic turnaround. Cello's and Bow's production increased substantially, although total demand for copper fittings fell by 24 percent, and imports plummeted. Prices rose to pre-1990 levels after the Deputy Minister of National Revenue (the Deputy Minister) confirmed

significant dumping margins. As a result, Cello's market share increased by 10 percentage points compared to the first half of 1992, and the market share of imports declined. The financial performance of the three producers improved significantly.

The Tribunal next determined that there was a causal link between the material injury suffered by the production of like goods in Canada and the dumping found by the Deputy Minister. The Tribunal noted that the material injury suffered by the industry was primarily in the form of price erosion caused by dumped imports in 1992 and the consequent impact on the industry's production and sale of like goods and, particularly, on the industry's financial performance.

It was evident that prices were led down by Nibco Canada and Streamline in 1992. The average selling price of imports by these firms declined below the average selling prices of domestic producers and other importers. The price declines occurred at the same time as Nibco Canada and Streamline imported unprecedented volumes, virtually all of which were dumped, by an average margin of 47 percent. The average selling prices of domestically produced fittings declined by 16 percent in 1992. Also, Cello's sales of domestically produced fittings dropped by 34 percent. The Tribunal was convinced that, in a commodity market where prices quickly align themselves with the lowest price, dumping of the magnitude found by the Deputy Minister had caused injury to the production of like goods in Canada.

In regard to the likelihood of material injury, the Tribunal was satisfied that, in the absence of protection, domestically produced copper pipe fittings were likely to face considerable downward price pressure.

POSITION OF PARTIES

Parties Supporting a Continuation of the Finding

Counsel for two of the three domestic producers, Cello and Bow, argued in support of a continuation of the Tribunal's 1993 finding. In evidence and testimony, they submitted that, in the absence of the finding, dumping of copper pipe fittings by the three US producers is likely to resume and that the Canadian industry is likely to suffer material injury as a result of such dumping.

In addressing the question of a likelihood of resumed dumping, counsel for Cello submitted that the Tribunal is not required to establish that dumping is a certainty or very likely, but rather that it is more likely than not. Counsel argued that several factors indicate that dumping is likely if the finding is rescinded. Among those factors were the initial margin of dumping of 47 percent determined by the Deputy Minister in 1993 and the continued dumping since the finding. Moreover, counsel submitted that dumping continues today, as evidenced by the fact that US price levels are higher than those in Canada, and that prevailing exchange rates contribute to higher US price levels and, thus, a propensity to dump.

Counsel for Cello also argued that differences in the market conditions between the United States and Canada will cause US price levels to remain higher than Canadian price levels in the future and, therefore, will necessarily lead to dumping. These differences include the US producers' ability to regulate price levels because of their elaborate computer systems, superior distribution systems in the United States which limit competition from Asian imports and the fact that there are fewer suppliers in the United States and, therefore, less market disruption.

Counsel for Cello argued that the Canadian market continues to be under substantial pricing pressure. Copper pipe fittings are a commodity product marketed on the basis of price. As such, there is customer resistance to price increases, and the evidence, in counsel's view, shows that prices are likely to decline in the future. Further, predictions of demand growth in Canada do not translate into improved pricing because the presence of substitute products and customer perceptions of appropriate price levels are far more important than housing starts and construction activity. Counsel pointed to Bow's plans to begin selling at the wholesale level, which will increase price competition, competition from Asian imports and consignment selling arrangements, as additional evidence of the pricing pressures in the Canadian market.

With respect to the US manufacturers, counsel for Cello noted that their capacity utilization rates were even higher in the 1990-93 period than they are today and, yet, they were found to be injuriously dumping. In addition, growing competition from plastic substitutes and other non-subject goods, combined with the fact that the US market for fittings is mature and indications of a coming decline in construction, suggests that the US producers' unused capacity will increase.

Counsel for Cello also argued that the US producers have not effectively monitored pricing to avoid dumping, but instead have engaged in various corporate manoeuvres to avoid the effect of the anti-dumping enforcement.

Turning to the likelihood of material injury caused by a resumption of dumping, counsel for Cello submitted that price erosion in the range of 25 percent could ensue. In support of this view, counsel drew a parallel between the Californian and Canadian markets which were claimed to be similar in many respects. Counsel noted that prices in the Californian market were some 20 to 25 percent lower than in the rest of the United States.

Given the price-sensitive nature of the market, counsel for Cello argued that even a very small margin of dumping would result in lost sales by Cello. The combination of declining prices and lost sales would have a negative impact on Cello's financial performance, would result in employment losses and would prevent capital expenditures necessary to remove vulnerability to resumed dumping.

In argument, counsel for Bow adopted the arguments of counsel for Cello and further submitted that Bow, until recently, had been unable to take advantage of the anti-dumping protection afforded by the finding. Of necessity, Bow had to consolidate the plastic segment of its business and to establish a new product line. Having completed these projects, Bow now intends to increase its penetration of the market for copper fittings and, to that end, has established definitive investment plans. However, without a continuation of the finding, Bow is particularly vulnerable to renewed dumping, and its investment plans would be in jeopardy. It was submitted that renewed dumping would result in a substantial loss of sales and profitability and would render Bow's domestic production practically unviable.

With respect to the likelihood of a resumption of dumping, counsel for Bow rejected the testimony of the US exporters that their compliance costs in adhering to Revenue Canada's determinations have been a major burden. Counsel suggested that such costs are very low when compared to the amount of business obtained in Canada. It was also submitted that, although Elkhart did not participate in the hearing, it is not a disinterested player in the Canadian market. In counsel's view, the evidence suggests that Elkhart will continue to do whatever is required to continue its penetration into the Canadian market, including taking market share and reducing its prices.

Counsel for Bow argued that the evidence shows that the US exporters increased production capacity for the subject goods between 1997 and 1998. During this time, their utilization rates declined, while their inventories increased. As a consequence, the US exporters have substantially increased the availability of fittings that are now overhanging the Canadian market. Further, it was claimed that inroads made by substitutable plastic products and the excessive number of competitors for copper pipe fittings sales in Canada will result in a renewed dumping assault on the domestic market if the finding is rescinded.

