ARTICLE 1904
BINATIONAL PANEL REVIEW PURSUANT TO THE
NORTH AMERICAN FREE TRADE AGREEMENT

IN THE MATTER OF:

Certain Iodinated Contrast Media Used for Radiographic Imaging, Originating in or Exported from the United States of America (Including the Commonwealth of Puerto Rico)

Secretariat File No.: CDA-USA-2000-1904-01

DECISION OF THE PANEL

ON REVIEW OF THE FINAL DETERMINATION
OF THE
COMMISSIONER OF CUSTOMS AND REVENUE

January 8, 2003

Before: Mr. Brian E. McGill (Chair)
Professor David J. Mullan
Mr. Mark R. Sandstrom
Professor Leon E. Trakman
Ms. Shawna K. Vogel

Hearing: September 9, 2002, Ottawa, Ontario, Canada

Appearances:

On behalf of Bracco Diagnostics Canada, Inc. and Bracco Diagnostics, Inc.	Mr. Dean A. Peroff
On behalf of Nycomed Amersham Canada Ltd. and Nycomed Inc.	Mr. Lawrence L. Herman
On behalf of Tyco Healthcare Canada Inc.	Mr. C.J. Michael Flavell, Q.C. Mr. Geoffrey C. Kubrick
On behalf of the Commissioner of Customs and Revenue	Mr. Michael Ciavaglia Mr. Michael Roach

Introduction

This is the Panel decision under the binational panel review process in the matter of Certain Iodinated Contrast Media Used for Radiographic Imaging, Originating in or Exported from the United States of America (Including the Commonwealth of Puerto Rico) (Secretariat File No. CDA-USA-2000-1904-01) conducted pursuant to Article 1904 of the *North American Free Trade Agreement* (NAFTA) and Part I.1 of the *Special Import Measures Act* (*SIMA*).[1] The Request for Panel Review of the final determination made by the Commissioner of Customs and Revenue, on March 30, 2000, in Case No. AD/1234 was filed with the NAFTA Secretariat, Canadian Section, by counsel for Nycomed Amersham Canada Ltd. and Nycomed Inc. on May 12, 2000 in accordance with Part II of the *NAFTA Article 1904 Panel Rules*. An additional Request for Panel Review was also filed by counsel for Bracco Diagnostics Canada, Inc. and Bracco Diagnostics, Inc.

The products that are the subject of this panel review are described as iodinated contrast media used for radiographic imaging, in solutions of osmolality less than 900 mOsm/kg H_2O, originating in or exported from the United States of America (including the Commonwealth of Puerto Rico).[2]

[1] R.S.C. 1985, c. S-15, as amended, (hereinafter "*SIMA*")

[2] Statement of Reasons concerning the making of a final determination of dumping with respect to Certain Iodinated Contrast Media Used for Radiographic Imaging, Originating in or Exported from the United States of America (March 30, 2000) File No. 4240-21/Case No. AD/1234 (CCRA) at 3 (hereinafter the "Statement of Reasons").

The parties to this panel review include Bracco Diagnostics Canada, Inc., Bracco Diagnostics, Inc., Nycomed Amersham Canada Ltd. and Nycomed Inc. as complainant and Tyco Healthcare Canada Inc. and the Commissioner of Customs and Revenue as respondents.

Standard of Review

Introduction

Canadian judicial review law identifies three possible standards of review: correctness, and two deferential standards: unreasonableness and patent unreasonableness.[3] Which standard applies is determined on the basis of a "pragmatic and functional analysis".[4] The principal components of that analysis are: the nature of the particular issue on which review is being sought, the expertise of the decision-maker, legislative indicia (if any), and the overall statutory purpose.[5]

The Supreme Court has also held that the critical factor in most instances will be expertise.[6] That aspect of the inquiry involves a consideration of the statutory qualifications and general expectations of expertise on the part of the decision-maker. However, beyond that, it

[3] These standards were first recognized explicitly in *Canada (Director of Investigation and Research)* v. *Southam Inc.*, [1997] 1 S.C.R. 748. (hereinafter "*Southam"*)

[4] This terminology was coined in *U.E.S., Local 298* v. *Bibeault*, [1988] 2 S.C.R. 1048, at 1088.

