CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Friday, September 26, 1997

Review No.: RR-97-004

IN THE MATTER OF a review, under section 76 of the *Special Import Measures Act*, of the finding made by the Canadian International Trade Tribunal on January 20, 1993, in Inquiry No. NQ-92-004, concerning 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;

AND IN THE MATTER OF a motion dated September 9, 1997, brought by Georgia-Pacific Corporation in respect of certain interrogatories served on CGC Inc.

ORDER

The Canadian International Trade Tribunal hereby orders, pursuant to section 17 of the *Canadian International Trade Tribunal Act*, CGC Inc. to respond, by Friday, October 3, 1997, to the interrogatories served on it by Georgia-Pacific Corporation on August 25, 1997, and by Westroc Inc. on August 26, 1997, subject to the modifications set out in Annex "A" to this order.

Arthur B. Trudeau
Arthur B. Trudeau
Presiding Member

Charles A. Gracey
Charles A. Gracey
Member

Robert C. Coates, Q.C.
Robert C. Coates, Q.C.
Member

Susanne Grimes
Acting Secretary

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ANNEX A

Tribunal Comments and Directives With Respect to Interrogatories for CGC/USG

	Response Required		Response Not Required	
Summary of Interrogatory	**Yes**	**Yes With the Following Modifications**	**No**	**Comments**
1. US price lists for 1997 including regional price lists.			**X**	Tribunal received annual selling prices for 1995 to mid-1997, by region.
2. Average net delivered selling prices for 1/2 & 5/8 in. gypsum board, by region, on a monthly basis, for the period January 1, 1996, to July 31, 1997.			**X**	Tribunal received annual selling prices for 1995 to mid-1997, by region.
3. Percentage breakdown of annual sales of gypsum board to buying groups and independent sales brokers separately, for each of the periods 1993, 1994, 1995, 1996 and 1997 for Canada and the US separately.		Provide for 1996 and first half of 1997		
4. Provide a copy of any agreement between your company and a buying group or an independent sales broker during the 1993-97 time period.		Provide for 1996 and first half of 1997		
5. Provide sales by plant in Canada of gypsum board in volume and net delivered value for 1995, 1996 and the first half of 1997.			**X**	Response on file

	Response Required		Response Not Required	
Summary of Interrogatory	**Yes**	**Yes With the Following Modifications**	**No**	**Comments**
6. Provide sales of gypsum board by plant in the US for 1995, 1996 and the first half of 1997.		Provide for the plants for which sales represent over 50% of USG's sales in a given region.		
7. Provide by plant the average transportation costs to deliver gypsum to each of the nine US regions.		Provide for the plants for which sales represent over 50% of USG's sales in a given region.		
8. Provide: a) an estimate of the percentage of each plant's total shipments delivered within 200 km of each plant, between 200 and 1,000 km of each plant and over 1,000 km from each plant for the calendar years 1993 to 1996. b) of these three distances, identify your two largest customers based on annual shipments. For each of these customers, provide the average annual FOB net plant price and the total shipment volume to each customer in the years 1995 and 1996.			a) **X** b) X	a) On file for 1995 and 1996 for four plants
9. Provide freight costs for US sales of gypsum board in the US from 1992 to mid-1997.			**X**	On file by region for 1997 Response to the Tribunal's Questionnaire, Question 15.

	Response Required		Response Not Required	
Summary of Interrogatory	**Yes**	**Yes With the Following Modifications**	**No**	**Comments**
10. On a plant by plant basis, provide average cost information.			**X**	Provided total average costs for all plants for 1997.
11. Provide a copy of all strategic plans, marketing plans or any other reports in respect of any on-going or potential investment in the addition or expansion of your company's (or a related company's) gypsum board production capacity. Please also provide a copy of any reports, studies or analyses, whether prepared internally or by a third party, concerning an increase or decrease in gypsum board production capacity within your company (or a related company) or within the industry generally, whether as a consequence of the construction of new plants, the expansion of existing plants, an increase in line speed and/or an increase in efficiencies.		Please provide It is noted that portions of this request were answered in response to the Tribunal's Questionnaire.		
12. Provide a copy of any report, whether generated internally by your company or a third party with respect to projected conditions in the US gypsum board market over the period 1997 to 2000.			**X**	Various reports are on file and others are publicly available
13. Provide the location and volume (capacity) of your company's warehouses and the latest related storage facilities for gypsum board in the US and in Canada.	**X**			

