Date: 20060719

Docket: T-997-01

Citation: 2006 FC 901

BETWEEN:

R & R TRADING CO. LTD.

Plaintiff

and

MINISTER OF NATIONAL REVENUE

Defendant

REASONS FOR JUDGMENT

LAYDEN-STEVENSON J.

[1] R & R Trading Co. Ltd. (R&R) imports off-shore steel products for distribution in Canada and the United States. Between 1992 and 1997, it imported Korean steel that was allegedly described in a Canadian International Trade Tribunal (CITT) order and therefore subject to anti-dumping duty.

[2] A Notice of Ascertained Forfeiture was issued to R&R demanding payment in relation to 43 transactions involving unpaid anti-dumping duty. R&R requested ministerial review and was partially successful. The original assessment amount was reduced.

[3] R&R now appeals the Minister's decision, specifically with respect to 39 of the 43 transactions. For the reasons that follow, the appeal will be allowed in relation to six transactions. In all other respects the appeal will be dismissed.

I. Background

[4] The primary purpose of anti-dumping legislation is to protect Canadian manufacturers and producers. The *Special Import Measures Act*, R.S. 1985, c. S-15 (SIMA), specifically subsection 41(1), empowers the CITT, after compliance with the antecedent procedural requirements of SIMA, to issue rulings in relation to unfair import competition, affecting Canadian manufacturers, as a result of dumped goods. Dumping is considered an unfair trade practice because imported goods are sold in Canada at a price (the export price) less than the price the goods are sold for in the country of origin (the normal value). The difference between the normal value and the export price is the margin of dumping.

[5] In circumstances where the CITT finds that dumping has caused, is causing or is likely to cause "material injury" to Canadian production of like goods, an anti-dumping duty (equal to the margin of the dumping) is levied on the dumped imports to offset the price advantage the importer enjoys as a result of the dumping. The anti-dumping duties are imposed under SIMA and are collected, managed and enforced under the provisions of the *Customs Act*, R.S. 1985, c. 1 (2nd Supp.) (*Customs Act*).

[6] On June 18, 1983, a CITT order imposed anti-dumping duties on Korean-manufactured steel pipe and tubing. In particular, the following steel pipe and tubing was determined to be subject to anti-dumping duty:

> carbon steel welded pipe in the nominal size range 12.7 mm to 406.4 mm (1/2+" to 16") inclusive, in various forms and finishes, usually supplied to meet ASTM A53, ASTM A120, ASTM A252, ASTM A589 or AWWA C200-80 or equivalent specifications, including water well casing, piling pipe, sprinkler pipe and fencing pipe, but excluding oil and gas line pipe made to API specifications exclusively originating in or exported from the Republic of Korea

[7] The CITT order was continued without amendment on June 5, 1990 (Review No. RR-89-008) and on June 5, 1995 (Review No. RR-94-004). It was continued again in 2000, but was rescinded in 2005.

[8] On June 14, 1993, a Canada Customs Anti-Dumping and Countervailing Division enforcement officer notified steel importers that Korean API 5L pipe in lengths under 40' would be subject to anti-dumping duty. The rationale underlying this ruling was that shorter lengths were not normally used in the oil and gas industry. Importers supplying documentation to establish that shorter lengths of pipe were to be used for oil and gas line applications would be exempt. The ruling was revised on December 9th of 1993, to substitute 37' for the original 40'.

[9] On December 11, 1997, a Notice of Ascertained Forfeiture was issued to R&R requiring payment of $1,102,839.66. The demand related to 43 transactions with respect to unpaid anti-dumping duty. R&R requested a Notice of Decision under section 129 of the *Customs Act* on December 11, 1997. The Minister's decision under section 131 of the *Customs Act* was issued on

March 8, 2001, and confirmed contraventions of the *Customs Act* in 39 of the 43 transactions. The Minister's decision reduced the amount of the original assessment and issued a demand for $421,384.24 pursuant to section 133 of the *Customs Act*. It is the Minister's decision that is the subject of this appeal.

[10] It seems to me that the quest for an understanding of these reasons, in the absence of basic and essential contextual information, presents an onerous task. Therefore, to furnish context, various topics are identified and discussed in the paragraphs that follow. The content in relation to each of the topics is derived from the evidence adduced during the trial. In view of the number of acronyms used, a glossary of acronyms is attached to these reasons as Schedule "A".

[11] Also, I should mention that the name of the agency charged with the administration of the *Customs Act* changes periodically. Canada Border Services Agency (CBSA) is the present entity. However, given the context of this matter, for clarity and convenience, throughout these reasons I will refer to the agency as "Canada Customs".

II. The Plaintiff

[12] R&R owns several subsidiary companies, one of which is North American Pipe and Steel Limited (NAPS). R&R imports off-shore steel products and, through its subsidiaries, distributes those products to a wide range of customers, from distributors to end-users.

[13] Mr. Earl Ritchie is the president and chief executive officer of R&R. From 1972 until 1985, Mr. Ritchie lived in Korea. He speaks and writes Korean. While in Korea, Mr. Ritchie began

sourcing Korean steel pipe for a Canadian company. When the Canadian company ceased operations, Mr. Ritchie started his own business. His Hong Kong-registered company, "Athabasca" was already in existence at that time. Initially, Athabasca purchased Korean steel and exported it primarily to the United States. Eventually, R&R was incorporated in British Columbia whereupon pipe was also exported to Canada. Mr. Ritchie returned to Canada, specifically to British Columbia, in 1985. Athabasca is still an active company and it provides an additional source of credit for the facilitation of R&R business.

[14] In its infancy, R&R employed only three or four people, including Mr. Ritchie and his cousin, David Bagnall, as the accountant. Over the years, R&R grew to its present state and it now has more than 100 employees. During the years in question (1992-1997) it imported, primarily, Korean steel into Canada.

[15] R&R purchased steel from a number of Korean manufacturers. In this proceeding, the relevant exporter companies are: Pusan Steel Pipe Corp. (Pusan), which later became known as SeAH Steel Pipe Corp. (SeAH); Korea Steel Pipe Co. Ltd. (Korea Steel), which later became known as Shin Ho Steel Co. Ltd. (Shin Ho); and Kukje Steel Co. Ltd.. It is important to note that Pusan/SeAH has a United States subsidiary company in Washington called State Pipe and Supply Co. (State Pipe).

III. Steel Pipe and Tubing

[16] Pipe and tubing are discrete tubular products manufactured from steel. When the steel itself is manufactured, a "heat number" is assigned to the "lot" of steel that is produced. If a number of

lots are produced during the mill run, each lot will have a unique heat number. The heat number is an important identifier that remains with the steel and attaches to the products that are produced from each specific lot of steel.

[17] Two significant things happen at the time that pipe and tubing are manufactured. First, an inspection certificate, also known as a mill test report (MTR), is issued by the manufacturer. The MTR stipulates the specification to which the pipe or tubing is manufactured and it delineates the results of the various testing processes employed with respect to the product. Second, the specification (of the product) and the heat number (from the steel lot used to produce the pipe or tubing) are stencilled on the pipe or tubing. When the pipe or tubing is too small (narrow) to be stencilled, a tag containing the specification and heat number is attached to the bundles of pipe or tubing.

[18] Although both are tubular products, there are significant general distinctions between pipe and tubing. Pipe is always produced to round cross sections while tubing is produced to round, square or other cross sections for a diversity of mechanical and structural purposes. Small pipe sizes are designated according to the approximate inside diameter referred to as nominal pipe size (NPS). Larger pipe sizes are designated according to the specified outside diameter (OD). Tubing is produced to actual outside/inside diameter tolerances and wall thickness.

[19] The wall thickness of pipe (outside diameter less inside diameter) is referred to by schedules while the wall thickness for tubing is referred to in gauges. Tubing is supplied to specified dimensions (rather than nominal dimensions) and is supplied to tighter dimensional tolerances than

those required for pipe. Pipe ends are usually bevelled or threaded to facilitate welding whereas tubing ends are normally plain to enable further cutting.

[20] Further distinctions between the two tubular products will become apparent as each of the specifications of the pipe or tubing in issue is addressed. Those products and their specifications, along with the characteristics of each of them are discussed below. It should be mentioned that where reference is made to "random length", a rough approximation would be: for single random length, 20'; for double random length, 40'; and for triple random length, 60'.

A. *API 5L*

[21] American Petroleum Industry (API) 5L is the specification that designates pipe which is known as line pipe. The "L" in the designation stands for "line". It is designed and used primarily for the transmission of oil and gas in the oil and natural gas industries. It is usually ordered in double or triple random lengths in order to minimize welding and thereby reduce the potential for leaks. It is commonly marketed with a bare metal finish. Single random lengths of API 5L would be the exception, rather than the norm, in the oil and gas industry and would normally be specifically ordered for a particular project.