[5] See *e.g. Pushpanathan* v. *Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982. (hereinafter "*Pushpanathan"*)

[6] See *Southam, supra*, note 3, at 773; *Pushpanathan, ibid*., at 1006-07, and *Canada (Deputy Minister of National Revenue)* v. *Mattel Canada Inc.*, [2001] 2 S.C.R. 100, at 115. (hereinafter "*Mattel"*)

calls for an evaluation of the expertise of the decision-maker in relation to the particular issue which is subject to review in comparison with the reviewing court's own expertise on that very same question.[7]

In terms of the nature of the question or issue, the courts differentiate in some contexts among questions of law, questions of fact, and questions of mixed law and fact. As in general law, the latter category is the most problematic in application. For these purposes, the Supreme Court of Canada has accepted that the process of applying the law to the facts requires an identification of the relevant legal principles and the application of those legal principles to the facts as found. The first stage of that process involves a question of law, albeit one occurring within the fact/law integration process.[8] However, the Court has also cautioned against too readily characterizing an issue arising in such a context as involving a question of legal principle. If the issue is "not readily extricable"[9] from the factual context, it should be treated for review purposes as a question of a mixed law and fact.[10]

Even if the question is one of law or legal principle, a deferential standard of review is, nonetheless, frequently necessary. However, this is not invariably so. No deference or lessened deference may be appropriate for a question of general law or a question which transcends the particular statutory regime and has currency in the common or general law as opposed to a

---

[7] See *e.g. Pushpanathan*, *supra*, note 5, at 1007 and *Mattel*, *supra*, note 6, at 115-16.

[8] See *e.g. Southam*, *supra*, note 3, at 766-67.

[9] See *Housen* v. *Nikolaisen*, 2002 SCC 33, at para. 36. (hereinafter "*Housen*")

[10] See *e.g. Mattel*, *supra*, note 6, at 117-18.

question that is context sensitive and within the particular area of expertise of the decision-maker.[11] In contrast, the more room the relevant statutory provision leaves for the exercise of discretion and the development of the meaning of statutory provisions on a case by case basis under the influence of the field expertise of the decision-maker, the greater is the call for judicial deference to the determination of those questions.[12]

In Canadian law, the most significant legislative indicator of an obligation of deference is the presence in the empowering legislation of a privative clause restricting the judicial review capacities of the courts. The stronger the privative clause, the greater is the need for judicial deference in exercising review authority.[13]

Application of the Standard of Review to Determinations by the Commissioner of the Canadian Customs and Revenue Agency

Determinations by the Commissioner of the Canadian Customs and Revenue Agency ("CCRA") under the *Special Import Measures Act* ("*SIMA*") do not enjoy the protection of a privative clause. However, there is consistent authority from NAFTA Chapter 19 panels to the effect that the Commissioner is generally entitled to a significant degree of deference.[14]

---

[11] Again, see *Mattel*, *supra*, note 6, for an example and also *Pushpanathan*, *supra*.

[12] For examples, see *Southam*, *supra*, note 3, and *Pezim* v. *British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557.

[13] See *Dayco (Canada) Ltd.*v. *CAW-Canada*, [1993] 2 S.C.R. 230.

[14] See *Re Certain Machine Tufted Carpeting from the United States of America* (1993), CDA-92-1904-01; *Re Certain Top-Mount Electric Refrigerators, Electric Household Dishwashers, and Gas or Electric Laundry Dryers, Originating in or Exported from the United States of America and Produced by, or on Behalf of, White Consolidated Industries, Inc. and Whirlpool Corporation their Affiliates, Successors and Assigns* (2002), CDA-USA-2000-1904-

The *SIMA* legislation is highly technical. Moreover, having regard to its overall structure and purpose, Parliament obviously intended the relevant parts of the legislation to be interpreted and applied in an agency setting that would provide considerable institutional expertise on trade matters. The legislation is also characterized in many parts by the conferral of broad discretion. Most of the interpretative judgments that have to be made depend critically on trade law concepts and not matters of general or external law. Facts are almost always critical and the process of law/fact application is commonly both complex and dependent on sensitivity to the issues gained through ongoing experience with the operation of the statute.