	Response Required		Response Not Required	
Summary of Interrogatory	**Yes**	**Yes With the Following Modifications**	**No**	**Comments**
14. Provide a copy of your company's most recent audited financial statement, or if not available, unaudited financial statements for the fiscal years 1993 to present.			**X**	Response on file
15. Provide: a) a copy of all documentation which addresses sales (actual, planned or projected) or competitive activity in the Canadian gypsum board market between 1993 and the present, including but not limited to summaries, reports or analyses, statements. b) predictions with respect to price or demand for gypsum board in Canada, correspondence with or reports of meetings with potential or existing Canadian customers. c) correspondence with or reports of meetings with existing or potential brokers who sell or may sell gypsum in the Canadian market.	b) Please provide c) Please provide	a) Provide requested information with respect to planned or projected activity in the Canadian market.		
16. Provide all the normal values assigned by Revenue Canada to your company over the 1992-97 period.	**X**			
17. Please advise whether antidumping duties have been imposed on importations into Canada of gypsum board manufactured by your company during the 1992-97 period.	**X**			

CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Wednesday, October 1, 1997

Review No.: RR-97-004

IN THE MATTER OF a review, under section 76 of the *Special Import Measures Act*, of the finding made by the Canadian International Trade Tribunal on January 20, 1993, in Inquiry No. NQ-92-004, concerning 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;

AND IN THE MATTER OF a motion dated September 9, 1997, brought by Georgia-Pacific Corporation in respect of certain interrogatories served on CGC Inc.;

AND IN THE MATTER OF a motion dated September 9, 1997, brought by Georgia-Pacific Corporation in respect of certain interrogatories served on National Gypsum Company.

STATEMENT OF REASONS

INTRODUCTION

By separate orders, each dated September 26, 1997, the Canadian International Trade Tribunal (the Tribunal) directed CGC Inc. (CGC) and National Gypsum Company (National) to respond to the interrogatories served on them by Georgia-Pacific Corporation (Georgia-Pacific) and Westroc Inc. These are the Tribunal's reasons with respect to those orders.

Background

By letter dated August 25, 1997, counsel for Georgia-Pacific served a set of interrogatories on CGC through its counsel. The interrogatories requested information and documentation regarding, among other things, US production, sales and exports of gypsum board, and requested CGC to respond on behalf of USG Corporation (USG). By letter dated August 29, 1997, counsel for CGC advised counsel for Georgia-Pacific that, "as a subsidiary of USG, CGC is not in a position to respond to your request for information *on behalf of* USG Corporation as decisions concerning information and records in the hands of USG is the purview of USG Management rather than CGC management." Counsel for Georgia-Pacific exchanged another round of correspondence, but counsel for CGC maintained the position that CGC was not in a position to respond.

By letter dated August 25, 1997, counsel for Georgia-Pacific served a set of interrogatories on National, in which it requested National to provide information and documentation concerning various matters, including National's pricing, transportation costs and the value and volume of sales from National's plants. National did not respond to Georgia-Pacific's interrogatories until September 15, 1997.

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Georgia-Pacific's Motion

By letter dated September 9, 1997, counsel for Georgia-Pacific applied to the Tribunal for an order in respect of its August 25, 1997, interrogatories to CGC and National. Georgia-Pacific requested the following relief:

- an order directing CGC to provide Georgia-Pacific with all of the information and/or documentation requested in its August 25, 1997, interrogatories, which is in the possession, power or control of CGC and USG, on behalf of CGC and USG;

- in the alternative, an order directing CGC to provide Georgia-Pacific with all of the information and/or documentation requested in Georgia-Pacific's interrogatories, which is in the possession, power or control of CGC and USG, on behalf of CGC alone; or

- in the further alternative, an order directed at CGC requiring it to provide Georgia-Pacific with all of the information and/or documentation requested in Georgia-Pacific's interrogatories, which is in the possession, power or control of CGC, and an order directed at USG requiring it to provide Georgia-Pacific with all such information and/or documentation in its possession, power or control, whether directly or through counsel for CGC.

Counsel for Georgia-Pacific also seeks an order of the Tribunal directing National to provide Georgia-Pacific with all of the information and/or documentation requested in Georgia-Pacific's August 25, 1997, interrogatories and in National's possession, power or control.