Parties Supporting a Rescission of the Finding

Counsel for two of the named US exporters, Mueller and Nibco, as well as Mueller's Canadian subsidiary, Streamline, argued in favour of a rescission of the finding.

Counsel for Mueller and Streamline argued that this review should not be about protecting Cello from changes in market demand and from price competition, nor about protecting Cello from marketing arrangements through consignment inventories or other forms of inventory programs offered by its competitors.

In addressing the likelihood of resumed dumping, counsel for Mueller and Streamline argued that the *World Trade Organization Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*¹² (the Anti-Dumping Agreement) contemplates that anti-dumping duties should be terminated after five years unless there are compelling reasons for a continuation. Under the Anti-Dumping Agreement, although not provided for in SIMA, any resumption of dumping must be clearly foreseen and imminent which, it was argued, is not the situation in this review. The facts indicate that there has been virtually no dumping since the finding and that the small ratio of anti-dumping duties paid has been *de minimis*. Moreover, the US exporters made scrupulous efforts to ensure that their exports were transacted at normal values.

Counsel for Mueller and Streamline submitted that several other factors lead to the conclusion that there is no likelihood of a resumption of dumping. The US market is buoyant, as reflected in the strength of residential, commercial and industrial construction. This buoyancy suggests that the US demand for the subject goods will continue to grow and will be sufficient to absorb industry production capacity. It was claimed that Canada represents a very minor market for sales of the subject goods by the US producers and that the Mexican market presents much better growth opportunities. Counsel also submitted that, because this is an industry with low fixed costs, there is no imperative for the US producers to maintain capacity utilization at peak levels, should demand decrease. Instead, the US producers would simply reduce a production shift in response to any decline in demand. Counsel also noted that there has not been any dumping by the US producers in any other of the approximately 30 countries to which they export. Finally, counsel suggested that the Canadian industry is not without recourse if dumping were to resume and that there was sufficient evidence to support filing a new complaint with Revenue Canada.

Counsel for Nibco argued that the industry chaos in the United States and Canada in the early 1990s that led to the finding of injury no longer exists. The US producers now have strong management and, while competition is fierce in the US market, the competition is based on economic reality. Similarly, structural and management changes in Canada have resulted in a much stronger industry. Counsel noted that both Nibco and Mueller have assiduously attempted to avoid dumping since the finding. Further, Nibco took legal steps in 1996 in order to manage difficulties associated with Revenue Canada's application of section 25 of SIMA. As a result of the divestiture of Nibco Canada, there has been virtually no dumping of Nibco fittings since 1996.

12. Signed at Marrakesh on April 15, 1994 (in force for Canada on January 1, 1996).

Counsel for Nibco argued that current and forecast economic conditions in the United States and Canada rule out the likelihood of resumed dumping. The US producers are operating at very high capacity utilization levels, with the majority of production destined for sale in their home market. These companies are not export dependent and only 1 to 2 percent of their production is exported to Canada. US price levels for copper pipe fittings are at historic highs and, therefore, there is no incentive to dump. With respect to the Canadian market, it was claimed that imports of Nibco fittings and those of the other US producers are not being sold at prices which should be of concern to the Canadian industry.

Counsel for Nibco argued that the Canadian industry is not vulnerable to a resumption of dumping. Counsel noted the extremely healthy margins and profits earned by the industry on sales of like goods. These profits were contrasted with the low level of investments made by Cello in comparison with the amount of money that it paid out in management bonuses. In addition, it was claimed that the evidence indicates that the Canadian producers are chasing market share amongst themselves and that Cello's main competition is with Streamline's sales from its own domestic production and not with US imports. Domestic production has increased, there is no longer a dependence on imports, and the Canadian producers are well managed. Moreover, demand is strong and is expected to remain strong, and prices, although having declined by 10 percent between 1995 and 1998, continue to be strong when compared to the decline in copper prices.

Counsel for Nibco requested that, if the finding is continued, Nibco be excluded. In the alternative, an additional 99 subject goods that Cello does not produce should be excluded in the event that the finding is continued.

ANALYSIS

Section 76 of SIMA provides that, on completion of a review, the Tribunal shall rescind or continue, with or without amendment, the order or finding. In making its decision, the Tribunal considers two fundamental questions. It first determines whether there is a likelihood of resumed dumping. If the Tribunal finds that there is no likelihood of resumed dumping, the finding is rescinded. If the Tribunal finds that there is a likelihood of resumed dumping, it then determines whether such dumping is likely to cause material injury to the domestic industry.

It was submitted by counsel for Cello and counsel for Bow that, in addressing whether there is a likelihood of a resumption of dumping, the Tribunal should ask itself whether it is more likely than not that dumping will take place. Counsel further referred to previous Tribunal orders, Review No. RR-97-004¹³ and Review No. RR-97-006,¹⁴ where the Tribunal opined that the clearly foreseen and imminent standard is not applicable in a review under section 76 of SIMA. Counsel submitted that subsection 2(1.5) of SIMA, which provides, in part, that "the dumping ... of goods shall not be found to be threatening to cause injury or to cause a threat of injury unless the circumstances in which the dumping ... of goods would cause injury are clearly foreseen and imminent," and that Article 3.7 of the Anti-Dumping Agreement, which provides, in

13. *Gypsum Board Composed Primarily of a Gypsum Core, with Paper Surfacing Bonded to the Core, Originating in or Exported from the United States of America, Order and Statement of Reasons*, January 19, 1998, at 13-14.

14. *Certain Hot-Rolled Carbon Steel Plate and High-Strength Low-Alloy Plate, Heat-Treated or not, Originating or Exported from Belgium, Brazil, the Czech Republic, Denmark, the Federal Republic of Germany, Romania, the United Kingdom and the Former Yugoslav Republic of Macedonia, Order*, May 5, 1998, *Statement of Reasons*, May 20, 1998, at 17.

part, that “[a] determination of a threat of material injury shall be based on facts and not merely on allegation, conjecture or remote possibility” and “[t]he change in circumstances which would create a situation in which the dumping would cause injury must be clearly foreseen and imminent,” have no application in a review under section 76 of SIMA. Counsel submitted that the events on which to rely to find that there is a likelihood of resumed dumping need not be foreseen and imminent. Rather, the Tribunal must judge the likely events based on the facts as they will likely exist absent a finding “over the near term.”