As a consequence, the applicable standard of review is almost invariably a deferential one. On matters of fact, the standard is generally one of patent unreasonableness or, as expressed in the language of the relevant statutory provision, whether there has been "an erroneous finding of fact that [the Commissioner] made in a perverse or capricious manner or without regard to the material before it."[15] Similar levels of deference are reserved for the process of applying the law to the facts. As for questions of law, the standard that is generally applied is that of unreasonableness and neither of the Respondents contended in this case that it should be any more deferential than that.

03; *Certain Beer Originating in or Exported from the United States of America by G. Heileman Brewing Company, Inc., Pabst Brewing Company, and the Stroh Brewery Company for Use or Consumption in the Province of British Columbia* (1992), CDA-91-1904-01, and on the issue of the meaning of "exporter", See *In the Matter of Final Determination of Dumping Regarding Certain Refined Sugar Beets in Granulated, Liquid and Powdered Form, Originating in or Exported from the United States of America* (1996), CDA-95-1904-04.

[15] *Federal Court Act*, R.S.C. 1985 s.18.1(4)(d).

The principal submissions by counsel for Bracco Diagnostics, Inc. and Bracco Diagnostics Canada Inc. ("Bracco") are, however, that, for at least one of the critical determinations made by the Commissioner in this instance, the issue of whether Bristol-Meyers Squibb ("BMS") was an "exporter", the standard of review should be that of correctness.[16] For this purpose, counsel for Bracco emphasizes two recent Supreme Court of Canada authorities in particular: *Canada (Deputy Minister of National Revenue)* v. *Mattel Canada Inc.*[17] and *Housen* v. *Nikolaisen*.[18]

Mattel Canada Inc. involved a decision of the Canadian International Trade Tribunal ("CITT") taken, not under *SIMA,* but under the *Customs Act*. More particularly, the CITT was required to interpret the terms "sale [of goods] for export to Canada" (with emphasis on the meaning of "sale of goods") and "a condition of the sale of goods". The Court held that, because these were questions of pure statutory interpretation involving a concept "intrinsic to commercial law",[19] there was no reason for deference and the standard was that of correctness. However, in so doing, the Court made it clear that it was not laying down a general rule for all questions of law to be resolved by the CITT under the customs legislation, let alone its *SIMA* jurisdiction.

[16] In relation to the findings with which it was taking issue, Nycomed argued the standard was that of unreasonableness. See Transcript Article 1904 Binational Panel Review in the Matter of Certain Iodinated Contrast Media Used for Radiographic Imaging, Originating in or Exported from the United States of America, held Monday, September 9, 2002 at pg. 96, 98 (Herman). (hereinafter "Transcript")

[17] *Mattel, supra,* note 6.

[18] *Housen, supra,* note 9.

[19] *Mattel, supra,* note 6, at 118.

The contrast drawn was to "technical words that are well beyond [the appeal court's] statutory mandate"[20] where deference was required.

It is also significant that in *Mattel* this question arose in the context of a statutory appeal from the CITT determination and not by way of an application for judicial review, the latter being the route by which determinations of the Commissioner and the CITT reach the courts or a NAFTA Panel under *SIMA*. This is important because the case law makes it clear that in general there is a diminished entitlement to deference in the case of appeals (in contrast to review).[21]

Housen was a civil appeal from the decision of a provincial court judge in a negligence action. As a consequence, its relevance to proceedings involving the review of the decisions of statutory authorities can be questioned. However, counsel does not rely on *Housen* for the proposition that there should be no deference because the Commissioner was engaged in the determination of questions of mixed law and fact. Rather, the Panel is urged to recognize the Court's position in *Housen* that, in the domain of mixed law and fact, decision-makers (be they judges, tribunals or officials) are required initially to identify the legal principles governing the application of the law to the facts. On issues of the content of legal principle in the fact/law application exercise, there is less or no room for deference.

[20] *Ibid.*

[21] See *e.g. Bell Canada* v. *Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722.