[22] API 5L is similar to ASTM A53, but API 5L is superior. Hence, while API 5L can be used for an ASTM A53 application, the reverse is not ordinarily so. Although used primarily for the conveyance of oil and gas, API 5L has been put to other uses. Mr. Ritchie described a situation where the piling for the Vancouver Convention Centre consisted of "API spec pipe". API 5L pipe must be able to withstand a high level of pressure with minimum tolerance defect. API 5L

specification pipe was not subject to anti-dumping duty unless it was imported in lengths less than 37'.

B. *ASTM A53*

[23] American Society for Testing and Materials (ASTM) A53 is the designation for pipe that is intended for mechanical and pressure applications. ASTM A53 is used for the transmission of steam, water, gas and air lines. It is a well-known specification and most distributors purchase and stock ASTM A53 as inventory because it can be used for a multitude of applications. The product manufactured to this specification is normally referred to as "standard pipe". It is commonly ordered in single or double random lengths. It is "black" or hot-dipped galvanized steel pipe (coated with a resistant rust inhibitor) and can be stored outside. It normally has bevelled ends to facilitate end-to-end welding or has threaded and coupled ends to facilitate joining.

[24] The ASTM A53 specification refers to nominal pipe sizes for outside diameters and to schedules for wall thickness. It is similar to API 5L but has less stringent tolerances. ASTM A53 pipe was subject to anti-dumping duty.

C. *ASTM A513*

[25] American Society for Testing and Materials (ASTM) A513 is the designation for mechanical tubing. While the "uneducated" might look at ASTM A513 and be unable to discern any difference between it and ASTM A53, those involved in the industry would know better. The ASTM A513 designation covers electric-resistance-welded carbon and alloy steel tubing for use as mechanical tubing. It has a multitude of uses, but is not typically used in the transmission of fluids.

Rather, it is used in a wide variety of applications where dimensional accuracy, surface finish and/or machinability are important. Many industries (including automotive, agricultural and manufacturing) use mechanical tubing for office equipment, appliances, airplane and axle tubes, shafting, finned tubing and shock absorber tubes.

[26] This specification refers to outside diameters, inside diameters and wall thickness. There are tight tolerances for the outside diameter and the wall thickness (ASTM tables are available with respect to the diameter tolerances). The dimensional tolerances are usually much more stringent for tubing than for pipe.

[27] The product manufactured to the ASTM A513 specification is normally plain-end square cut because it is not very often welded end-to-end. It is usually bare metal or lightly oiled and generally is stored inside. Some of the tubing may be coated with rust-inhibitor paint, but the tubing is not galvanized. ASTM A513 tubing was not subject to anti-dumping duty.

D. *ASTM A500*

[28] American Society for Testing and Materials (ASTM) A500 is a specification for structural tubing. Products manufactured to this specification are intended for structural applications, not conveyance applications. This specification is used in a wide variety of applications where strength appearance, resistance to bending and resistance to tensional stresses are important. It has more restrictive tolerances than ASTM A53, but less restrictive tolerances than ASTM A513. Some provinces have accepted A500 Grade C with flash removed (flash is the welding bead along the inside seam of the pipe) and wall thickness less than standard for use as well casing. Not all

provinces have done so because A500 is generally regarded as a structural tubing rather than a pressure-tested pipe. This product is of limited relevance in this proceeding. It was not subject to anti-dumping duty.

E. *Dual Specification*

[29] Dual specification refers to a product that meets two or more specifications simultaneously. It is common industry practice for manufacturers to make stock products that will meet two or more specifications in order to increase marketability. This practice, referred to as dual or triple specification, enables the purchaser to resell the product in accordance with any of the individual specifications that have been certified. In addition to "dual specification", the practice has also been called "dual stencilling" or "dual certification".

[30] In circumstances involving more than one specification, the manufacturer ensures that the product simultaneously meets all of the requirements of the multiple specifications, stencils the product with the identification marks required by each of the individual specifications already defined/described and issues a single inspection certificate that details the multiple specifications that have been satisfied simultaneously. The practice is viable because the requirements for the multiple specifications are similar. Dual certification for API 5L and ASTM A53 is common.

F. *Recertification, Reclassification or Downgrading*

[31] These terms were used interchangeably throughout the trial to describe a common industry practice. The practice occurs primarily in two circumstances: (a) there is a deficiency in the production of a product such that it cannot meet the specifications of the intended product but can

and does meet the specifications of another product; and (b) circumstances are such that the manufacturer wants to sell off what is left of a product. In either case, the product will likely be downgraded or recertified to facilitate a sale.

IV. Importation of Offshore Pipe

[32] Korean steel products were shipped to R&R. If the vessel arrived in Vancouver, the steel products were unloaded at the Fraser Surrey Docks. However, if the ship arrived in the United States, the steel products were unloaded there and trucked to Canada. In the latter situation, the products entered Canada at the Pacific Highway Crossing port of entry at Surrey, British Columbia.

[33] At the Fraser Surrey Docks, imported goods are unloaded onto the docks and the importer or its agent (a Customs broker) will submit paperwork to Canada Customs in order to obtain customs release of the goods. While on the docks, the goods remain in a "controlled" area. Customs release is necessary to enable the importer to take possession of the goods. The "paperwork" consists of a document known as a cargo "manifest" which includes, among other things, information in relation to the shipper, the vessel, and the goods (description and quantity). Other documents include a commercial invoice, packing list, bill of lading and so on. The "B3", a Canada Customs coding document, must be completed for release of the goods. The B3 takes its name from its form number. This document indicates a transaction number, a business number to identify the importer, the foreign vendor, the country of origin, the port of entry, whether the importation is an A, B or Type 10 entry, and provides the value of the goods in both foreign and domestic currency. Duties and taxes owing must be paid before the goods will be released.

[34] When a Type 10 entry is processed, the importer can bring goods into Canada, but cannot release them into Canadian consumption. The goods are moved from the docks (a controlled area) to a bonded area. R&R had its own bonded area and it often moved steel products from the docks to its bonded yard. To release the goods into Canadian consumption, a Type 20 entry must be submitted to Customs. Part, or all, of the goods can then be released by Canada Customs. To be clear, a "shipment" that is processed by way of Type 10 entry can be released in segments. Each segment will necessitate the completion of a Type 20 entry. All Type 20 entries must refer to a previous Type 10 entry. Duties and taxes must be paid before the goods listed in a Type 20 entry will be released for Canadian consumption.

[35] Customs officers are not trained in the nuances of steel products. As a result, they rely on the paperwork submitted by the importer or its broker. The software program used by Customs officers for commercial importations is known as ACROSS (Accelerated Commercial Release Operating Support System). Subject to circumstances when a "watch for" (to be discussed shortly) has been issued, in almost all instances, the goods are released on the basis of the paperwork. Only in two to three percent of cases will a physical inspection be conducted. In short, importation (including payment of applicable duties and taxes to Canada Customs) constitutes a self-reporting system.

[36] It is not clear, from the evidence, whether the Type 10 entry applies with respect to importations crossing at the Pacific Highway Crossing port of entry. It is clear that, in all other respects, the circumstances governing the release of the goods are the same. The Form B3 must be completed and submitted in order for the goods to be released. At the border crossing, a trucker will

first encounter a primary inspector. The primary inspector is the officer to whom the trucker makes a declaration as to the type of goods, if any, that are being transported. If goods are being imported, the trucker must proceed to the compound where the paperwork is either completed by the trucker or is obtained from the broker. The nature of the package of documentation presented to Canada Customs is the same as that with respect to goods that are unloaded on the docks. Physical inspections may or may not be conducted.

[37] A "watch for" is essentially an "alert". It is a notice entered into the ACROSS and it serves to alert the primary customs inspectors who will be reviewing the paperwork regarding an imported shipment. The watch for indicates that, if certain conditions exist, it is advisable to examine the goods being imported. The specific content of the watch for depends on the data entered into the software system. The information is inputted by the customs intelligence section. In R&R's case, a watch for was entered. If the importer number of R&R together with the country of origin (South Korea) was entered into ACROSS (by the primary inspector), the watch for would appear on the computer screen.

[38] Two facts must be noted here. First, the watch for can be over-ridden by the primary customs inspector. Typically, this might occur in circumstances where there is a manpower shortage to conduct the physical inspection, or where a number of shipments have already been referred for inspection and yet another would be impractical because it could not, in any event, be completed. Second, the watch for will pop up on the computer screen only if the watch for information relates to mandatory inputs by the primary inspection officer. This latter situation is best illustrated by reference to the circumstances in relation to R&R. The two-digit code for the

country of origin is not a mandatory input for the primary inspector. Consequently, in situations where the country of origin code had not been entered, the watch for did not appear on the screen. In December of 1996, after a $1.25 million dollar shipment for R&R was missed, the watch for was adjusted so that it would appear in all cases when R&R's importer number was entered.

V. The Agreed Statement of Facts

[39] At the outset of the trial, the parties jointly submitted an agreed statement of facts. It is not necessary to recite all those facts. Some of them relate to the parties' agreement regarding documents and the presentation format of the various transactions.