In the motion, counsel for Georgia-Pacific notes the following. By letter dated July 29, 1997, the Tribunal advised counsel that it had established fixed time frames for interrogatories in the present review. Attached to that letter were guidelines with respect to interrogatories. The guidelines provide that interrogatories or requests for the production of documents could be directed to any party and that a party so served would be required to provide a "full and adequate" response within a certain time frame. The guidelines provide that any party unable or unwilling to provide a full and adequate response, on the grounds that the information or documents requested are irrelevant, provide a response that sets out the reasons for that contention. The guidelines also state that, where a party contends that information or documents necessary to provide a full and adequate response are unavailable, that party must set out the reasons for the unavailability and provide information which it considers would be of assistance to the person who initiated the interrogatories.

In the motion, counsel for Georgia-Pacific also notes that CGC and USG participated in the Tribunal's inquiry, Inquiry No. NQ-92-004,[1] which led to the finding under review. In Inquiry No. NQ-92-004, CGC supported an injury finding, whereas USG did not. Since the Tribunal's finding, CGC has become a wholly owned subsidiary of USG. While USG participated in the Tribunal's review initiation, or notice of expiry process, which preceded the present review and responded to a Tribunal questionnaire in the review, it is not a party to the review.

Counsel for Georgia-Pacific submits that both CGC and National have failed to comply with the Tribunal's interrogatory guidelines by failing to provide a full and adequate response to Georgia-Pacific's

1. *Gypsum Board Originating in or Exported from the United States of America, Finding*, January 20, 1993, *Statement of Reasons*, February 4, 1993.

interrogatories. Moreover, counsel for Georgia-Pacific submits that, even if counsel for CGC is correct in maintaining that CGC is not required to file a response on behalf of USG, it is in violation of its obligation to "provide any alternative information or documents" that would be of assistance to Georgia-Pacific. Counsel for Georgia-Pacific submits that National has violated its obligation to file a response to Georgia-Pacific's interrogatories.

Counsel for Georgia-Pacific submits that the Tribunal's interrogatory guidelines were created to provide parties to the review with the right to obtain, in a timely manner, all relevant information and documentation in the possession of, or reasonably accessible by, other parties. In this respect, counsel submits that the Tribunal's interrogatory system is analogous to the discovery systems utilized by superior courts. As such, counsel submits that the Tribunal's interrogatory guidelines should be "informed" by the superior courts' application of discovery rules.

Counsel for Georgia-Pacific notes that rule 30.02(4) of the Ontario *Rules of Civil Procedure*[2] provides that "[t]he court may order a party to disclose all relevant documents in the possession, control or power of the party's subsidiary or affiliated corporation or of a corporation controlled directly [or] indirectly by the party and to produce for inspection all such documents that are not privileged." Counsel notes that the Ontario District Court utilized that rule in *Peters* v. *General Motors of Canada*,[3] in ordering General Motors of Canada Ltd. to disclose all relevant documents in the possession, control or power of its affiliated corporation, General Motors Corporation, a US corporation.

Counsel for Georgia-Pacific points out that rule 450(1)(*b*)(ii) of the *Federal Court Rules*[4] provides that the court "may order a party to disclose in an affidavit of documents all documents relevant to any matter in issue that are in the possession, power or control of any corporation or individual that directly or indirectly controls the party.[5]" Counsel submits that, even before rule 450(1)(*b*)(ii) was enacted, in *Monarch Marking Systems, Inc.* v. *Esselte Meto Ltd.*,[6] the Federal Court—Trial Division ordered a Canadian company to produce documents in the possession and control of its foreign affiliate.

Counsel for Georgia-Pacific submits that that the Federal Court—Trial Division's decision in *Monarch* was cited with approval by the Federal Court of Appeal in *R.* v. *Crestbrook Forest Industries Limited*.[7] Counsel for Georgia-Pacific submits that the conduct of CGC and National is such as to thwart the Tribunal's objectives in establishing the interrogatory guidelines to the prejudice of Georgia-Pacific and that the interests of equity, efficiency and natural justice warrant the granting of the relief sought by Georgia-Pacific.

By letter dated September 11, 1997, the Tribunal invited CGC and National to respond to Georgia-Pacific's motion and provided Georgia-Pacific with the opportunity to reply to such responses.

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2. R.R.O. 1990, Reg. 194.
3. (1986), 14 C.P.C. (2d) 147 (Dist. Ct.).
4. C.R.C. 1978, c. 663, as amended.
5. R. 30.02(4) of the Ontario *Rules of Civil Procedure* and R. 450(1)(*b*)(ii) of the *Federal Court Rules* hereafter referred to the "affiliate exceptions."
6. (1983), 75 C.P.R. (2d) 130.
7. (1993), 93 D.T.C. 5186 (leave to appeal to S.C.C. refused (1993) 160 N.R. 320n).