Alternatively, counsel for Streamline argued that, in determining whether there is a likelihood of resumed dumping, it is not simply a question of whether it is more likely than not that dumping will take place. Counsel submitted that the Tribunal should apply the standard set out in Article 3.7 of the Anti-Dumping Agreement such that, in order to find that there is a likelihood of resumed dumping, the Tribunal would have to find that the resumed dumping is clearly foreseen and imminent and not based on allegation, conjecture or remote possibility. Counsel referred to the Tribunal’s decisions in Review No. RR-97-007¹⁵ and Review No. RR-97-006, where the Tribunal stated that it was more concerned with immediate factors than with more remote factors in looking at the issue of a likelihood of resumed dumping and submitted that foreseeability and imminence of resumed dumping drive consideration of the facts in this case.

The substance of Article 3.7 of the Anti-Dumping Agreement relates to an inquiry into threat of injury and provides, in part, that “[t]he change in circumstances which would create a situation in which the dumping would cause injury must be clearly foreseen and imminent.” The language of Article 3.7 is reflected in subsection 2(1.5) of SIMA which relates to inquiries under section 42 of SIMA. Section 76 of SIMA, which deals with reviews, does not contain similar language. In the Tribunal’s view, subsection 2(1.5) makes it clear that the Tribunal is required to apply the “clearly foreseen and imminent” standard in considering the question of threat of injury in an inquiry under section 42. There are no other similar provisions requiring the Tribunal to apply the same standard with respect to its analysis of either dumping or injury in reviews under section 76. The Tribunal notes that Article 11 of the Anti-Dumping Agreement, which deals with reviews of anti-dumping orders, does not contain a similar standard to that contained under Article 3.

In determining whether there is a likelihood of resumed dumping and, if so, whether such dumping is likely to cause material injury to the domestic industry, the Tribunal is of the view that the focus must be on circumstances that can reasonably be expected to exist in the near or medium term as opposed to more remote circumstances. As a result, in this review, the Tribunal has given more weight to forecasts and other evidence relating to expected market conditions to the end of 1999 than to forecasts and evidence relating to expected market conditions beyond that time. The Tribunal has also given more weight in this review to evidence regarding plans that are likely to materialize. In this regard, the Tribunal found the evidence from the named exporting companies with respect to their future plans vis-à-vis the Canadian market to be more persuasive than the evidence of the witnesses for the domestic industry who speculated as to what these companies might do, absent the finding.

15. *Certain Cold-Reduced Flat-Rolled Sheet Products of Carbon Steel (Including High-Strength Low-Alloy Steel) Originating in or Exported from the Federal Republic of Germany, France, Italy, the United Kingdom and the United States of America, Order and Statement of Reasons, July 28, 1998.*

Likelihood of Resumed Dumping

In assessing the likelihood of a resumption of dumping, the Tribunal considers a range of factors to understand what market conditions for the subject goods are likely to be, absent the finding. Such factors include: market conditions in the exporting countries, including prices and changes in production capacity and utilization rates by foreign producers; likely future market conditions for the subject goods in the exporting countries; the potential for exports to third-country markets and whether the foreign suppliers have dumped in third-country markets; what market conditions are likely to be in the Canadian market; the volume and value of exports by foreign suppliers in the Canadian market since the finding; and whether there has been dumping during the period of the finding and, if so, by what margins.

The Tribunal's reasons for its finding in 1993 clearly set out the tumultuous market conditions which existed in the early 1990s, due largely to the recession and major structural changes occurring in the US and Canadian markets. Witnesses for Mueller and Nibco confirmed that conditions were particularly difficult during this period in both the Canadian and US industries. The witnesses referred to chaotic conditions among the three producers due to financial and management weaknesses and the turbulence which resulted in the two markets.¹⁶

Evidence in this review suggests that the chaotic conditions which led to dumping in 1992 no longer exist. Management within the US industry is now stable, financial results are strong, and marketing is conducted in an orderly fashion.¹⁷ Moreover, the evidence indicates that the market for copper pipe fittings in the United States has shown significant growth, although data on prices show a gradual decline over the period of review.¹⁸ However, other evidence and testimony indicate that the price of inputs has decreased even faster. As the price of copper declined from 1995 onwards,¹⁹ the spread between the selling price of copper pipe fittings and the cost of copper, which accounts for as much as 60 percent of production costs, increased. According to testimony, the US producers are, and strive to be, very profitable. In particular, the witness for Nibco testified that net profit levels of 10 percent earned on sales of the subject goods generated returns on equity which far exceed returns on equity for US manufacturing in general.²⁰

The Tribunal is cognizant of the many views and prognostications presented with respect to forecasts for the US economy and for the demand for copper pipe fittings over the next several years. While such forecasts are, by their very nature, speculative, the evidence persuades the Tribunal that, in the shorter term, at least through 1999, domestic demand in the US economy is likely to remain strong. The evidence and testimony point to strong residential and commercial construction over the near term²¹ which will likely continue to provide solid demand for copper pipe fittings in the United States and which will likely allow the US producers to maintain capacity utilization rates at very high levels.

16. *Transcript of Public Hearing*, Vol. 2, August 19, 1998, at 478 and Vol. 3, August 20, 1998, at 605-607.

17. *Transcript of Public Hearing*, Vol. 2, August 19, 1998, at 478 and Vol. 3, August 20, 1998, at 612.

18. *Protected Pre-Hearing Staff Report*, June 3, 1998, Tribunal Exhibit RR-97-008-6 (protected), Administrative Record, Vol. 2 at 80 and 82.

19. Exporter's Exhibit H-2 (protected) at 9, Administrative Record, Vol. 14A.

20. *Transcript of Public Hearing*, Vol. 3, August 20, 1998, at 612-13 and 617-18.

21. *Transcript of Public Hearing*, Vol. 2, August 19, 1998, at 466-67; and Manufacturer's Exhibit C-22, Administrative Record, Vol. 11B.