[40] The agreed upon facts identify 43 transactions in which R&R imported steel product. All products originated in South Korea and the "true nature of the product is at issue". There are 39 transactions remaining in issue. No anti-dumping duty was paid with respect to any of the 39 transactions.

[41] The CITT ruling with respect to anti-dumping duties under SIMA applied to pipe coming within the description of the ruling even if it was purchased from State Pipe in Washington (the U.S. subsidiary of Pusan/SeAH), subject to applicable normal values.

[42] The bills of lading (included in Customs entry documents) were completed by the shipping company.

[43] In relation to transaction number 32, the pipe (18 bundles comprised of 998 pieces of 2" pipe described as ASTM 513) was physically inspected by customs officer Bruce Pemberton on June 3, 1996. Mr. Pemberton confirmed that the pipe bore tags describing it as single stencil A53 pipe.

[44] In relation to transaction number 42, the 6 5/8" imported pipe, described in the SeAH MTR (as dual specification), was physically inspected by Customs officer Maria Brosas on February 13, 1997. Ms. Brosas confirmed that the pipe was stencilled as dual specification API 5L/ASTM A53, but was tagged with a single specification of API 5L.

[45] On June 14, 1993, the defendant communicated its determination that API 5L pipe in lengths under 40' would be subject to anti-dumping duty in accordance with the CITT ruling (the short-length API 5L determination). This ruling has been described earlier at paragraph 8 of these reasons. Prior to communicating this ruling, the defendant communicated, orally and in writing, with certain industry players. The plaintiff R&R, philosophically, did not agree with the short-length API 5L determination.

[46] The adjustment of the original determination of the short-length API 5L determination to reduce the threshold from 40' to 37' was the result of R&R's submission, through its president (Mr. Earl Ritchie), to the effect that single random lengths were less than 37' rather than 40'. Although Mr. Ritchie did not agree that anti-dumping duty should apply to any API 5L pipe, the defendant adjusted the determination to reflect the lower threshold. R&R was provided with notice of the adjustment by letter dated December 9, 1993. R&R did not take any formal steps to appeal or

review the adjusted API 5L determination and takes the position that no avenue was available to enable it to do so. R&R did not, on any occasion, engage in a process whereby it provided the defendant with evidence that shorter lengths of API 5L were to be used for oil and gas line applications.

[47] It was in the best interest of a distributor such as R&R to have dual (or triple or quadruple) specifications stencilled on the pipe acquired from its suppliers because it would be more marketable to a wider audience of purchasers. When pipe was marked as API 5L/ASTM A53, it was marketable to customers who were looking for API 5L pipe or to customers who were searching for ASTM A53 pipe. API 5L pipe is a superior grade to ASTM A53 pipe. Pipe made to API 5L grade can be used for ASTM A53 applications although the reverse is not always true, given that API 5L is a superior grade.

[48] The amount originally demanded in the ascertained forfeiture was reduced on appeal to the Minister under section 129 of the *Customs Act* as a result of a determination that anti-dumping duties were not owing with respect to pipe imported for the following transactions:

Transaction number	Date of Entry
13227-001242505 (#27)	June 29, 1995
13227-001292469 (#29)	November 7, 1995
13227-001438419 (#33)	July 15, 1996
13227-001485601 (#43)	March 4, 1996

[49] The amount originally demanded in the ascertained forfeiture was reduced on appeal to the Minister under section 129 of the *Customs Act* for the following transactions:

Transaction number	Date of Entry	Reduced Amount
13227-001031214 (#15)	October 28, 1994	$1,568.34
13227-001934251 (#17)	December 5, 1994	$11,881.08
13227-001034990 (#19)	December 7, 1994	$7,725.39
13227-001035218 (#20)	December 7, 1994	$13,551.87
13227-001158547 (#21)	January 9, 1995	$2,249.70
13227-001159651 (#22)	January 24, 1995	$8,607.36
13227-001241401 (#25)	June 13, 1995	$8,476.71
13227-001290775 (#31)	November 28, 1995	$31,736.28
13227-001437463 (#34)	August 14, 1996	$2,815.20
13227-001464194 (#36)	August 27, 1996	$153.42
13227-001441470 (#37)	October 4, 1996	$1,047.57
13227-001465867 (#38)	November 5, 1996	$2,068.86
13227-001485359 (#41)	February 13, 1997	$6,570.96

[50] The changes to the amount originally demanded in the ascertained forfeiture resulted from: (a) the application of "normal values"; and (b) a general reduction of 30% overall (from $601,977.48 to $421,384.24) due to the inconvenience caused by the delay arising from the defendant's review of the policy regarding GST implications.

[51] "Normal values" are set values based on information provided by a specific manufacturer relating to its manufacturing costs. [Normal value is also referred to as the price at which the goods are sold in the country of origin.] Where the information is accepted by the Minister or the ministerial delegates, normal values reduce or eliminate the anti-dumping duty in relation to goods imported from that particular manufacturer.

[52] Although the plaintiff imported some ASTM A53 pipe for which normal values had been negotiated, those normal values have been properly accounted for in the decision made pursuant to section 131 of the *Customs Act*. All applicable normal values were properly calculated and applied to the transactions which qualified for normal values, at the adjudications stage, with the following exceptions:

(a) the normal value for 1" pipe in transaction number 17 ought to have been 336,158 Korean won per metric tonne rather than 382,789 won per metric tonne;

(b) the normal value for 1" pipe in transaction number 19 ought to have been 336,158 Korean won per metric tonne rather than 334,563 won per metric tonne.

VI. The Relevant Statutory Provisions

[53] The pertinent provisions of the *Customs Act* are attached to these reasons as Schedule "B". Section 7.1 requires that information provided to a Customs officer relating to the importation of goods be true, accurate and complete. Sections 12 and 13 impose a requirement to report goods imported into Canada. Section 17 specifies the duties applicable to imported goods and prescribes the rates and liability in relation to these duties. Subsection 40(1), among other things, imposes an obligation on those who import goods for sale to maintain records in relation to the goods.

[54] Section 124 authorizes the issuance of an ascertained forfeiture and section 127 provides that the resulting debt is final and not subject to review except in accordance with the Act. Subsection 129(1) permits application for ministerial review of the ascertained forfeiture. Section 131 generally describes the Minister's decision with respect to contravention of the Act. It also contains a strong privative clause stipulating that review of the decision is limited to the extent and manner prescribed by subsection 135(1).

[55] Section 133, paragraph (a) and subsection (1.1) specify the obligations and powers of the Minister in relation to the review. Section 135 provides for an appeal of the Minister's decision to this court.

VII. Common Ground

[56] It is common ground that the objectives of the *Customs Act* are to regulate, oversee and control cross-border movements of people and goods. The attainment of those objectives depends on the effectiveness of the self-reporting system created by or imposed by the *Customs Act*. Ascertained forfeiture is a civil collection mechanism. It is an administrative process that is intended to provide a timely and effective means of enforcing the *Customs Act*. It is purely economical. see: *Martineau v. Minister of National Revenue*, [2004] 3 S.C.R. 737.

[57] The parties agree that the burden of proof in relation to the payment of duties and compliance with the Act is on the plaintiff, R&R. see: *Customs Act*, section 152 and *Mercier v. Canada (Minister of National Revenue)* (2004), 258 F.T.R. 309 (F.C.). There is consensus that the matter is to be addressed *de novo*. In the circumstances of this particular matter, the parties jointly

submit that no deference is owing to the Minister. Apparently, the evidence is such that it is impossible to define, with any degree of accuracy, what was or was not before the Minister when the section 131 decision was made. Accordingly, both parties request that the court decide the matter afresh.

[58] It is also common ground that the court's jurisdiction in this matter is restricted to deciding whether there was a contravention of the *Customs Act*. The calculation of duties and the issue of penalties, if any, are beyond the parameters of a determination regarding "contravention". Consequently, any issue taken by the plaintiff regarding the application of the normal values and the applicable Korean won (as outlined above) is beyond this jurisdiction. In any event, this particular issue was not explored during the trial or in argument.

VIII. Concession

[59] R&R concedes that the assessed portion of the shipment in transaction number 32 is subject to anti-dumping duty. Therefore, while there were initially 39 transactions in issue, the number is now 38.

[60] R&R has not suggested that the imported goods in issue could have been found or that the seizure of the goods would have been anything other than impractical in the circumstances. I take this silence as an indication that R&R does not dispute that the conditions with respect to ascertained forfeiture, as delineated in section 124 of the Act, were satisfied.

IX. The Transactions

[61] Each of the parties has placed the various transactions in categories. R&R has proposed four categories. Three of its proposed categories contain two sub-categories and the other contains three sub-categories. The Minister has three proposed categories; one of them has two sub-categories.