CGC's Response

Counsel for CGC submits that, contrary to the assertions of Georgia-Pacific, on August 29, 1997, it responded to Georgia-Pacific's interrogatories in accordance with the interrogatory guidelines. Counsel states that he advised Georgia-Pacific that CGC was not in a position to respond to Georgia-Pacific's interrogatories "on behalf of" USG, as the interrogatories called for information and documents in the hands of USG, and decisions concerning same would require USG's authority. CGC also pointed out that, in subsequent correspondence with Georgia-Pacific, it reiterated its position, but invited Georgia-Pacific to direct interrogatories directly to CGC. To date, Georgia-Pacific has not availed itself of that opportunity.

Counsel for CGC submits that, to make the order requested by Georgia-Pacific, the Tribunal would have to pierce the corporate veil and make a finding that CGC is an agent of USG or that CGC was established by USG as a "rouse" [sic] through which to act. Counsel submits that it is well settled in law that subsidiary corporations enjoy a strong presumption favouring their existence as separate and distinct legal entities. In counsel's submission, where there is no express or implied agency, fraud, conspiracy or evidence that the subsidiary is the alter ego of the parent corporation, the corporate veil should not be lifted. Counsel submits that there is no evidence upon which the Tribunal could arrive at such a finding with respect to CGC. In this regard, counsel notes that CGC is a Canadian corporation of long-standing history and activities in Canada, with full management and control over its operations. Moreover, given that USG is a US corporation, the order sought by Georgia-Pacific would be extraterritorial.

Counsel for CGC also submits that, even if the Tribunal is prepared to accept counsel for Georgia-Pacific's analogy to the Ontario and Federal Court discovery systems, the Tribunal's interrogatory guidelines do not contain an affiliate exception comparable to those contained in the Ontario *Rules of Civil Procedure* or the *Federal Court Rules*. Counsel notes that the affiliate exception rules were added to the Ontario and Federal Court rules only recently. Counsel argues that, because the Tribunal's interrogatory guidelines contain no affiliate exception provision, it would only be appropriate to draw an analogy between the Tribunal's interrogatory guidelines and the Ontario and Federal Court rules as they existed prior to the addition of the affiliate exceptions in those rules. On this basis, counsel submits that the cases cited by counsel for Georgia-Pacific, which were decided after the affiliate exceptions were added to the rules, are of no assistance.

Counsel for CGC refers the Tribunal to the Federal Court—Trial Division's decisions in *Indalex Ltd.* v. *The Queen*[8] and *Bowlen* v. *R. (No. 2)*,[9] both decided before the addition of the affiliate exception to the *Federal Court Rules*, and to the UK Court of Appeal's decision in *Lonrho Ltd.* v. *Shell Petroleum Co.*,[10] which, counsel submits, stand for the proposition that it is only in very rare circumstances that courts will require discovery beyond documents and information within the possession, power and control of the parties to a proceeding. Counsel submits that, even if the Tribunal is able to imply the existence of a rule analogous to the affiliate exception in its interrogatory guidelines, it should heed the caution of the Federal Court of Appeal in *Crestbrook* that the power to order such discovery, or in this case interrogatories, should be used sparingly.

8. 84 D.T.C. 6018 (F.C.-T.D.)
9. (1977), 5 C.P.C. 215 (F.C.-T.D.).
10. [1980] Q.B. 358; aff'd [1980] 1 W.L.R. 627 (H.L.).

National's Response

Counsel for National in Canada submits that counsel for Georgia-Pacific has provided no justification for the information that he has requested National to produce. Counsel for National also submits that "the imbalance between the tenuous relevance of that data [requested] and the burden placed upon [National] to provide a complete response is self-evident." Finally, counsel for National indicates that National is prepared to respond, on a best effort basis, to certain questions posed by Georgia-Pacific.

The Tribunal also received a submission from counsel for National in the United States. Counsel noted that, in this review, National has already completed a detailed questionnaire sent to it by the Tribunal. Counsel notes that opposing counsel in this review had an opportunity to offer comments on what the Tribunal's questionnaires should contain. In counsel's submission, having availed themselves of that opportunity, the scope of the Tribunal's questionnaire should be adequate for both the Tribunal's and opposing counsel's needs in preparing for the hearing.

Counsel for National submitted that the questions posed by Georgia-Pacific concerned matters which were only remotely relevant to the issues before the Tribunal and/or were overly burdensome when the very significant amount of work required for the preparation of answers was compared to their limited probative value. Finally, counsel indicated that the answers to certain of the questions could be obtained from information already on the record in the review.