Data submitted by the three named US exporters indicate that an additional 6.0 million pounds of production capacity was added between 1995 and 1997 and a further 1.5 million pounds was added in the first quarter of 1998.²² Given the size of the Canadian market, these additions to production capacity alone are more than sufficient to supply the entire Canadian market demand. Further, although the US producers operated at very high utilization rates during the period of review, the Tribunal notes that utilization rates declined somewhat in the first quarter of 1998, while inventory levels increased. The Tribunal is not convinced, however, that these factors, if considered in isolation, would lead to a resumption of dumping if the finding were rescinded. In addition, the evidence suggests that a downturn in demand would not create an imperative for the producers to continue operating at high utilization rates. This is an industry with relatively low fixed costs. If sales decline, the industry is likely to reduce or eliminate a production shift in order to maintain prices rather than attempt to maintain high throughput and sell the product at lower prices.²³

The Tribunal also notes that, although US production of copper pipe fittings is geared for the US market, a not insignificant share of production is destined for export markets. In this regard, shipments to Canada represent less than 2 percent of total US production. Also, and as noted earlier, the three producers together export to roughly 30 other markets. Many of these markets have growing demands and price levels which are as high as or higher than price levels in Canada.²⁴ In short, given the strong level of demand in the US market and growing export markets, it does not appear to the Tribunal that there is an imperative for the three US producers to seek increased sales in the Canadian market at dumped price levels. The evidence also reveals that none of the companies have had anti-dumping actions taken against their shipments in any other country.

The Tribunal also notes the evidence and testimony with respect to demand for substitute products which, counsel for the domestic industry argued, would result in growing excess capacity in the United States. In the Tribunal's opinion, a review of the evidence and testimony does not indicate that substitute products, principally plastic substitutes, have displaced or will displace the demand for copper pipe fittings to any significant degree over the next few years. The evidence suggests that plastic substitutes have made inroads in certain regional markets in the United States. However, copper tubing and, by correlation, copper pipe fittings, have maintained a dominant position in the US market despite predictions of growing demand for plastic substitutes. A recent study of the US demand for copper tubing notes that "Over the last decade, copper's market share has declined between 1-2 percent, and over the course of the last 20 years, copper has never declined at the rate that contractors anticipated."²⁵

The Tribunal has also looked at what conditions might be in the Canadian market for pipe fittings in the near future. The evidence before the Tribunal is that, in the first quarter of 1998, there was some decline in prices for copper pipe fittings in Canada and that, for the first time since the finding has been in place, some prices were below those of the United States. Furthermore, the Tribunal heard evidence that it is likely that, with or without a finding, prices will decline further in Canada²⁶ in the near term. Taking into account

22. *Public Pre-Hearing Staff Report*, June 3, 1998, Tribunal Exhibit RR-97-008-5, Administrative Record, Vol. 1A at 73-74.

23. *Transcript of Public Hearing*, Vol. 3, August 20, 1998, at 676-79; and Exporter's Exhibit H-2 (protected) at 38-39, Administrative Record, Vol. 14A.

24. *Transcript of In Camera Hearing*, Vol. 3, August 20, 1998, at 283-84.

25. Manufacturer's Exhibit A-67 at viii, Administrative Record, Vol. 11.1.

26. *Transcript of Public Hearing*, Vol. 2, August 19, 1998, at 348.

these projected further declines in prices, and absent a finding, the likelihood that some sales of copper pipe fittings by the three named exporters will be at dumped prices is increased.

The Tribunal notes that Nibco, Mueller and Elkhart, the three named exporters, have maintained a significant presence in the Canadian market for copper pipe fittings despite the finding. Data submitted by Revenue Canada²⁷ indicate that anti-dumping duties have been assessed against imports of the subject goods in each year since the finding. In the Tribunal's view, the assessments have been at a low level in relation to the total value of shipments made since 1993. With the exception of 1995, the weighted ratio of anti-dumping duties to the value of importations has been in the range of 3 percent.

The ratio of anti-dumping duties reached a high of 9 percent in 1995, due largely to assessments made against imports by Nibco Canada. In 1996, Nibco sold Nibco Canada to NCI. Because Revenue Canada determined that Nibco and NCI were not related parties, imports of Nibco fittings by NCI were no longer subjected to the constraints of export price determinations pursuant to section 25 of SIMA. Since the divestiture of Nibco Canada in early 1996, the data indicate that assessments of anti-dumping duties against fittings exported by Nibco have been insignificant.

The average amount of anti-dumping duties assessed on imports of fittings produced by Elkhart since the finding has also been very low and, in 1996 and 1997, was less than 1 percent of the value of imports. Average anti-dumping duty assessments on imports of fittings produced by Mueller were somewhat higher than those on shipments by Nibco and Elkhart, but less than the average of 3 percent of the total value of imports for fittings produced by the named exporters.²⁸ The data show that, in certain periods, a significant proportion of the anti-dumping duty assessments were made on shipments of fittings by exporters that had purchased the subject goods produced by one or more of the named US producers.²⁹ These shipments accounted for less than 2 percent of total imports. These other exporters refused to co-operate with Revenue Canada and, thus, did not have specific normal values in place. In these instances, normal values were determined under section 29 of SIMA, based on the export price advanced by 133 percent.

The evidence suggests that a significant proportion of the anti-dumping duty assessments were made on new items that were imported without normal values having been determined by Revenue Canada. In those instances, normal values are determined under section 29 of SIMA, based on the export price of the goods advanced by 133 percent. The Tribunal notes that, in the first half of 1998, almost all of the anti-dumping duties assessed against Streamline imports resulted from the advance under section 29.³⁰ Such assessments may be appealed.³¹

The Tribunal is persuaded that the exporters made reasonable efforts to ensure that dumping did not occur. Witnesses for Mueller and Nibco testified as to the monitoring systems that have been established to

27. Tribunal Exhibit RR-97-008-4 (protected), Administrative Record, Vol. 2 at 6.

28. *Ibid.*

29. *Ibid.* In 1997, for example, 61 percent of anti-dumping duties were assessed against such imports.