[62] My review of the evidence, more particularly the submissions in relation to the evidence, revealed that the transactions delineated in R&R's submissions total 41 rather than 38 (transaction 32 having been conceded at the conclusion of the trial). After cross-referencing the transaction numbers with R&R's proposed categories, it became apparent that R&R had included transactions 5, 7, 24 and 26 in two separate categories. The transactions are listed under "Document Errors", more specifically, the sub-category "MTRs Not Corrected". The same transactions are listed under the category "Dual Specification", more particularly, the sub-category "Purchases from Korea". Although this discovery ought to have resolved the problem, R&R was then left with 37 rather than 38 transactions.

[63] Further searching revealed an absence of any reference to transaction 30 in R&R's submissions. To complicate matters, I could not locate any reference to this transaction in the examination-in-chief of any of R&R's witnesses. Mr. Ritchie was questioned regarding transaction 30 during cross-examination (transcript, pp. 387, 388). Having thoroughly reviewed the documentation, I am satisfied that transaction 30 can be included within the category entitled "Dual Specification Pipe".

[64] To be clear and to alleviate any further confusion, transactions 27, 29, 33 and 43 do not form any part of this appeal. R&R received a favourable ministerial decision with respect to these transactions. As previously noted and, at the risk of redundancy, transaction 32 has been conceded.

[65] Having considered the proposed categories of both parties, I am satisfied that the remaining 38 transactions can appropriately be dealt with under the defendant's proposed categories. If R&R has raised additional arguments in relation to specific transactions, they will be addressed. Accordingly, I will address the following general categories: Dual Specification Pipe; Short Length Pipe and Experts' Reports on the A513 Specification.

G. *Dual Specification Pipe*

[66] Ordinarily, Korean dual specification pipe is subject to anti-dumping duties. However, in circumstances where the Korean manufacturer has established normal values, the situation can be different. Established normal values will result in either elimination or reduction of the anti-dumping duty.

[67] The nature of dual specification pipe has been discussed earlier. I accept as a fact that the production of dual specification pipe is a common practice in the industry. The expert report of metallurgist Frank Christensen, the evidence of the plaintiff's expert, Victor Marks, and the evidence of the defendant's expert, Michel Seguin, is consistent in this respect.

[68] Mr. Ritchie also acknowledged the existence and prevalence of dual specification pipe and went to great lengths to explain, in his view, why Korean clerical staff preparing MTRs would

erroneously record a product as dual specification (rather than single). Dual specification products are not subject to anti-dumping duties in the United States. Hence, according to Mr. Ritchie, R&R ordered single specification pipe and when it received MTRs certifying the pipe as dual specification, it was the result of clerical error. He claimed that the Korean employees were so accustomed to entering dual specifications for the United States exportations (comprising over 90% of the total market) that the recording of dual specifications was virtually automatic.

[69] Another point should be noted here. Mr. Ritchie was adamant that he was not interested in incurring anti-dumping duty. He maintained that when R&R received dual stencilled pipe from Korea, it was kept in R&R's bonded area and was shipped out to the United States. The only exception was in relation to dual stencilled pipe imported from Pusan (SeAH) because of his understanding that there were normal values in place with respect to Pusan. Mr. Ritchie acknowledged that he did not have specific information as to the extent of those normal values and that he made no inquiries of Canada Customs in this regard. As it happens, and as Mr. Ritchie is now aware, Pusan did not have established normal values for all dual spec pipe.

[70] Similarly, the evidence is also clear that when dual specification pipe was transported into Canada from State Pipe (Pusan's or SeAH's United States subsidiary), Mr. Ritchie was operating under the same mistaken belief that normal values applied to all Pusan/SeAH pipe. Notwithstanding, R&R consistently reported the pipe, to its customs broker, as single rather than dual specification. The documentation presented to Canada Customs reflected that information and contained a declaration that the pipe was single specification.

[71] Now, at the conclusion of the trial, R&R concedes that there are transactions where the MTR certifies the pipe as dual specification and R&R cannot establish that the pipe is not dual stencilled. Those transactions arise in relation to purchases from State Pipe. R&R therefore admits that the pipe is dual stencilled. Additionally, R&R concedes that there are purchases from Korea Steel that have dual specification MTRs. The inconsistencies, in other documents, are not such that R&R can establish, on a balance of probabilities, that the dual specification is the result of a document error. Hence, it admits that the pipe is dual stencilled.

[72] These concessions relate to transactions 5, 7, 24, 26, 28, 34, 35, 37, 39, 40 and 42. I add transaction 30 to that list because it also relates to dual specification pipe from Pusan/SeAH via State Pipe. As a result of the concessions, the argument previously advanced by R&R under its proposed category "Document Errors", sub-category "MTRs Not Corrected" is no longer of any relevance.

[73] R&R, however, takes the position that dual specification pipe is not subject to anti-dumping duty because "dual pipe has been made to API 5L specification exclusively" and as a result is "excluded under the CITT order". The rationale underlying this argument is as follows:

(a) the anti-dumping order excludes "oil and gas line pipe **made** to API specifications exclusively" (R&R's emphasis). CITT has deliberately selected the word "made". R&R submits that "made" means "manufactured". Because API 5L and ASTM A53 are different specifications and API 5L is superior, dual specification pipe will have been made to API 5L specification only and will therefore include any lesser specifications (such as ASTM 53);

(b) the use of the phrase "oil and gas line pipe" does not assist in the definition. The evidence establishes that "oil and gas line pipe" is a common reference to pipe manufactured to the API 5L specification. The wording would, however, exclude oil and gas line pipe that might be made to some other specification (e.g. if ASTM set up a specification for line pipe it would not qualify for this exemption);

(c) the pipe is stencilled at the mill, but the stencilling is not part of the manufacturing process. The pipe has already been manufactured to a particular specification at the stencilling stage. The stencil is simply the specification by which the manufacturer elects to market the pipe. This may be the specification to which the pipe was made or manufactured or it may be some lesser specification depending on which market is likely to achieve a sale;

(d) the word "exclusively" means that if API creates a specification that is the same as an existing ASTM specification or if ASTM creates a specification that is the same as an existing API specification, so that the products could be used interchangeably, anti-dumping duty is imposed on API. At that stage the API pipe and the other pipe named in the dumping order (it need not be A53 but could be A120 or other named pipe) could be used interchangeably and the anti-dumping order must be extended to such pipe. Here API 5L and A53 cannot be used interchangeably;

(e) the proposed interpretation does not undermine the CITT order. API pipe is heavier and costs more to produce. Mr. Marks stated that Canadian manufacturers don't manufacture dual specification pipe for standard sizes of API 5L or A53B because of the additional cost of meeting the superior specification. It is manufactured only for specialized sizes;

(f) CITT could have used wording to specifically exclude dual specification or multiple specification pipe if one of the specifications identifies a pipe named in the CITT order;

(g) the defendant is an active participant in CITT rate hearings. It is the entity that investigates the dumping issues and reports to CITT. It is the entity that administers the order. The defendant will know if there are problems with the interpretation of the language used. The wording of the CITT order has not changed since 1983. This issue could have been addressed at the hearings in 1990, 1995, and 2000 and the order could have been revised. The defendant has done nothing more than issue an order in 1993 that anti-dumping duty should apply to API pipe under 37';

(h) R&R's interpretation is not illogical. The United States imposes anti-dumping duty on A53 pipe but not on dual specification API 5L/A53 pipe.

[74] With respect, R&R's interpretation of the CITT order is, in my view, a torturous one. In interpreting the order, regard must be had to its underlying policy or purpose. Clearly, the policy underlying the order is to protect Canadian producers from injury caused by the dumping of the specified pipe into the market. If the order is to be interpreted as excluding dual specification pipe, despite the fact that such pipe is extensively used in applications common to standard pipe, both the policy and the purpose behind the order would be undermined.

[75] In addition, R&R's interpretation would render meaningless the use of the word "exclusively". The phrase "made to API specifications exclusively" means precisely that. The word "exclusively" modifies the word "specification". It does not modify the word "made". Thus,

the dual specification pipe does not conform to API specifications exclusively. Rather, it conforms to both API and ASTM specifications. In this respect, I rely on the report of Frank Christensen and specifically his statement, which I accept, that dual specification pipe meets the standards of both specifications simultaneously.

[76] Moreover, the words "oil and gas line pipe" do have meaning when placed in this context. Although the phrase may well be a common descriptor in the industry, the fact that it is included gives effect to the purpose of the order, that is, to exclude pipe used in oil and gas line pipe applications.

[77] Reference to the *Canadian Oxford Dictionary*, 2nd ed. (Don Mills: Oxford University Press, 2004) reinforces my view in this respect. "Exclusive" is defined as: "excluding other things"; "excluding all but what is specified"; and "employed or followed or held to the exclusion of all else". This definition strengthens the supposition that the CITT order exempts only pipe with an API specification to the exclusion of all other specifications.