As already noted, in certain circumstances, issues of legal principle can be segmented from the rest of the determination of a question of mixed law and fact. However, it is also clear that the reviewing or appellate court or tribunal should only do this when the legal principle is "readily extricable."[22] Even more importantly, the fact that a question of legal principle is readily extricable does not mean automatically that the correctness standard of review is applicable. That will depend on whether the issue of legal principle is itself one, which by reference to the other factors in the "pragmatic and functional" analysis, should be reviewed on a correctness rather than an unreasonableness basis.

In summary, to succeed in persuading the Panel that any issue is subject to correctness review, counsel has to establish, not only that it involves issues of legal principle, but also that it is the kind of legal issue that does not engage the Commissioner's expertise or involves a question on which the reviewing court or tribunal has a similar or greater expertise.

The Standard of Review Applicable to the Particular Determination Challenged by Bracco

Counsel for Bracco contends that the Commissioner's determination that BMS was an "exporter" should be reviewed on a correctness standard. The principal basis for this contention is that the determination of the meaning of the term "exporter" is a pure question of law and, more particularly, depends on the general Canadian common law of "agency". However, that submission, in effect, assumes that the legal question of whether a company is an "exporter" for

[22] *Housen, supra*, note 9, at para. 36.

the purposes of this determination depends on whether that company was acting in its own right or as an agent in shipping or arranging for the shipment of goods to Canada. The answer to that question is not an issue of agency law, but depends on the interpretation of a technical provision in *SIMA* that lies at the heart of the Commissioner's overall task of making the determination of whether a company has been engaged in dumping.

Nowhere in *SIMA* is it provided expressly that the question of whether a company is an exporter depends on whether that company is an agent or a principal in terms of the common law or contract law sense. In fact, the term is left undefined in *SIMA*, raising, at least, a basis for presuming that the CCRA was to give it content and meaning by reference to the overall purposes and objectives of *SIMA* and field expertise developed in the administration of that legislation. Thus, the legal context of a relationship, which achieves a particular function or purpose in the common law of agency, particularly in a contractual setting, will not necessarily be relevant to the determination of the meaning of a term in a specialized statutory regime such as *SIMA*.

That is not to say that the Commissioner's determination is in no way related to the law of agency. It might be that the determination of the question of who is an "exporter" depends in whole or in part on whether the company shipping the goods or arranging for the shipment of goods to Canada is an agent in the common law sense of that term. However, whether that is so is primarily a question for the Commissioner exercising his powers under a complex piece of legislation, which, on its face, leaves room for judgment by the Commissioner as to the appropriate characteristics of an "exporter" under *SIMA*.

If the Commissioner were to determine that the common law concept of "agency" was relevant to the determination of the question of who was an "exporter", then, under the *Mattel* and *Housen* principles, the Commissioner's identification of the principles of a common law principal-agent relationship would be subject to correctness review. However, this was not an issue in the Commissioner's reasons in this matter and, therefore, as with all of the other issues raised by both Bracco and Nycomed, the standard of review is that of reasonableness. Did the Commissioner act unreasonably in determining as a matter of law and fact that BMS was the exporter of the subject goods or, more specifically, in terms of the argument of counsel of Bracco, did the Commissioner act unreasonably in failing to determine that issue in whole or in part by reference to the common law of agency?

Rejection of Bracco's Challenge to the CCRA's Determination

Bracco contends that the CCRA erred in determining that BMS was the exporter of the subject goods. All parties to this panel review agree that the term "exporter" is not defined in *SIMA*. Bracco argues that the CCRA erred in identifying BMS as the exporter of the subject goods rather than Bracco, and in particular Bracco Diagnostics, Inc. ("BDI"). Bracco argues that (1) the exporter is the party that owns and sells the subject goods and determines the price at which the goods are sold and (2) the CCRA ignored agency law is making its determination of who is the exporter. Bracco also argues that the CCRA *SIMA* Handbook, and specifically §4.5.13 "invokes general agency law" and requires an agency law analysis.[23]

[23] Bracco references portions of §4.5.13.2 which state "that the exporter for *SIMA* purposes must be a principal player in the transaction, that is, must have owned the goods at some point in the life of the goods." Moreover, it