30. Manufacturer's Exhibit C-12 (protected), Administrative Record, Vol. 12B.

31. Importers may appeal assessments pursuant to the relevant provisions of SIMA. Consequently, the amount of anti-dumping duties assessed for 1997 and 1998 may include those that qualify for refund when information is provided to Revenue Canada which will allow the determination of specific normal values.

ensure that sales to Canada would be made at the normal value levels determined by Revenue Canada.³² It is clear that the nature of the administration process makes it virtually impossible to ensure 100 percent compliance, especially when dealing with such a vast array of products. Revenue Canada has conducted seven normal value and/or export price reviews since the finding. Moreover, the number of copper pipe fittings for which normal values have been determined has increased considerably since 1993. Prior to the most recent review completed in June 1998, Revenue Canada had established over 4,000 specific normal values for fittings produced by the three exporters.³³

The difficulty of administering normal values on such a wide array of items is compounded by the application of section 25 of SIMA to calculate export prices on sales between the named exporters and their Canadian affiliates. The witness for Streamline testified that the profit margins which Revenue Canada determined must be met for each sale of fittings imported from Mueller in each review period represented a moving target. Because the profit margins were constantly changing and, in some cases, applied retroactively, the witness claimed that it was difficult, if not impossible, to ensure that no dumping would occur.³⁴ It appears that these difficulties in the administration of export prices provided sufficient impetus for Nibco to seek alternative marketing arrangements in Canada which would provide more certainty in its pricing for the Canadian market.³⁵

The preceding analysis of dumping during the period of the finding, albeit at minimum levels, indicates to the Tribunal that, without the vigilance of scrupulously exporting at normal values, there is a likelihood that products will be dumped in the Canadian market, especially if prices in the Canadian market continue on the present trend of being lower than US prices.

In the final analysis, an examination of the evidence on future competition in the Canadian market for cast pipe fittings leads the Tribunal to believe that dumping is likely to occur, absent the finding. In cross-examination, a witness for Streamline testified that the company was at a competitive disadvantage on its sales of cast fittings. For contractual and legal reasons, Streamline is required to purchase its cast requirements from its parent company, Mueller, which, in turn, is required to purchase its cast requirements from Nibco.³⁶ Because Streamline purchases its cast fittings from a related company, Streamline must sell at minimum profit margins periodically determined by Revenue Canada, pursuant to section 25 of SIMA.

Streamline claimed that it wanted the finding rescinded because, at present, it cannot compete with imports of Asian cast fittings which are selling in Canada at price levels that are some 4 percent below Streamline's prices.³⁷ It is also clear that Streamline is at a competitive disadvantage against NCI's sales of Nibco cast fittings, since NCI is not constrained by the profit margin requirements of section 25 of SIMA. Similarly, Streamline is also at a competitive disadvantage against sales by Cello, which produces cast fittings domestically and which, therefore, can meet any price-competitive situation. Given these competitive disadvantages, Streamline would, if the finding were rescinded, likely sell cast products at dumped prices in the Canadian market given the ability to alter the minimum profit constraints imposed by section 25 of SIMA. The Tribunal also notes that, if the finding were rescinded, Streamline would take an overall approach to ensuring

32. *Transcript of Public Hearing*, Vol. 2, August 19, 1998, at 478-79 and 527-28 and Vol. 3, August 20, 1998, at 625; and Exporter's Exhibit H-1 at 28-30, Administrative Record, Vol. 13A.

33. Tribunal Exhibit RR-97-008-4 (protected), Administrative Record, Vol. 2 at 3.

34. *Transcript of Public Hearing*, Vol. 2, August 19, 1998, at 338-39.

35. *Transcript of Public Hearing*, Vol. 3, August 20, 1998, at 618-23.

36. *Transcript of Public Hearing*, Vol. 2, August 19, 1998, at 355-57.

37. *Transcript of Public Hearing*, Vol. 2, August 19, 1998, at 369.

profitability rather than an item-by-item approach³⁸ and that, therefore, certain items would inevitably be dumped.

In light of the foregoing, particularly the likelihood of cast pipe fittings being dumped by a major exporter, as well as the inherent difficulty of ensuring that the vast array of imported products are not dumped when prices in Canada are likely to continue to be below US prices, the Tribunal concludes that, on balance, there is a likelihood of resumed dumping of copper pipe fittings in Canada. In view of this conclusion, the Tribunal now turns to the question of whether there is a likelihood of material injury to the domestic industry which might be caused by a resumption of dumping.

DOMESTIC INDUSTRY

Given the fact that there is a relationship between one of the major producers and a named exporter and that producer did not support a continuation of the finding, the Tribunal, at the commencement of the hearing, asked counsel and witnesses to clarify about which producers they were speaking when referring to the domestic industry. Counsel were also asked to address, in argument, the issue of how the domestic industry should be defined for the purposes of assessing a likelihood of material injury in this review.

Counsel for Cello and counsel for Bow argued that a major proportion does not mean 50 percent of domestic production. Rather, a major proportion is a significant proportion of domestic production. In counsel's view, Cello and Bow do represent a major proportion of domestic production, and they should be considered the domestic industry for the purposes of the Tribunal's review. Streamline, counsel submitted, should be excluded from the domestic industry for the following reasons: Streamline's business objectives and views as to the finding are the same as those of Mueller, a named exporter and Streamline's parent company; the witness for Streamline indicated that the company wanted to source goods which would be dumped from Mueller, if the finding were rescinded; Streamline is not seeking the protection of SIMA which is contrary to the objectives of SIMA; and SIMA ought not to be used as a sword against other Canadian producers.

Counsel for Streamline submitted that subsection 76(2) of SIMA does not refer to the term "Canadian production." Counsel referred to the Tribunal's finding in Inquiry No. NQ-93-001 and submitted that the Tribunal did not exclude Cello from the domestic industry at that time on the basis that it was also an importer because "companies are so closely integrated with North American producers and ... companies have relationships almost without exception with American companies, it would be rather foolish to exclude a Canadian company from the remedies it is entitled to seek under SIMA because it has either an import relationship or an equity relationship with a U.S. company."³⁹ Finally, counsel pointed out that Cello did not object to Streamline's participation in the original inquiry and only opposes Streamline's participation in this review because Streamline opposes continuation of the finding rather than remain neutral as it did in the 1993 inquiry.