[78] Further, it is settled law that CITT orders are not to be construed through the application of principles of statutory interpretation: *J.V. Marketing Inc. v. Deputy Minister of National Revenue for Customs and Excise*, [1992] C.I.T.T. No. 102, aff'd (1994), 178 N.R. 24 (F.C.A.); *Canada (Deputy Minister of National Revenue, Customs and Excise – M.N.R.) v. Schrader Automotive Inc*. (1999), 240 N.R. 381 (F.C.A.). The operation of the CITT review process involves overriding policy matters related to economic, trade and commercial matters. The court should be deferential to the

policy behind the ruling: *Yves Ponroy Canada v. Canada (Deputy Minister of National Revenue - M.N.R.)* (2000), 259 N.R. 38 (F.C.A.).

[79] R&R's argument also suggests that it is the manufacturer's label on the MTR that is determinative as to whether the pipe is subject to the ruling, regardless of the MTR's accuracy. However, the words of the order "usually supplied to meet A53…or equivalent specifications" are broader than "certified to". The language used by the CITT in its order includes pipe that is normally supplied to meet ASTM A53 or equivalent specifications, irrespective of the label or certificate.

[80] Insofar as the defendant's participation in CITT hearings is concerned, the defendant takes exception to R&R's comments and submits that they are not accurate. There is certainly no evidence to support R&R's position in this respect and I therefore attach no significance to it. I do note, however, that the evidence does establish that it was open to R&R to take part in the CITT review, but it elected not to participate.

[81] The approach taken by the United States regarding dual specification pipe is irrelevant.

[82] In summary, acceptance of R&R's interpretation of the word "exclusively" would negate the order's protection against the material injury arising from the dumping of Korean ASTM A53 pipe. Excluding dual specification pipe from the order would yield a result whereby importers could, in all cases, import dual specification pipe, without paying duty, then market and sell it as ASTM A53. Such activity would totally undermine the underlying policy and purpose of the order.

[83] For the foregoing reasons, R&R's interpretation of the CITT order is not sustainable and I reject it. It follows that R&R's appeal cannot succeed with respect to transactions 5, 7, 24, 26, 28, 30, 34, 35, 37, 39, 40 and 42.

[84] This determination does not dispose of all transactions in the dual specification pipe category. Transactions 1 through 4, 6, 8, 9, 19, 20, 22, 23 and 31 must be addressed. R&R would also have transactions 25 and 38 placed in this category, but I am satisfied that those transactions are best dealt with under the "experts' reports" and the "short length pipe" categories.

[85] Although the above-noted transactions are subsumed under the dual specification pipe category, R&R sub-categorizes transactions 1, 2, 3, 4, and 9 as "errors in shipping documents other than MTRs". In relation to transactions 6, 8, and 31, R&R maintains that they relate to "errors on MTRs that were corrected". In relation to transactions 19, 20, 22 and 23, R&R says that they are properly described as belonging in what it has labelled the "generic purchase order" category.

[86] Overall, R&R's position is that anti-dumping duty has been assessed in transactions where any document pertaining to the transaction in issue describes the pipe as A53 or dual A53/API 5L. This approach places it, as plaintiff, in a precarious situation. R&R asserts that the evidence indicates, on a balance of probabilities, that the pipe is API 5L rather than A53 or dual.

[87] With respect to the "errors in shipping documents", R&R contends that the files in relation to each of the transactions (1, 2, 3, 4 and 9) contain inconsistent documents as to the specification of

the pipe. It must be one specification or the other. Therefore, it falls to the court to have regard to the documents as a whole in order to determine, on a balance of probabilities, which specification was stencilled on the pipe. It is said that to conclude, on the basis that the pipe is no longer available, that R&R does not meet its onus is not an option. Otherwise, a person could never succeed where there is an ascertained forfeiture.

[88] R&R claims that the evidence is supportive of its position because Ms. Brosas, Messrs. Hunt, Maceyovski, Ritchie and Bagnall testified that errors were made from time to time in shipping documents and MTRs.

[89] The testimony of Ms. Brosas and Mr. Hunt, when viewed in the context in which it was given, is overstated and not as favourable as R&R presents it to be. However, the other witnesses did testify that human error does occur and that documents will occasionally contain errors.

[90] Mr. Ritchie and Mr. Bagnall stated unequivocally that R&R did not want to import A53 pipe or dual specification pipe that was subject to anti-dumping duty because it was not profitable. Mr. Kendal (Canada Customs investigator) acknowledged that, during the period in question, R&R paid $25,000 in anti-dumping duties.

[91] Both Messrs. Ritchie and Bagnall related that it was the practice of R&R, whenever a shipping document (particularly an MTR) was in error, to seek to have it corrected. R&R refers to various faxes requesting corrected documents as corroboration in this respect. Mr. Bagnall testified that the shipments containing document errors represented a small portion (he estimated less than

5%) of R&R's total purchases. Given that there were 333 shipments from Korea, during the time in question, it is not unreasonable, according to R&R, to expect some clerical errors and all the more so in transactions with a foreign country and in a foreign language. R&R makes no mention of Mr. Ritchie's proficiency in Korean in its argument.

[92] R&R claims that the investigator elected not to recognize documentary errors as a logical explanation for any "mis-description" in the 43 transactions. Thus, if any document in any of the transactions identified a shipment as ASTM A53 or short length API 5L, it was assessed for anti-dumping duty. R&R argues that it is illogical to assume that errors will not turn up in business documents. Human error is a reality, particularly in the pre-computer world. R&R asserts that document error is a logical explanation in relation to these transactions.

[93] Insofar as the pre-eminence of the stencil on the pipe and the contents of the MTR are concerned, I want to be perfectly clear. The evidence of all witnesses (for both parties) is that the MTR is a crucial document that is heavily relied upon by those in the industry. The stencil on the pipe is of similar significance. However, on the facts, the pipe stencilling in relation to the "errors in shipping documents" is not a major factor. The MTR, normally, should be important.

[94] I accept that the MTR is generally regarded in the industry as an extremely significant and credible document and that it is heavily relied upon by distributors and engineers alike. Notwithstanding, on the facts of this particular case, I find that the legitimacy and the credibility of the MTRs from the Korean manufacturers in this matter are highly questionable and suspect for reasons that will be further explored under the category entitled "experts' reports on the A513

specification". For now, suffice it to say that I attach very little weight or significance to the MTRs in this matter.

[95] That said, R&R's argument is not devoid of merit. In view of the evidence as well as the application of ordinary common sense, some recognition should be given to the potential for human or clerical error. Having approached the alleged "errors" on that basis and having reviewed the documentary and oral evidence, I am not satisfied (with two exceptions) that R&R has discharged its onus.

[96] The documentation in transactions 1, 2, 3, 4 and 9 is comprised of "in bond" documents, Customs forms, commercial invoices, bills of lading, packing lists and MTRs. In nearly all cases, there is insufficient indication that the shipments in issue were comprised of API 5L pipe. It is true, as R&R suggests, that the documents go both ways. However, the bulk of them, in each instance, indicate dual specification shipments. Moreover, in two of the transactions, it is readily apparent, and I find as a fact, that the documents were altered for the specific purpose of representing dual spec pipe as single spec pipe to Canada Customs. That an MTR, for any given shipment, designates pipe as API 5L is of no moment, given the view that I take of the MTRs in this matter.

[97] There are, however, two transactions where R&R has persuaded me that the dual specification designation is in error. Transaction number 9 has only a bill of lading that depicts a dual specification shipment. All other documents (and there are a number of them) refer to API 5L. The bill of lading was corrected to conform to all other documents. In these circumstances and on

this evidence, I am satisfied that R&R has met its onus and its appeal in relation to transaction 9 should succeed.

[98] I am of the same mind with respect to transaction number 3 in that I am persuaded that the shipment is not a dual specification shipment. Rather, it is API 5L. However, that does not end R&R's problem because the pipe in transaction 3 is single random 21' length pipe. Unless R&R's argument in relation to the "short length pipe" category prevails, its victory regarding transaction number 3 under the "dual specification pipe" category is a hollow one.

[99] Thus, I conclude that R&R has established, on a balance of probabilities, that there was no contravention in relation to transaction number 9. Any conclusion with respect to transaction number 3 is reserved until the "short length pipe" category has been addressed and determined.

[100] Next, R&R turns to transactions 6, 8 and 31 and submits that each of the shipments includes an MTR which is single specification API 5L. Mr. Ritchie and Mr. Bagnall testified that the single specification MTR in each case replaced an incorrect dual specification MTR, which did not conform to the stencil on the pipe. Both testified that R&R employees checked shipments on arrival to confirm that the stencils were single specification. Correction was requested for an MTR showing dual specification designation.

[101] Given the evidence, as it unfolded at the trial, I have considerable difficulty with R&R's argument. The only evidence regarding inspection of the shipments (to check for stencilling) is that of Messrs. Ritchie and Bagnall. Mr. Bagnall's testimony is of limited assistance because he was, by

his own admission, involved in the administrative end of the business and he did not profess to have more than a limited knowledge regarding steel pipe.

[102] There is no record of any inspections. None of the files contain notations regarding inspections. None of the R&R correction requests mention pipe stencils. Rather, they refer to other "documents". More significantly, Messrs. Ritchie and Bagnall acknowledged, on cross-examination, that there were instances (not infrequent) where corrections to MTRs had been requested before the pipe shipments arrived. This fact seriously undermines the credibility of these witnesses' evidence.