During the hearing before the Panel, counsel for Bracco argued that the entire relationship between BMS and BDI, the two corporate entities being considered as possible exporters in the country of exportation, must be viewed as one of principal and agent. That is, BDI was the principal and BMS was the agent, and all actions of BMS were those of its principal who, therefore, must be the exporter.[24]

The Panel is not persuaded that an agency law analysis is required or appropriate. First, *SIMA* does not expressly provide that the question of whether a company is an exporter depends on whether that company is an agent or a principal in the common law sense. Further, the Panel does not agree that the *SIMA* Handbook requires the agency analysis that Bracco believes is determinative here. Certainly, Section 4.5.13 of the *SIMA* Handbook does use the phrases "principal", "principal in the transaction," "principal player," "intermediaries and agents," as well as "agents, tolling operations." Nevertheless, these terms can have a business or commercial

---

directs that "the case officer should again go behind the paper documentation to uncover a clear picture of the functions each of the parties to the transaction has performed. Based on this analysis, the various intermediaries and agents can usually be detected and eliminated as principals in the transaction, and the identity of the true principal players, i.e., the vendor, the exporter and importer, should become evident." The handbook also states that:

> it is the CCRA's position that agents, tolling operations, etc., are generally not principals and therefore are not exporters as envisaged by *SIMA*. To illustrate, a United States pipe producer may sell threaded pipe to an importer in Canada. The United States pipe producer may contract out the threading to an independent machine shop in the United States. The producer would therefore send the pipe to the independent machine shop for threading with instructions to the machine shop to ship it to the importer when completed. In such a case, the strict application of the idea that the exporter is the person who gives up responsibility for the goods to a carrier for shipment to Canada would suggest that the machine shop is the exporter as the point of direct shipment is at the machine shop. However, the machine shop does not (and never has) owned the goods and is not engaged in selling pipe. It is not reasonable in these circumstances, that the machine shop, who only provides a tolling service, should become the exporter. Accordingly, the CCRA holds that the exporter must be or have been a principal in the transaction at some point prior to the time that the goods are shipped to Canada. However, it must be remembered that while the exporter must have been an owner of the goods at one time, the exporter will not be dictated by who owns the goods at the time they are shipped to Canada.

[24] See Transcript at pg. 15-20, 28-92 (Peroff).

meaning and their use does not necessarily signify the requirement of a strict, legal relationship of principal and agent. While it is beyond the scope of this decision to define the terms "principal" and "agent" as used in the *SIMA* Handbook, the Panel does not believe that the existence of these terms in the *SIMA* Handbook requires the CCRA, in determining who is the exporter under the *SIMA*, to conduct an analysis whose outcome is dependant solely on agency law. Thus, the Panel concludes that the CCRA did not act unreasonably in failing to determine the question of who is the "exporter" in whole or in part by reference to the common law of agency.

The arrangements and relationships among BMS and the Bracco companies for the manufacture and sale of the subject goods are complex. In its brief, Bracco provides some details on the roles of BMS and the Bracco companies in relation to the manufacture and sale of the subject goods. During the oral hearing before this Panel, counsel for Bracco made extensive comments on this subject, describing the purchase of raw materials, the provision of manufacturing services and product labeling as well as transportation, payment and fee arrangements between BMS and the Bracco companies. Moreover, counsel reviewed discussions with customers, transfer of title, identification of parties in customs documents and pricing decisions.[25]

The CCRA, in its investigation, is in a position to review all evidence in respect of purchase and ownership of raw materials, manufacturing services, product labeling,

[25] See Transcript at pg. 30-92 (Peroff).

transportation, payment and fees among BMS and the Bracco companies, as well as the discussions with customers, transfer of title, invoicing and customs document declarations. It appears that the CCRA comprehensively evaluated this evidence. The basis for the CCRA's conclusion which is challenged here is set out in the Statement of Reasons and three confidential letters sent by the CCRA to BMS and the Bracco companies dated March 31, 2000. In the confidential letters, the CCRA set out its reasons and, in particular, made findings on who ordered the raw materials, who produced the goods, who labeled and packaged the goods and who transported the goods. The Panel concludes that, based on the reasons set out in the Statement of Reasons and, particularly, on the confidential letters and the findings described in these letters, the CCRA did not act unreasonably in determining as a matter of fact and law that BMS was the exporter of the subject goods.[26]