Section 2 of SIMA defines "domestic industry," in part, as follows:

the domestic producers as a whole of the like goods or those domestic producers whose collective production of the like goods constitutes a major proportion of the total domestic production of the like goods except that, where a domestic producer is related to an exporter or importer of dumped or subsidized goods, or is an importer of such goods, "domestic industry" may be interpreted as meaning the rest of those domestic producers.

38. *Transcript of Public Hearing*, Vol. 2, August 19, 1998, at 386 and 451.

39. *Transcript of Public Argument*, Vol. 4, August 21, 1998, at 753.

Subsections 2(1.2) and (1.3) of SIMA further provide as follows:

(1.2) For the purposes of the definition “domestic industry” in subsection (1), a domestic producer is related to an exporter or an importer of dumped or subsidized goods where

- (a) the producer either directly or indirectly controls, or is controlled by, the exporter or importer,
- (b) the producer and the exporter or the importer, as the case may be, are directly or indirectly controlled by a third person, or
- (c) the producer and the exporter or the importer, as the case may be, directly or indirectly control a third person,

and there are grounds to believe that the producer behaves differently towards the exporter or importer than does a non-related producer.

(1.3) For the purposes of subsection (1.2), a person is deemed to control another person where the first person is legally or operationally in a position to exercise restraint or direction over the other person.

It is well established that the word “major” in relation to a major proportion of the total domestic production of like goods means “significant” rather than the more precise mathematical sense of more than one half.⁴⁰ It is also well established that the Tribunal has the discretion to exclude from the domestic industry a domestic producer that is related to an exporter or importer of dumped or subsidized goods or that is an importer of such goods.⁴¹

The Tribunal is satisfied that Mueller controls Streamline and that Mueller and Streamline are, therefore, “related” for the purposes of paragraph 2(1.2)(a) of SIMA. The evidence shows that Streamline is a wholly owned subsidiary of Mueller, that corporate decisions concerning Streamline’s investments and production are made by Mueller, that Mueller has established certain stipulations for the purchases of cast pipe fittings by Streamline and that Mueller establishes the prices for sales to Streamline.

However, on the basis of this relationship alone, the Tribunal finds no compelling reason in this review for excluding Streamline from the domestic industry. In the Tribunal’s view, the evidence shows that Streamline manages its day-to-day operations in a manner which is independent of Mueller and that its sales in Canada over the period of review were predominantly from domestic production. The Tribunal was not presented with persuasive evidence to indicate that Streamline’s production would cease if the finding were rescinded. On the contrary, the evidence shows that, since the finding, management at Streamline and Mueller has changed and that significant investments have been made to expand Streamline’s production of copper fittings. The Tribunal is, therefore, satisfied that, in the near or medium term, Streamline’s strategy for Canadian production is not going to change.

40. *Japan Electrical Manufacturers Association v. The Anti-Dumping Tribunal*, 12 C.E.R. 260, Action No. A-1096-84, October 17, 1986. Also, see *McCulloch of Canada Limited and McCulloch Corporation v. Anti-dumping Tribunal*, [1978] 1 F.C. 222 at 225.

41. See, for example, *The Dumping in Canada of Refined Sugar Originating in or Exported from the United States of America, Denmark, the Federal Republic of Germany, the Netherlands, the United Kingdom and the Republic of Korea, and the Subsidizing of Refined Sugar Originating in or Exported from the European Union*, Canadian International Trade Tribunal, Inquiry No. NQ-95-002, *Findings*, November 6, 1995, *Statement of Reasons*, November 21, 1995, at 17.

Streamline accounted for the majority of the total domestic production of copper pipe fittings for domestic consumption over the period of review. Streamline imports a limited range of the subject copper pipe fittings from its parent, Mueller, to complete its range of product offerings. However, when compared to the volume produced for domestic consumption, imports by Streamline represented a small percentage of its total sales of copper pipe fittings in Canada and about 1 percent of Mueller's total US production. In addition, Mueller exports to Cello, another domestic producer. Moreover, the Tribunal is not persuaded that, for the purposes of this case, the fact that Streamline imports from Mueller should be an important factor in considering whether or not to exclude it from the domestic industry. The nature of the industry and, more particularly, the fact that producers can only produce limited product ranges cost effectively have resulted in a situation where producers, including Cello, rely on imports to complete their product range. This was true at the time of the finding and continues to be the case, albeit to a lesser extent, since the finding.

With respect to resumed dumping of cast fittings, which Streamline does not produce, but which are produced by Nibco and imported by Streamline from Mueller as part of an agreement between Nibco and Mueller, the Tribunal is of the view that such imports are likely to be relatively modest when compared to Streamline's sales in Canada from its domestic production.

Taking into account all of these factors, the Tribunal is not persuaded that it should exclude Streamline from the domestic industry for the purposes of this review.

In light of its decision not to exclude Streamline from the domestic industry, there is no need for the Tribunal to consider whether Cello and Bow, on their own, constitute a major proportion of the domestic production. Streamline, Cello and Bow account for all domestic production and constitute the domestic industry for the purpose of the Tribunal's consideration of whether there is a likelihood of injury from resumed dumping.

Likelihood of Material Injury

In considering the question of material injury to the domestic industry in a review, the Tribunal may consider a range of factors, including changes in market conditions since the finding, the recent and likely future performance of the domestic industry and the likely volume and prices of dumped imports, taking into account market conditions in the exporting country and in Canada.

In addressing the question of material injury to the domestic industry in its 1993 finding, the Tribunal noted the difficult market conditions of the early 1990s caused by the recession and major structural changes which were occurring in the domestic market at that time. Fierce price competition drove prices down to a level where imports from the named exporters were found by the Deputy Minister to be dumped by an average margin of 47 percent during the period of investigation. A consideration of these and other factors in the market led the Tribunal to find that the domestic industry, in general, and Cello, in particular, had suffered material injury, primarily in the form of loss of production and sales, price erosion and loss of profitability.

By contrast to the very difficult market conditions which existed in the early years of the decade, the evidence in this review, which looked at market factors commencing in 1995, indicates that domestic market conditions have stabilized and that the health of the domestic industry has improved substantially. Data collected for the 1993 inquiry do not allow for a direct comparison with the data collected for this review due

to a difference in product coverage.⁴² However, a review of the trends for key economic indicators between the two periods is revealing.