[103] In transaction 8, the MTR, (later replaced by a "corrected" MTR) was marked with a handwritten notation that stated, "For Customer use only! Not Customs". Both Messrs. Ritchie and Bagnall acknowledged that it was entirely possible that the "uncorrected" MTR could have been provided to a customer prior to the arrival of the "corrected" version.

[104] In these circumstances and, again, given the view that I take of the MTRs in this matter, R&R has not satisfied me that the appeal should be allowed with respect to transactions 6, 8 and 31.

[105] The last "group" under the dual specification pipe category relates to transactions 19, 20, 22 and 23. R&R has labelled these transactions the "generic purchase order". The purchase order used in all four transactions was purchase order number 36520 dated June 8, 1994.

[106] R&R submits that these transactions constitute a discrete group. It argues that there are simply no documents involved in these transactions to support an A53 identification with respect to the pipe. The import records and the MTR confirm that the imported pipe was either API 5L or ASTM A513. Neither is subject to anti-dumping. Neither of the expert metallurgists sought to challenge the A513 specification.

[107] R&R contends that the only basis for the assessment is the reference to A53B on the purchase order. Mr. Ritchie explained that the purchase order number was used as a reference number for a number of purchases over a period of months. He recounted that Korea Steel required a purchase order number for all shipments. Because R&R had not issued a separate written purchase order for this transaction, repeated reference was made to an existing purchase order.

[108] It is asserted that the purchase order is not a valid one in any event. In particular, it is missing the quantity of pipe, the diameter, thickness (schedule), length, cut (plain end, bevelled, etc.) and coating. There is simply no evidence of any ASTM A53 pipe imported under this purchase order. R&R maintains that its explanation (the purchase order was used for reference number purposes) makes sense and there is no other logical explanation. Because neither the shipping documents nor the MTRs identify the pipe as A53, the pipe will have been stencilled API 5L or A513 rather than A53. The defendant has provided no evidence to the contrary, despite a thorough investigation.

[109] It seems to me that R&R has confused the issue as to which party bears the onus of proof in relation to these transactions. It is for the defendant to establish the importation. That the defendant

has done. It now falls to R&R to establish, on the civil standard, that its importations did not constitute a contravention of the *Customs Act*.

[110] In spite of my reservations regarding Mr. Ritchie's credibility in many respects, with regard to these particular transactions, I am persuaded, on the basis of the evidence before me, that R&R should succeed in relation to transactions 19, 20, 22 and 23. The defendant is correct that the purchase order refers to "MT ERW Steel Pipe to A53B". However, there is no assessment with respect to that particular purchase or importation. The four specific transactions that are in issue are represented as hand-written notations on the purchase order. There is an invoice number for each transaction along with other pertinent information depicted on the document.

[111] There is significant documentation contained in the exhibits with respect to each of the impugned transactions. With one exception, none refers to ASTM A53 pipe. In the circumstances, I find Mr. Ritchie's explanation regarding the purchase order to be both plausible and reasonable. It appears to me that the purchase order in question was indeed one of convenience and I so find. The transactions in issue, on the basis of the evidence, and on the civil standard of proof, were not importations of ASTM A53 pipe. It follows that R&R's appeal with respect to transactions 19, 20, 22 and 23 will be allowed, subject to the qualification discussed in the paragraph that follows.

[112] There is a caveat with respect to this determination. My review of the documents in relation to these transactions did not reveal any short length API 5L pipe. However, there are transactions where several different sizes of pipe are included in the one transaction. There are some transactions in evidence where as many as eight different sizes of pipe are included in a single

transaction yet only two sizes of pipe are in issue. While I am reasonably confident that I have not overlooked a short length pipe shipment in transactions 19, 20, 22 and 23, I do not discount the fact that I may have done so. Therefore, in the event that short length pipe may be in issue in transactions 19, 20, 22 and 23, R&R cannot succeed on this appeal in relation to the short length API 5L pipe in these transactions unless its argument regarding the "short length pipe" category prevails at the end of the day.

H. *Experts' Reports on the A513 Specification*

[113] This category includes transactions 10, 13, 14, 15, 17, 21, 25, 36, 38 and 41. It also encompasses transactions 11, 12, 16 and 18. The second group of transactions also comes within the "short length pipe" category. Because R&R has a separate and distinct argument in relation to short length pipe and because the fate of some previous transactions turns on the outcome of that argument, transactions 11, 12, 16 and 18 will be addressed under both the "experts' reports" and the "short length pipe" categories.

[114] Some preliminary comments regarding the experts and the nature of their evidence are warranted. There were four expert reports entered as exhibits at trial. R&R tendered the report of Victor Marks and he was called as a witness. Mr. Marks could not assist in relation to this category because he had no experience with ASTM A513 mechanical tubing. To the contrary, he stated that he "didn't hear about it till about six months ago".

[115] The defendant entered the expert reports of Frank Christensen, Jeff Hunt and Michel Seguin. Messrs. Hunt and Seguin were called as witnesses while Mr. Christensen's report was entered on consent. The designations of expertise were as follows:

- Mr. Christensen - an expert in pipe and tubing metallurgy;
- Mr. Hunt - an expert in pipe and tubing metallurgy as well as its marketing and sales;
- Mr. Seguin – an expert in the marketing and sales of steel pipe and tubing with the understanding that sales and marketing involves some knowledge regarding production.

[116] I should state that Mr Christensen's initial involvement in this matter was at the behest of Roy Kendal, the Canada Customs investigator. During his investigation in relation to R&R, Mr. Kendal, having no expertise in relation to the composition and varieties of steel pipe and tubing, turned to Mr. Christensen for expert assistance. Mr. Christensen examined the MTRs in transactions 10, 13, 14, 15, 17, 21, 25, 36 and 41 and provided a report of his findings to Mr. Kendal. The report became a significant factor regarding some transactions that were being investigated.

[117] In preparation for this action, Mr. Christensen also examined the MTRs in transactions 11, 12, 16 and 18. The report prepared for the purpose of trial provides Mr. Christensen's findings and opinion regarding both the MTRs examined during the investigation and those that he examined later.

[118] This action was originally scheduled to be tried in May 2005. The trial was adjourned because Mr. Christensen had suffered a stroke and was incapable of testifying. Residual health issues prevented Mr. Christensen's appearance at this trial and the parties agreed to enter his report, on consent.

[119] Mr. Hunt independently examined the MTRs for transactions 10, 13, 14, 15, 17, 21, 25, 36 and 41 and prepared a report outlining his conclusions. Mr. Hunt had not seen Mr. Christensen's report nor is there any indication that he was aware of its existence.

[120] Mr. Seguin provided evidence with respect to the various specifications of pipe and tubing (including the general characteristics of each of them) and with respect to the practice known as downgrading or recertifying.

[121] Because of the manner in which these transactions have been approached historically, I intend to address them in two separate groups. The transactions encompassed in the short length pipe category will be discussed only after I have dealt with the first group. For clarity and coherence, I should add that the bottom line arising out of the examinations and reports of Messrs. Christensen and Hunt was that R&R's ASTM A513 mechanical tubing, in fact, was manufactured as ASTM A53 specification pipe.

[122] R&R mounts a number of challenges to the experts' conclusions. First, it takes issue with the fact that Mr. Christensen, in rendering his opinion, has selected the precise wording of the CITT order rather than using "other wording to explain his interpretation" of the MTRs. The allegation is

that he is seeking to use his expertise to make the decision that is the court's function to make. As an expert, Mr. Christensen is supposed to assist the court; he is not to be an advocate.

[123] Next, R&R claims, on the wording of the CITT order, it is not sufficient that pipe may have been made (manufactured) to ASTM A53 specifications. Unlike API 5L, which is excluded from the anti-dumping order, "the order does not address what specification it is made or manufactured to". R&R formulates the issue as: "what market it is usually supplied to meet". It develops this argument as follows. If the imported pipe or tubing is usually being supplied to meet the A53 market, it would normally have to include A53 as one of its specifications, or evidence would have to be introduced that it is being used for an A53 purpose. The purpose of the anti-dumping order is to protect the A53 market (and the other markets named in the CITT order) considered to be at risk from dumping. The CITT order does not seek to protect the A513 market. There is no finding that it (ASTM A513) has resulted in material harm or that anti-dumping protection with respect to it is required.

[124] Further, the word "usually" is added so that the defendant "doesn't have to prove the end use of a particular piece of pipe in order to impose duty – only that it is likely or usually supplied in transactions where A53 is purchased".

[125] R&R claims that the evidence is clear that A53 pipe and A513 tubing do not compete within the same market. Mr. Hunt stated that A53 is used for mechanical and pressure applications and for the conveyance or transfer of steam, water, gas and air lines. A513 is intended for use as mechanical tubing. Mr. Christensen's report also identifies different markets for each product. Mr.