Remand of Margin Calculations for Nycomed/Searle

The CCRA found that Searle Ltd. was the manufacturer and exporter of the subject contrast media marketed by the Nycomed group. Nycomed does not contest the CCRA determination of export price using a constructed value methodology by which the price was calculated back to the Searle ex-factory level pursuant to *SIMA* paragraph 25(1)*(c)*.

[26] As part of his contention that the Commissioner had not provided adequate reasons for the decision, counsel for Bracco asserted that the panel was confined to the Statement of Reasons released by the CCRA on March 30, 2000. More particularly, he submitted that the panel could not treat the contemporaneous confidential letters sent to his client and other affected companies as part of the reasons. We reject that position. The Statement of Reasons is a public document. The confidential letters elaborated on these reasons by reference to proprietary information. That information could not be put on the public record without compromising the submitter's entitlement to protection from its release. In those circumstances, the reasons for the decision are composed of both documents.

Nycomed does contest the CCRA's calculation of normal value. The CCRA calculated normal value based on ministerial specification under *SIMA* section 29. The CCRA resorted to section 29 because it determined that normal value could not be determined under either section 15 or section 19. Specifically, the CCRA stated that Searle "produces the goods and sells the goods only to Nycomed Imaging, AS. in Norway".[27] The CCRA concluded that: "As Searle Ltd. did not have domestic sales of like goods, its normal values could not be determined pursuant to section 15. . . ". Similarly, the CCRA also stated that it could not use section 19(b) because "the exporter, Searle, Ltd., does not sell these products domestically . . . ".[28]

Complainant Nycomed understood the CCRA statements noted above to refer to the locus of the transaction between Searle and Nycomed and asserted before the Panel that the CCRA made a clear error as regards the location of purchase. Nycomed identified specific evidence in the record indicating that transfer of the goods between Searle and Nycomed occurred F.O.B. Searle's plant in Puerto Rico.[29] Accordingly, Nycomed claims Searle did have domestic sales, *i.e.*, sales in the United States.[30] The CCRA defended the CCRA determination as referring to location of sale between Searle and Nycomed,[31] but could not explain the CCRA's factual conclusion on the point of sale. Instead, the CCRA suggests in its briefs and argument that, even if this Panel does find that these sales constitute domestic sales, there are a number

[27] Statement of Reasons at 12.

[28] *Id.*

[29] Article 3.4 of the Supply Agreement states that: "The products shall be shipped f.o.b. supplier's warehouse."

[30] Puerto Rico was considered part of the United States by the CCRA.

[31] Counsel asserted that the basis of the decision was that "you have to have a sale for use in the country of export, within the domestic market. These were not domestic sales." See Transcript at pg. 177 (Roach).

of alternative arguments that could justify the determination, thereby making a remand unnecessary.

The CCRA argued that the transactions' location was irrelevant because the sales were disqualified as "outside of the normal course of trade."[32] At the hearing before the Panel, CCRA counsel produced a document from the record which discussed the Searle/ Nycomed sales relationship, but which did not express the conclusion that the sales were outside of the ordinary course of trade.[33] Regardless, the Statement of Reasons, the operative decision document,[34] does not address the ordinary course of trade issue. Moreover, it is not appropriate for the Panel to accept other *post hoc* justifications offered for the CCRA decision here. The CCRA is required to state clearly its legal findings and to explain the basis for those findings. Moreover, the CCRA is vested with the responsibility of preparing decision documents which permit Panel review. Remand is appropriate here for the CCRA to clearly state and support its finding that Searle had no domestic sales of subject merchandise.

As a technical matter, the Panel's review of the CCRA's determination of normal value could end at this point. The CCRA must justify its rejection of use of *SIMA* sections 15 and 19

[32] *SIMA* section 16(2)(a) provides that: "In determining the normal value of any goods under section 15, there shall not be taken into account (a) any sale of goods . . . if the vendor did not at the same or substantially the same time, sell like goods in the ordinary course of trade to other persons...."