Between 1992 and 1995, domestic production of copper pipe fittings grew sharply, due largely to increases in production by Streamline. Over this period, the impact of the finding is evident, as imports from the named US exporters fell dramatically, with a consequent large increase in market share held by the domestic industry. Average industry selling prices more than doubled, while average import selling prices more than tripled. The combination of growing sales and higher prices resulted in a significant turnaround in the financial performance of the domestic industry. The negative industry financial returns in 1992 had, by 1995, been translated into a net profit of 38 percent of net sales. Other economic indicators also showed similar gains between 1992 and 1995, including substantial increases in industry exports and employment levels.⁴³

Turning to the current review period, the economic indicators suggest that the performance of the domestic industry since 1995 continues to be positive. Between 1995 and 1997, domestic production increased due to production gains by Cello. During this period, domestic market volumes increased by 24 percent, to 4.3 million pounds, while sales from domestic production increased by 30 percent. Industry market share fell by 5 percentage points over the three-year period, but remained at close to 70 percent of total market demand throughout the period of review. The indicators also show that, although industry average selling prices fell over the period, the industry maintained solid financial results on domestic sales. As well, industry export sales remained strong and very profitable.

Data for the first quarter of 1998 showed a weakening in market demand when compared to the first quarter of 1997. Total market sales volume fell by 11 percent, while industry sales fell by 16 percent. Industry sales declines in the domestic market were offset somewhat by increased export sales. However, while lower domestic market sales resulted in a decrease in profits for the industry compared to 1997, profits continued at very healthy levels.⁴⁴

The Tribunal is persuaded that, having benefited from five years of protection afforded by the finding, the industry is now on a solid financial footing. Consolidated industry financial data reveal that sales of copper pipe fittings throughout the period of review were highly profitable. Gross margins approaching 50 percent of industry sales and net profits in the 30 to 40 percent range suggest that industry financial results have been outstanding. The data show that all three producers have shared in this financial success and, although profits declined somewhat in the first quarter of 1998, the companies continued to earn very healthy profits. The data also reveal that, for Cello and Streamline, gross margins and profits earned on sales of copper fittings far exceed gross margins and profits earned on the sales of other products marketed by the two companies.

Moreover, the export performance of both Cello and Streamline has been very favourable. Cello, which only began exporting copper pipe fittings in recent years, now devotes an increasingly significant

42. The Tribunal's 1993 inquiry included copper pipe fittings which were subsequently excluded from the finding of material injury. Accordingly, data collected for this review do not include the range of products which were excluded by the finding.

43. *Protected Pre-Hearing Staff Report*, June 3, 1998, Tribunal Exhibit RR-97-008-6 (protected), Administrative Record, Vol. 2 at 86-87.

44. *Ibid.*

proportion of its production to export markets, in particular to the United States. Cello's export sales generated significant profits throughout the review period and, with the expansion of its distribution network in the markets that it serves, the Tribunal has no doubt that export sales will continue to make a major contribution to the company's future financial position. Similarly, exports of metric size fittings by Streamline, which account for the majority of the company's production, have returned very healthy profits. Bow does not export copper pipe fittings.

The Tribunal notes that Cello and Streamline made significant capital investments over the period of review which allowed the companies to expand their product lines and improve production efficiencies. As a result of these investments, imports of US-produced fittings by the two companies fell by nearly 50 percent between 1995 and 1997. Given the short-term plans by both Cello and Streamline to further increase capital investments,⁴⁵ the Tribunal is of the view that the competitive strength of the two companies will be enhanced.

With respect to Bow, the Tribunal notes that the company has devoted its efforts to strengthening its competitiveness in plastic products and other non-subject fittings. Bow argued for a continuation of the finding on the grounds that it intends to expand its production of copper pipe fittings. However, Bow's evidence did not show that it has firm plans or has made financial commitments which would persuade the Tribunal that production of a broader range of copper pipe fittings is likely to occur in the near or medium term. Data submitted by Bow with respect to forecasted capital investments in 1998 and 1999⁴⁶ do not convince the Tribunal in this regard.

Within this overview of the market for copper pipe fittings, the Tribunal now addresses the question of a likelihood of material injury caused by a resumption of dumping. A key consideration in this analysis is the recent trends and future price prospects for copper pipe fittings in the Canadian market, as well as factors underlying recent and projected price movements.

The Tribunal heard considerable evidence and testimony with respect to price levels in the Canadian market and the reasons why prices have been declining in recent periods. In considering this matter, the Tribunal has carefully reviewed the pricing data contained in the staff report, as well as evidence submitted during the course of the review.

The data show that weighted average industry selling prices fell from almost \$8.00/lb. in 1995 and 1996 to \$6.78/lb. in 1997, but increased slightly in the first quarter of 1998 when compared to the corresponding period of 1997. Within the industry, Cello's weighted average prices were down marginally in 1998 compared to 1995, while weighted average prices by Streamline and, to a lesser degree, by Bow were down sharply in 1998 compared to 1995. The data also show that the weighted average prices of imported fittings from the named US exporters declined, but that these selling prices were roughly \$3.00/lb. higher than prices obtained on domestically produced fittings.⁴⁷

45. *Ibid.* at 59-60.

46. *Ibid.*

47. *Ibid.* at 41.

The Tribunal also reviewed pricing data on sales of several large volume items on an aggregate basis and to specific wholesale accounts.⁴⁸ The aggregate data confirm the decline in market prices, but show that sales from domestic production were consistently made at prices significantly lower than sales made from US imports. As well, a review of sales to specific wholesale accounts⁴⁹ suggests that, in the few instances where there was competition with US imports, industry selling prices were generally lower than prices of US imports. In the Tribunal's view, for the most part, the competition for sales to these accounts occurred between Cello and Streamline from their domestically produced fittings. Moreover, with few exceptions, Streamline's prices to these accounts were significantly lower than Cello's selling prices.

Cello claimed that price declines since 1995 have largely been due to the aggressive pricing activities of the US exporters and their Canadian importers. There is no doubt that US imports have continued to play a significant role in domestic market price competition. However, this competition has been maintained generally at undumped price levels.