Georgia-Pacific's Reply

In reply to counsel for CGC's submission, counsel for Georgia-Pacific notes that neither CGC nor its counsel has provided any indication as to whether or not they have or have had access to some of the information or documents contemplated in Georgia-Pacific's interrogatories. Moreover, counsel for Georgia-Pacific notes that counsel for CGC has not indicated whether any attempt has been made to request USG to provide that information or those documents. Finally, counsel for Georgia-Pacific notes that counsel for CGC has indicated that CGC will respond to interrogatories concerning only its own operations. Counsel for Georgia-Pacific submits that these facts, taken together, lead to the inference that CGC has access or has had access to some or all of the information or documents in issue and that it intends to use those documents selectively in presenting its case to the Tribunal.

With respect to counsel for CGC's arguments regarding the lifting of the corporate veil, counsel for Georgia-Pacific submits that the Tribunal does not have to pierce the corporate veil or find that CGC is USG's agent in order to make the order that it seeks. In Georgia-Pacific's submission, the Tribunal may issue the order if it concludes that the administration of justice warrants the production of the relevant evidence.

However, in the submission of counsel for Georgia-Pacific, if the Tribunal is not prepared to issue an order on that basis and goes on to consider the legal issues raised by counsel for CGC, it should still grant Georgia-Pacific the relief that it seeks. Counsel for Georgia-Pacific submits that the Tribunal may pierce the corporate veil, even if it concludes that CGC is USG's agent for one purpose and is autonomous for all other purposes. In support of that proposition, counsel for Georgia-Pacific cites *Nedco Ltd.* v. *Clark,*[11] *Aluminum*

11. [1973] 6 W.W.R. 425.

Co. of Canada Ltd. v. *Toronto* [12] and *Toronto* v. *Famous Players Canadian Corp.*[13] Counsel submits that, for the purposes of the Tribunal's review, CGC is acting as the sole representative of USG and that CGC is thus acting in a manner "akin" to an agent.

Counsel for Georgia-Pacific also takes issue with counsel for CGC's submission that the Tribunal's interrogatory guidelines do not contain an affiliate exception and that one cannot be implied. Counsel for Georgia-Pacific submits that counsel for CGC's argument on this point is illogical. In that connection, counsel for Georgia-Pacific points out that the Tribunal's interrogatory guidelines were "enacted" after the affiliate exceptions were added to both the Ontario and Federal Court rules and that the Tribunal enacted the guidelines with the knowledge that superior courts had the power to order "affiliates" to produce documents. In the submission of counsel for Georgia-Pacific, in light of that fact, the existence of that power in the superior courts must "inform" the Tribunal's consideration of its power under the interrogatory guidelines.

Moreover, counsel for Georgia-Pacific argues that, even before the Ontario and Federal Court rules contained an express affiliate exception, the courts would, in appropriate circumstances, order that documents in the possession of affiliated corporations be produced. In other words, the power of those courts to make such orders is not derived from the rules, but rather is part of their inherent jurisdiction as superior courts of record.

With respect to National, counsel for Georgia-Pacific notes that National has failed to comply with the interrogatory guidelines, in that it failed to provide a response of any kind within the time frame established. Counsel submits that it is too late for National to challenge the relevance of Georgia-Pacific's interrogatories, to provide cursory responses to select interrogatories or to challenge Georgia-Pacific's right to issue interrogatories at all on the grounds that its counsel had an opportunity to comment on the Tribunal's questionnaires. Counsel submits that all of the information sought in the interrogatories to National is relevant. Moreover, counsel submits that, taken to its logical conclusion, National's position would see a complete elimination of interrogatories in the review process.

REASONS FOR DECISION

The Tribunal is of the view that Georgia-Pacific's motion raises the two following issues:

- whether the Tribunal has the power to order CGC and National to respond to Georgia-Pacific's interrogatories; and

- if the Tribunal does have such power, whether it should exercise it in this case.

Tribunal's Power to Order Production of Documents and Information

Subsection 17(2) of the *Canadian International Trade Tribunal Act*

Many of the parties' submissions with respect to the Tribunal's power to order CGC and National to respond to Georgia-Pacific's interrogatories focused on the interrogatory guidelines issued by the Tribunal on July 29, 1997. The Tribunal is of the view that those guidelines do not add or detract from the Tribunal's

12. [1944] 3 D.L.R. 609.
13. [1936] S.C.R. 141.

power. They are a "guideline" issued by the Tribunal to bring structure to its interrogatory process, aimed at facilitating the exchange of information by parties prior to the hearing in a productive and timely manner.