[33] The document provided to the panel was entitled "NOTE TO FILE."

[34] CCRA counsel stated at the panel hearing ". . . that you live and die with the Statement of Reasons." See Transcript at pg. 167 (Ciavaglia); *see also* Transcript at pg. 137 (counsel is willing to "live and die with the Statement of Reasons"). The panel here does not go so far. Earlier in this opinion the panel accepted the reasoning provided in confidential letters sent to the investigation participants as a cognizable explanation for the CCRA's determination as respects Bracco. *See footnote 26, supra.*

prior to utilizing section 29.[35] Nevertheless, in the interests of economy of resources, the Panel also addresses the CCRA's calculations under section 29.

Notwithstanding its identification of Searle as the exporter, for the purpose of the *SIMA* section 29 calculations, the CCRA designated Nycomed as the exporter.[36] Thus, the CCRA stated that it designated Nycomed as the exporter for the "limited" purpose of determining normal value, which the CCRA determined on an ex-warehouse Memphis (and not ex-factory Searle) basis. Nycomed objects to this point of comparison because it is further down the distribution chain than the determination of export price (*i.e.*, the Searle ex-factory level). The CCRA argued to the Panel that: "Once the Commissioner determined that Nycomed Inc. was substituted as the exporter for normal value purposes, then the differences in the trade level do not matter."[37]

The Panel finds that the Statement of Reasons does not adequately describe the CCRA's decision making and does not adequately identify the evidentiary basis for the CCRA's findings.[38] Accordingly, in the context of the remand ordered here, if the CCRA again determines to apply section 29 to establish normal value, it must explicitly delineate the

---

[35] Section 29 of *SIMA*, referred to as ministerial specification, is used when the CCRA forms the opinion that information is not available to calculate the normal value pursuant to section 15 or section 19(b) of the *SIMA*.

[36] Section 16(1) of the *SIMA* permits other vendors to be deemed the exporter for normal value purposes.

[37] See Transcript at pg. 198 (Roach).

[38] We note that counsel for Tyco stated at the hearing that he was not sure what deductions were taken (see Transcript at pp. 264-265), but indicated that deductions should have gone "back to the point where [Nycomed] took delivery of the goods." See Transcript at pg. 266 (Kubrick). As set out earlier, the CCRA findings as to where Nycomed first took possession of the goods are unclear, but the record appears to indicate transfer occurred in Puerto Rico. If possession did transfer in Puerto Rico, this would be a fact in conflict with use of Memphis as the point of acquisition.

adjustments made to the normal value starting price to achieve comparability with the export price.[39] Moreover, if the dumping margins here are created solely through the administration of *SIMA* and not by differences in distribution,[40] the CCRA should state whether its interpretation of the *SIMA* framework for the normal value determination results in a comparison which is consistent with any requirement of *SIMA* for a comparable level of trade.[41]

[39] We note that section 15 of *SIMA* states that normal value findings shall include adjustments "to reflect the differences in terms and conditions of sale, in taxation and other differences relating to price comparability." Nycomed strongly believes the data to make appropriate adjustments to enhance fair comparability are available in the record.

[40] The Statement of Reasons indicates that: "The goods sold to Nycomed Imaging, AS. are shipped directly from Puerto Rico to Canadian, United States, and Latin American markets."

[41] Although *SIMA* controls the CCRA's decision making, the CCRA's remand determination should also state whether it believes its statutory construction is consistent with the WTO agreement provisions governing normal value and export price comparisons.

Conclusion

The Panel orders the Canada Customs and Revenue Agency to make a determination on remand consistent with the findings of this opinion. The remand determination shall be made within 45 days.

Signed in the Original by:

Brian E. McGill (Chair)
Brian E. McGill (Chair)

David J. Mullan
David J. Mullan

Mark R. Sandstrom
Mark R. Sandstrom

Leon E. Trakman
Leon E. Trakman

Shawna K. Vogel
Shawna K. Vogel

Issued on the 8th day of January 2003.