In the Tribunal's view, the price declines are due largely to other factors. In this regard, the evidence indicates that copper prices fell by almost 50 percent between 1995 and 1998.⁵⁰ Copper tubing and, in the case of cast fittings, copper ingots account for virtually all of the material costs in the production of copper fittings. With rapidly declining material costs, it is clear that the high price levels of 1995 and 1996 could not be sustained. As well, the evidence suggests that there has been growing competition from offshore imports, particularly cast fittings originating in Taiwan, and increasing competition from plastic substitutes. The Tribunal is of the opinion that these other factors and the aggressive price competition between Cello and Streamline on domestically produced fittings had a much greater impact on the domestic market price declines than did competition from US imports.

The evidence suggests that the price decline has been, at least temporarily, arrested. In May 1998, major market players, including Cello and Streamline, instituted an 8 percent price increase, an increase which appears to be holding.⁵¹ However, in the longer term, the evidence and testimony of witnesses suggest that prices are likely to decline further. In this regard, Cello argued that Canadian prices could decline by about 25 percent, absent the finding. In support of its claim, Cello noted the similarities between the Canadian market and the Californian market, where prices in the latter have fallen by upwards of 25 percent. Further, Cello argued that customers expect that prices will decline by 20 to 30 percent, if the finding is rescinded.⁵²

The Tribunal is not persuaded that price declines of the magnitude suggested by Cello will materialize in the Canadian market. The evidence suggesting that the Californian market is not unlike the Canadian market is, in the Tribunal's view, insufficient to be indicative of price trends in Canada.

48. The data included sales and prices for five benchmark items. These items accounted for more than one half of industry volume sales in 1997 and the first quarter of 1998, but only about 15 percent of sales from US imports during this period. *Protected Pre-Hearing Staff Report*, June 3, 1998, Tribunal Exhibit RR-97-008-6 (protected), Administrative Record, Vol. 2 at 89-101.

49. The Tribunal reviewed pricing data to eight large wholesale accounts. These accounts represent the vast majority of copper pipe fitting purchases made in the Canadian market.

50. *Public Pre-Hearing Staff Report*, June 3, 1998, Tribunal Exhibit RR-97-008-5, Administrative Record, Vol. 1A at 20.

51. *Transcript of Public Hearing*, Vol. 2, August 19, 1998, at 556-57.

52. Manufacturer's Exhibits A-2 at 53-54 and 67 and A-72, Administrative Record, Vol. 11.

Significantly more comparative data on such matters as historical price movements, product mix and consumer behaviour would be needed to make this determination.

The testimony of the witness for Streamline suggests that prices may decline in the range of 5 to 10 percent in the future, with or without the finding in place.⁵³ A consideration of price movements in the Canadian market over the period of review, as well as forecasts for domestic market demand, leads the Tribunal to believe that moderate price declines, as suggested by Streamline, as opposed to the large declines predicted by Cello, are more likely to occur. Cello claimed that market growth has been moderate, but that demand forecasts lead it to believe that market conditions are at or will return to the levels that prevailed in the early 1990s.⁵⁴ While forecasts are, by nature, speculative, the Tribunal is of the view that, notwithstanding the current instability in financial markets, demand for copper pipe fittings is likely to continue to be strong in the near future, given the current strength of the Canadian economy and projections for the growth of residential, commercial and industrial construction.⁵⁵

The Tribunal notes that imports of US fittings continue to have a significant presence in the Canadian market. However, a review of the evidence suggests that a considerable proportion of the imports consist of fittings which are higher-priced, lower-volume items.⁵⁶ Cello and Streamline continued to import the subject goods from US producers during the review period in order to fill out their product lines. However, as the domestic producers continued to expand their production range, they placed less reliance on imported product. In this context, any dumping by the three named exporters is likely to be limited to a small volume of products and is not likely to significantly affect pricing in the Canadian market for copper pipe fittings.

Having carefully considered the evidence and testimony, the Tribunal expects that the US exporters will continue to closely monitor their exports to Canada to minimize dumping. In addition, the Tribunal's analysis of market conditions in the United States concluded that the three named exporters have little incentive to dump in Canada. Although the evidence suggests that Streamline is likely to offer imported cast fittings at dumped prices, the Tribunal believes that such dumping, if it does occur, will be intermittent and not at volumes and prices which would disrupt the domestic market. The Tribunal notes that Streamline's sales of imported cast fittings represent less than 5 percent of its total domestic sales of copper pipe fittings.⁵⁷ Such sales also represent less than 2 percent of the domestic industry's sales in Canada from domestic production in 1997.

A continuation of current trends in the Canadian market for copper pipe fittings, and especially a further decline in prices, is likely to lead to some decline in the future financial performance of the domestic industry. However, the Tribunal is persuaded that, notwithstanding these price declines, the domestic industry's overall performance is likely to continue to be strong. More importantly, the Tribunal is of the view that other factors, particularly the intense price competition among the domestic producers, rather than any dumping by the US producers, are likely to be the major contributing factors affecting the industry's

53. *Transcript of Public Hearing*, Vol. 2, August 19, 1998, at 348.

54. Manufacturer's Exhibit A-45 at 7, Administrative Record, Vol. 11.1.

55. Tribunal Exhibit RR-97-008-31, Administrative Record, Vol. 1A at 118; and Manufacturer's Exhibits C-16 and C-21, Administrative Record, Vol. 11B.

56. Tribunal Exhibit RR-97-008-37A, Administrative Record, Vol. 1A at 130.2.

57. Manufacturer's Exhibit C-28 (protected), Administrative Record, Vol. 12B.

performance in the near future. Consequently, the Tribunal is not persuaded that a resumption of dumping is likely to cause material injury to the domestic industry.

CONCLUSION

For the foregoing reasons, the Tribunal concludes that there is a likelihood of resumed dumping, but that such dumping is not likely to cause material injury to the Canadian industry, and hereby rescinds the finding.

Patricia M. Close
Patricia M. Close
Presiding Member

Peter F. Thalheimer
Peter F. Thalheimer
Member

Richard Lafontaine
Richard Lafontaine
Member