The Tribunal is a quasi-judicial body created pursuant to the *Canadian International Trade Tribunal Act*[14] (the CITT Act). With certain exceptions, tribunals such as this one have only such powers as are bestowed on them by their enabling legislation. Section 17 of the CITT Act provides as follows:

> (1) The Tribunal is a court of record and shall have an official seal, which shall be judicially noticed.
>
> (2) The Tribunal has, as regards the attendance, swearing and examination of witnesses, the production and inspection of documents, the enforcement of its orders and other matters necessary or proper for the due exercise of its jurisdiction, all such powers, rights and privileges as are vested in a superior court of record. (Emphasis added)

As noted above, Georgia-Pacific's interrogatories contemplate the production of various documents, as well as the provision of certain information. It is well established as a matter of law that superior courts have the power to order parties to their proceedings to produce documents. On that basis, the Tribunal is of the view that subsection 17(2) of the CITT Act provides it with the necessary authority to order parties to its proceedings to produce documents. The question of whether that power should be exercised in this particular case is addressed below.

With respect to the production of information, as distinct from existing documents, the Tribunal is of the view that the Federal Court of Appeal's decision in *Interprovincial Pipe Line Limited* v. *National Energy Board* is instructive.[15] In that case, Interprovincial Pipe Line Limited appealed an order of the National Energy Board (the Board) directing it to produce certain information pertaining to Lakehead Pipe Line Company Inc., a wholly owned US subsidiary. The Court found that, for the information to be created, Interprovincial Pipe Line Limited would have to instruct Lakehead Pipe Line Company Inc. to perform certain "calculations, reconciliation, analysis, adjustments, estimates and forecasts.[16]" The Court stated that the issue in the appeal was "whether the Board has statutory authority to order the preparation and filing of information in a documentary form that is not already in existence.[17]" In the course of its judgment, the Court noted that, though all of the information sought by the Board could have been obtained over an extended period of time in the form a *viva voce* evidence, that was not a practical way of proceeding.

Like subsection 17(2) of the CITT Act, subsection 10(3) of the *National Energy Board Act* (the NEB Act)[18] refers specifically to the production of documents, as opposed to information. Without answering the question definitively, the Federal Court of Appeal questioned whether that provision could be relied on to provide the requisite authority for the Board's order. In considering that question, the Court noted that, with respect to certain of the Board's proceedings, the Board's rules provided that the Board could order parties to provide it with "such further information, particulars or documents as the Board deems

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14. R.S.C. 1985, c. 47 (4th Supp.).
15. [1978] 1 F.C. 601 (F.C.A.).
16. *Ibid.* at 605-606.
17. *Ibid.* at 605.
18. R.S.C. 1985, c. N-7. 10(3) The Board has, with respect to the attendance, swearing and examination of witnesses, the production and inspection of documents, the enforcement of its orders, the entry upon and inspection of property and other matters necessary or proper for the due exercise of its jurisdiction, all such powers, rights and privileges as are vested in a superior court of record.

necessary." However, the Court found that the Board's rules did not apply to the proceeding at issue. The Court also noted that, in certain types of proceedings before the Board, the NEB Act provided the Board with express authority to order the production of information. However, the Court observed that those provisions did not apply to the proceeding at issue. After canvassing these matters, the Court stated:

> In view of these uncertainties I am unable to conclude that there is clearly explicit authority in the Act or the Rules for the power exercised by the Board in the present case, but given the practical necessity of the power I am of the opinion that it exists by necessary implication from the nature of the regulatory authority that has been conferred on the Board. See *Halsbury's Laws of England*, 3rd ed., vol. 36, para. 657, p. 436: "The powers conferred by an enabling statute include not only such as are expressly granted but also, by implication, all powers which are reasonably necessary for the accomplishment of the object intended to be secured."(Emphasis added)[19]

In reaching that conclusion, the Federal Court of Appeal noted as follows:

> There can no doubt that the power to order the preparation and filing of written information of this kind is necessary to the effective exercise of the Board's jurisdiction under the Act. Mr. Whittle, the Secretary of the Board, put the matter thus in his affidavit:
>
> > It is my opinion that, if the Board is not able to require companies subject to its jurisdiction to provide information in a form directed by the Board, and if it is restricted to using unprocessed, unanalysed, unscheduled, uncollated and disorganized documents, financial and engineering data as happen to be in the custody and control of such companies, the Board, assisted by technical staff, would be unable to adequately discharge the statutory responsibilities assigned to it under the National Energy Board Act.