Herd and Mr. Maceyovski sold to the A53 market and did not wish to purchase pipe with an A513 specification.

[126] R&R asserts that it does not matter that a metallurgist might be of the opinion that the A513 spec tubing is A53 pipe. The fact is that the MTR for the pipe says A513. Pipe with an A513 specification and stencil is not supplied to persons who want A53 specification product. This submission, R&R says, is supported by:

- the evidence that if A513 is stencilled on the pipe and designated on the MTR, it cannot be sold as A53. Buyers will not apply their own interpretation of an MTR. Mr. Pickard of CCTF and Mr. Maceyovski of Russell Steel advised that they would not even accept single specification API 5L in place of A53, even though API 5L is superior, because customers would not accept it. Only if a customer agreed in advance to the change would Russell Steel substitute;
- Mr. Herd of Westland testified that he ordered A53 pipe. When pipe with an A513 stencil and MTR was delivered, he returned it. He sold to customers in the A53 market and his customers would not accept pipe with an A513 specification;
- Mr. Hunt's evidence that a knowledgeable person could purchase a product, based on a review of the MTR, is insufficient to conclude that R&R bought pipe with an A513 specification and sold it to persons requiring an A53 specification;
- Mr. Marks confirmed that a buyer would not accept pipe that had a different specification than the one requested;
- Canada Customs completed an extensive investigation of R&R's sales. The investigator, Mr. Kendal, confirmed that he had not identified any situation in which

pipe marked as A513 (said by Messrs. Christensen and Hunt to meet A53 specification) was supplied to a customer who requested A53;

- Mr. Ritchie testified that R&R sold the product in issue only to persons wishing to purchase an A513 specification;
- Mr. Seguin failed to address the issue of whether he would accept one specification, when another was ordered. He stated that if a customer does not require an MTR, the customer could buy any specification. He addressed the issue of what happens if the specification is not important rather than the situation where a customer wants one grade and the distributor proposes to supply another. A customer who does not require an A53 or an A513 specification could purchase cheaper construction grade pipe.

[127] Moreover, R&R argues, the pipe in these transactions could also meet A513 standards. The manufacturing tolerances are more restrictive, but the manufacturer was prepared to certify it. No one, other than the manufacturer, will have done the necessary tests. The manufacturer has represented a specification on the MTR. The evidence of Messrs. Ritchie and Herd was that purchasers rely on the specification in the MTR. While there may be some items on the MTR that are also consistent with A53 or API 5L (grade A or schedule 40), it is the specification of A513 that is critical.

[128] Last, R&R submits that a ruling that this pipe would be subject to anti-dumping would be a problem for international trade (both imports and exports). Mr. Marks confirmed that IPSCO made pipe to a higher specification than that put on the pipe. Mr. Hunt confirmed that pipe is recertified.

Recertifying is an important part of the steel trade, either for the purpose of selling out surplus inventory or to deal with a questionable determination. Requiring importers to report pipe for duty based on specifications not identified on the pipe or in the MTR and imposing anti-dumping duty and penalties in such circumstances would be unrealistic and unnecessary applications of the CITT order. The evidence of Messrs. Marks, Maceyovski and Pickard was that the specification (not the details of the tests) set out in the MTR is determinative.

[129] In relation to the "wording" used by Mr. Christensen, R&R does not suggest that the report is inadmissible on this basis nor does it make any formal objection in this respect. Rather, it suggests that "to borrow from the exact wording of the order seems to be a little bit more of an assistance than the court expects from an expert". At its highest, R&R's submission is an equivocal caution regarding what can conveniently be labelled "expression of opinion on the ultimate issue".

[130] As I stated during R&R's final submissions, I am aware that it is the function of the court, not the expert, to determine this matter. The metallurgists' evidence was necessary and reliable. Also, it was of assistance to the court. R&R does not suggest otherwise.

[131] I find no basis (nor is one suggested) upon which to conclude that Mr. Christensen assumed the role of an advocate. Additionally, I note Mr. Kendal's evidence that R&R, at the adjudications level, argued that Mr. Christensen's terminology (in the initial report prepared for Mr. Kendal, Mr. Christensen used the phrase "consistent with" rather than "usually supplied to meet") was indecisive. Mr. Christensen employed more specific language in the report prepared for trial. R&R cannot have it both ways.

[132] The R&R submissions, pared down, amount to this:

- in spite of the findings of the metallurgists, the MTR designation and pipe stencilling are paramount and conclusive;
- pipe designated or stencilled as ASTM A513 could not be sold in the market as A53;
- even if the product met ASTM A53 standards, it could be recertified or downgraded to ASTM A513 tubing; and
- the defendant has not established that ASTM A513 designated tubing was marketed as ASTM A53.

[133] Before turning to these submissions, a few words about the onus of proof and the metallurgists' findings are in order. I reiterate that the onus is on R&R. The defendant has filed expert evidence in relation to the identity of the products that are the subject of the transactions in this category. There is no onus on the defendant to identify a specific "situation in which pipe marked as A513 was supplied to a customer who requested A53".

[134] Both Messrs. Christensen and Hunt are educated and experienced metallurgists. Both hold degrees in metallurgy engineering. Both have been members of the ASTM Specifications Subcommittees on ASTM A53 and ASTM A513 standards. Their combined experience in this area exceeds 50 years. Both are well-qualified to provide expert evidence in this proceeding. Both reviewed the properties of the MTRs for the first group of transactions in this category.

[135] Independently, each found that nearly all indicia pointed to ASTM A53A pipe rather than ASTM A513 mechanical tubing. Hydrostatic testing results, terminology (schedule 80. BPEB) and the use of nominal values (used for steel pipe but not mechanical tubing) were present. In four of nine transactions (transactions 14, 17, 21 and 41), Pusan/SeAH or Korea Steel/Shinho indicated a specification that, according to Messrs. Christensen and Hunt, does not exist (ASTM A513 ERW Steel Pipe). In a fifth transaction, the MTR contained no specification. Rather, it described the product as "mechanical tubing" and "ERW steel pipe". If the experts are to be believed, these terms are contradictory.

[136] Additionally, because ASTM A513 mechanical tubing is neither intended nor ordinarily used for the conveyance of fluids under pressure, the specific hydrostatic testing data delineated in the MTRs in question would not, in the ordinary course, be provided for ASTM A513 mechanical tubing. Granted, certain hydrostatic testing data for ASTM A513 mechanical tubing will be provided upon customer request. However, such requests (referred to as S7 or S8 (supplementary) test requirements) must be specifically ordered. Aside from the fact that R&R has produced no such purchase orders or, for that matter, any specific evidence of S7 or S8 requests, the hydrostatic tests in all transactions in issue, according to the experts, either exceeded or fell short of establishing ASTM A513 standards. Moreover, the experts stated that the tests reported in the MTRs are mandatory for ASTM A53, but not for ASTM A513.

[137] The MTRs for transactions 36 and 41 refer to galvanization through zinc coating test results. Mr. Christensen indicated that zinc coating (hot-dipped) would throw off the stringent dimensional tolerances of mechanical tubing. Mr. Hunt stated that the ASTM A513 specification does not

contemplate galvanized tubing. While specific coats of painting are permitted, galvanization is not. At the end of the day, the evidence, from these experts, unequivocally points to a single conclusion: the MTRs in this category indicate that the product is ASTM A53 pipe rather than ASTM A513 mechanical tubing.

[138] Turning now to R&R's arguments, for convenience, I again note its submission that: the MTR designation and pipe stencilling are paramount and conclusive; pipe designated or stencilled as ASTM A513 could not be sold in the market as ASTM A53; and even if the product met ASTM A53 standards, it could be recertified or downgraded to ASTM A513 standards.

[139] At the outset, I should state that in circumstances where Mr. Ritchie's evidence conflicts with that of other witnesses, I accept, without reservation, the evidence of the other witnesses over that of Mr. Ritchie. His evidence, in addition to being self-serving, vacillated according to the category of product under discussion and was in some cases internally inconsistent. For example, during his testimony regarding the experts' reports category, he vigorously defended the supremacy of the MTR designation, above all else. However, when addressing dual specification pipe, he insisted that it was the stencil that ruled "in spite of what the MTR said".

[140] I accept the evidence of the experts that the product described as ASTM A513 mechanical tubing and so designated in the various MTRs in the first group of transactions in this category (with two exceptions to be discussed later) was ASTM A53 pipe. I find, as a fact, that the product was improperly designated on the MTR.