Those words apply equally to Tribunal inquiries under the *Special Import Measures Act*[20] (SIMA), as well as to certain inquiries under the CITT Act. Much of the information used by the Tribunal in SIMA cases is simply not kept "on the shelf" by companies in a documentary form. In addition, in proceedings under SIMA, the Tribunal is often required to examine some portion or subset of an industry. Even where documentary information is available, it typically relates to operating companies as a whole, as opposed to subsets thereof. If the Tribunal could not obtain information organized in an accessible manner from parties, but rather could obtain only documents, it would be forced to break those documents down and "back out" the information of relevance to the inquiry. In so doing, the Tribunal would have to make numerous assumptions concerning allocations and other matters, which would very substantially lessen the accuracy and reliability of the information generated.

To obtain the information required for proceedings under SIMA, the Tribunal's staff distributes questionnaires to participants in the industry, including domestic producers, importers and exporters. The information gathered is synthesized into a detailed pre-hearing staff report which sets out, among other things, information concerning prices, imports, financial results of the domestic industry, data regarding capacity utilization, inventories and market trends. (By way of illustration, the pre-hearing staff report in this

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19. See also *Bell Canada* v. *Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722, where the Supreme Court of Canada stated at 1756:

> The powers of any administrative tribunal must of course be stated in its enabling statute but they may also exist by necessary implication from the wording of the act, its structure and its purpose. Although courts must refrain from unduly broadening the powers of such regulatory authorities through judicial law-making, they must also avoid sterilizing these powers through overly technical interpretations of enabling statutes.

20. R.S.C. 1985, c. S-15.

review is 88 pages in length, contains over 60 tables and figures setting out financial and economic data and includes 30 schedules setting out additional data.) The pre-hearing staff report is distributed to all parties in a given Tribunal proceeding and is heavily relied upon by the Tribunal and parties as a reference document. The Tribunal has operated in this manner since it was established in late 1988, and its predecessors operated in a similar manner. In short, if the Tribunal could not obtain information, it would be a practical impossibility to gather the information necessary for the Tribunal to discharge its mandate.

The Tribunal is of the view that, under subsection 17(2) of the CITT Act, it has the power to order parties to its proceedings to produce documents and that, by necessary implication, it has the power to order parties to its proceedings to produce information.

Should the Tribunal Exercise its Power to Order Production of Documents and Information in this Case

Notwithstanding its view that it has the necessary authority to order parties to its proceedings to produce documents and information, the question remains whether the Tribunal should exercise that power in this instance. The Tribunal is of the view that the starting point for the analysis of that question is relevance. In other words, if any of the documents or information sought by Georgia-Pacific is, in the Tribunal's view, not relevant to its review, then the Tribunal should not order the production. In addition, where the production or preparation of the documents or information requested would represent a substantial burden on the party, and the materials, though relevant, are of limited probative value, the Tribunal should refrain from exercising its power to order the production. The Tribunal has reviewed the interrogatories at issue with these principles in mind and has concluded that, for the most part, they elicit relevant information which is of probative value. Consequently, the Tribunal has directed CGC and National to respond to the interrogatories, subject to certain modifications to the questions.

CGC maintains that it cannot respond to the interrogatories "on behalf of" USG, as the information and documents relating to USG are in USG's possession, power and control. CGC also argues that the Tribunal should not lift CGC's corporate veil unless it is satisfied that CGC was established by USG as a "rouse" [sic] through which to act or that there is evidence of an agency relationship, fraud, conspiracy or evidence that CGC is USG's alter ego. Georgia-Pacific argues that, to grant the relief sought, the Tribunal need not lift the corporate veil, but rather need only be satisfied that such an order is in the interests of the administration of justice and fairness. Georgia-Pacific also argues that, if the Tribunal is not prepared to proceed on that basis, there is sufficient evidence on the record for the Tribunal to find that CGC is acting in a manner akin to an agent of USG.

In *Monarch*, the Federal Court—Trial Division ordered a corporate officer of a Canadian company to answer questions concerning matters which the Court acknowledged were within the knowledge of the company's foreign affiliated companies. In reaching that decision, the Court stated:

> Today's commercial reality, with international corporations, large and small, doing business through affiliates across much of the world and treating national boundaries as minor inconveniences to be coped with by organisational means, dictates that the corporate veil ought not to be permitted to inhibit the administration of justice in Canada. Examination for discovery is an important tool in the administration of justice on its civil side. I have no doubt that, under proper sanctions by the court, Canadian companies can readily and economically obtain from their foreign affiliates answers to proper questions on discovery. I am convinced that they should be required to try and to pay the consequences of their failure or their affiliates recalcitrance.

The Tribunal notes that, in *Crestbrook*, the Federal Court of Appeal cited *Monarch* with approval and stated that, to the extent that the Federal Court—Trial Division's decision in *Indalex* was in conflict with the decision in *Monarch*, the latter should be taken as a correct statement of the law.

In *Crestbrook*, the Federal Court of Appeal was asked by a litigant to order a Canadian company, Crestbrook Forest Industries Limited, to answer questions which required information which was not in that company's control, but in the control of its two Japanese shareholders. After a careful analysis of the relationship between Crestbrook Forest Industries Limited and the Japanese shareholders, the Court issued the order on the basis of its view that the Canadian company was the "alter ego" of the Japanese firms.

In considering Georgia-Pacific's motion, the Tribunal considers it important to examine the relationship between CGC and USG. In that regard, the Tribunal notes that CGC is a wholly owned subsidiary of USG and that it is on record in this review as supporting the rescission of the Tribunal's finding. At the time of the proceeding in Inquiry No. NQ-92-004, which gave rise to the finding under review, CGC, while a subsidiary of USG, was not a wholly owned subsidiary. In Inquiry No. NQ-92-004, CGC argued in favour of the Tribunal making an injury finding.

The Tribunal also notes that, in its 1994 Annual Report, which is on the record of this review, USG states that it will "invest for growth by focusing its capital resources on taking advantage of distribution and marketing synergies among its subsidiary operations, developing and marketing new products, managing its North American gypsum business on a continental basis." The Annual Report also states that "Each of the core businesses is now managed as a unit, rather than as separate companies." It is apparent from the Annual Report that USG considers its gypsum wall board business in North America as one of its core businesses.

The 1994 Annual Report also states that "USG's North American Gypsum business is leading its industry in capitalizing on opportunities presented by the North American Free Trade Agreement. The business is becoming 'borderless,' in that the gypsum operations are serving customers and managing inventory and capacity on a continental basis." In a section of the Annual Report entitled "Operations Review" and subtitled "United States Gypsum Company," with respect to CGC, it is stated: "CGC Inc. is implementing the North American gypsum strategy through market and product-line expansions and coordination of manufacturing and distribution with U.S. Gypsum." Finally, the financial statements in the Annual Report group US Gypsum, CGC and other subsidiaries under the heading "North American Gypsum."

USG's 1995 Annual Report follows the same pattern in terms of grouping and discussing results on a North American basis. For example, in the Annual Report, USG states that it is "achieving unique service and competitive advantages by integrating its three North American gypsum units."

In its 1996 Annual Report, USG makes note of the fact that, in 1996, CGC became a wholly owned subsidiary. USG states that "[t]his will enable USG to further align CGC strategically and operationally within the North American gypsum business." In the Annual Report, developments with respect to USG's North American operations and results from the years operations are discussed on a North American basis.

Based on the foregoing, the Tribunal is of the view that USG competes and manages its gypsum wall board business on a North American basis. The Tribunal is not prepared to conclude that CGC is, for all purposes, the "alter ego" or agent of USG. However, given the integration and co-ordination of USG's North American operations, the fact that CGC is "implementing the North American gypsum strategy" and the fact that the presence or absence of an injury finding would affect cross-border trade in gypsum wall

board and the operation of the North American market generally, the Tribunal is persuaded that CGC is acting as USG's agent for purposes of this review. In view of the North American perspective from which USG apparently manages its gypsum board business, it is reasonable to conclude that the decision as to what position CGC should take in this proceeding was made in the United States.

The Tribunal notes that, in *Crestbrook*, the Federal Court of Appeal indicated that the power to require the sort of answers at issue in that case should be used "sparingly" and only in "special situations, where it is shown as a prerequisite that it is in the interests of the administration of justice to look behind the sanctity of the corporate identity." In the Tribunal's view, this case presents such a situation. Subject to the modifications set out in its decision, the Tribunal is of the view that the documents and information sought by Georgia-Pacific are relevant to this review. To allow CGC to erect a corporate wall in resisting to provide those materials would frustrate the Tribunal's ability to discharge its mandate under SIMA and would seriously impede certain parties' ability to present their cases to the Tribunal.

Arthur B. Trudeau
Arthur B. Trudeau
Presiding Member

Charles A. Gracey
Charles A. Gracey
Member

Robert C. Coates, Q.C.
Robert C. Coates, Q.C.
Member