[141] I have already discussed some of the experts' findings in this regard. There are a number of additional pertinent observations that should be noted. In transaction 14, there were three separate MTRs in relation to the same product. The first MTR provided an "ASTM A53A" specification. Both experts, independently, concluded that there were no irregularities or inconsistencies between the specification and the reported test results. The second MTR specification (in relation to the same product) was ASTM A513 C100880 for ERW Steel Pipe BPEB. Both experts listed a number of problems with the MTR's contents. To illustrate, I reproduce the comments of Mr. Christensen, which are slightly more detailed but consistent with those of Mr. Hunt. The acronym "psi" (not yet encountered) refers to pounds per square inch. Mr. Christensen found:

> 1. There is no type number (Type 1, 2, 3, 4, 5, or 6) reported, which is an essential descriptor for ASTM A513.
>
> 2. It is assumed that the term "80" in the specification designation refers to "Schedule 80", given that the wall thicknesses reported are 0.276 in. and 0.218 in., which are the appropriate wall thicknesses for 2 ½ in. and 2 in. Schedule 80 pipe, respectively. The designation of schedule number is unique to pipe; it does not apply to mechanical tubing.
>
> 3. The type "BPEB" signifies "black plain-end bevelled". This terminology for end finish is unique to pipe; this end finish is inconsistent with mechanical tubing.
>
> 4. The nominal sizes (2 ½ in. and 2 in.) are terms that are unique to pipe; such designations are not used for mechanical tubing.
>
> 5. The weight designation is unique to pipe; the designation does not apply to mechanical tubing. The weight designations (3.47 and 2.28 kg/ft) correspond to those specified for Schedule 80 pipe.
>
> 6. The furnishing of tension test results is inconsistent with ASTM A513 unless "Tensile Properties Required" had been specified in the purchase order. The test results are sufficient to qualify the tubular product to ASTM A53 Grade A or API 5L Grade A.
>
> 7. The furnishing of hydrostatic test pressures is inconsistent with ASTM A513 unless Supplementary Requirement S7 had been

> specified in the purchase order. For tubing ordered to S7, the required hydrostatic test pressures are 2690 psi for 2.875 in. OD x 0.276 in. wall thickness, and 2570 psi for 2.375 in. OD x 0.218 in. wall thickness. The test pressure reported (2500 psi) for both sizes is insufficient to qualify the tubular product to ASTM A513 S7, but is identical to that required for Grade A or B pipe made to ASTM A53 or API 5L.
>
> 8. The furnishing of nondestructive electric test results is inconsistent with ASTM A513 unless Supplementary Requirement S8 had been specified in the purchase order. It should be noted that such testing is required for pipe made to ASTM A53 or API 5L.

[142] The third MTR (in relation to the same product) provided an ASTM A513 C100880 specification for mechanical tubing, type BPEB. I do not intend to delineate the experts' comments in relation to this certificate although I note, again, that they independently arrived at the same conclusion (MTR presented A53A pipe being certified to A513) by way of similar observations.

[143] In transaction 25 (I will say more about this transaction later), a revised MTR, revealed a change in the chemical composition of the product. According to Messrs. Hunt and Seguin (and the report of Mr. Christensen), this is not possible. The elements of the steel (for the specific heat number lot) do not change. Although different commodities of different sizes can be made from the steel, the chemical composition of the steel itself remains constant. I accept that this is the case.

[144] I also accept Mr. Hunt's evidence that an MTR number should be unique to a certain commodity and that the specification of ASTM A513 does not have a metallurgical fit with the reported test results.

[145] It serves no useful purpose to review the transactions individually because the experts' conclusions are compelling in relation to each of them. It is within this context that I assign no weight to the ASTM A513 specification of the manufacturer in the MTRs in these transactions. This determination also serves as clarification with respect to my comments in paragraph 94 of these reasons.

[146] In so concluding, it follows that I reject R&R's position that "the certificate is what it is…once we bring it in as A513, that's what it is… the key point is the spec…it's ASTM A513 and if we happen to say something on the side that is not to somebody's liking, well, that's beside the point". I also discount Mr. Ritchie's evidence that there is no rule saying that mandatory type tests for A53 can't be done on A513. While API specifications constitute a global standard and no specific licence is required to manufacture ASTM (unlike API where a licence is required), the ASTM standards are mandatory. Adherence to the ASTM standards is required internationally.

[147] In summary, I find, in relation to transactions 10, 13, 14, 15, 17, 21, 36 and 41, that the product described in the MTRs is ASTM A53 pipe rather than ASTM A513 mechanical tubing. I accept Mr. Hunt's characterization that "pipe and tubing are like oil and water; they don't mix".

[148] However, R&R contends that the ASTM A53 was recertified or downgraded to ASTM A513. Mr. Ritchie's position was that "manufacturers are completely within their rights to recertify the pipe to that standard". He suggested that Stelco had recertified ASTM A53 to ASTM A513 (an allegation that was denied by Mr. Seguin who was employed by Stelco for 30 years). Mr. Ritchie

acknowledged on cross-examination that he could have confused ASTM A513 with ASTM A500, but on re-examination, he reverted to his initial statement.

[149] Notwithstanding R&R's argument in this respect, this issue can be disposed of summarily. The evidence, on all counts, is clear that downgrading or recertifying is a common industry practice. The evidence of both Messrs. Hunt and Seguin, which I accept, was that recertification is done at the time of manufacture, not at a later date. Mr. Hunt stated that a revised certificate would display the original certificate number and an amendment showing the additional products. That is not the case here. Additionally, the ASTM standards speak to what is permitted rather than what is prohibited.

[150] Most importantly, Messrs. Hunt and Seguin testified with respect to the existence of a "chain" for downgrading or recertifying. This chain is represented as follows: API 5L → ASTM A53 → ASTM 500 → ASTM A8589. The downgrading chain does not include ASTM A513 mechanical tubing. Again, borrowing from Mr. Hunt's terminology, "it's like putting a square peg in a round hole".

[151] Last, with respect to these transactions, R&R argues that it couldn't sell ASTM A513 as ASTM A53. It points specifically to the evidence of Messrs. Herd, Maceyovski and Pickard to support the proposition that, in circumstances where an MTR specification of ASTM A513 was provided in relation to an order for ASTM A53 pipe, the shipment would be returned to R&R by the purchaser.

[152] I do not see this evidence through the same lens as R&R. First, all three gentlemen were employed by major distributors. Mr. Herd (Westland Industrial Supply), in particular, had no independent recollection regarding the transaction in question and couldn't remember what he did with it. He testified that MTRs were not always required at that time although they were required for stock purchases. If, in a stock purchase, an MTR specification for ASTM A513 was provided for an ASTM A53 order, he thought that it would be returned.

[153] Messrs. Maceyovski (Russell Metals) and Pickard (CCTF Edmonton) did require MTRs when ordering ASTM A53 pipe. It is apparent that (for the most part) it was common practice for distributors to insist on MTRs with respect to purchases. The same could not be said for non-distributors. Rather, it was the evidence of all witnesses (including Mr. Ritchie) that, at the time in question, customers rarely requested MTRs. The estimates regarding the percentage of customers who made such a request ranged from a low of 10% to a high of 20%.

[154] Thus, for a variety of reasons, I find that R&R has not established that it could not sell the ASTM A513 (as specified in the MTR) as ASTM A53 pipe. My reasons are derived from the following factual findings, which in turn are derived from the evidence indicated:

- Mr. Ritchie acknowledged that, in circumstances where subsequent MTRs were issued, an original MTR (with ASTM A53 specification) could have been provided to a customer;
- R&R did not sell exclusively to distributors. It also sold to smaller suppliers and distributors and to approximately 200 end users;
- R&R provided copies of MTRs only when they were specifically requested;

- Mr. Ritchie testified that, visually, it was difficult to distinguish between the two products;
- Mr. Hunt, who dealt with engineers on a regular basis, stated that an engineer could look at the test reports of an MTR, regardless of the specification, and make a decision whether to purchase the product for a particular application. The product is bought and sold daily on the basis of fit, form and function;
- Mr. Seguin testified that, where an MTR is not required, a customer will buy the material that meets the OD and wall for the intended application, if the product is priced accordingly;
- Mr. Ritchie acknowledged advising potential buyers that "we have something and give them the dimensions, we could even show them the mill test report, and we would have to leave them to decide whether or not they could use the material";
- Mr. Ritchie further acknowledged that R&R provided "technical support" for buyers. If a customer used A53 pipe, R&R might refer the customer to the A513 spec because it helps the buyer to reduce costs and R&R to increase sales;
- Mr. Ritchie agreed that, if a buyer wanted to use a product that could convey water to a specific pressure, the product described in the MTRs (as ASTM A513 specification) could be used;
- R&R's Korean agent knew that ASTM A53 was subject to anti-dumping duty and that ASTM A513 was not subject to anti-dumping duty;
- R&R's Korean agent notified R&R as follows: "Re A513 high strength pipes of 6NB X .188, .219 & .250: Shinho offered with A53B Quality – MTR as A513 or

5LB. Price at 60/MT CNF. We can make some dollar negotiation. However, advise. Price Idea."

- Mr. Max Arthur (Northside Industries) put out an RFQ (request for quote) for 3 ½" schedule 40 A53 pipe in "a couple of different lengths and full length pieces". R&R responded (through NAPS) with a very favourable price. Mr. Arthur requested mill test certification and later received an MTR with A513 specification. When Mr. Arthur questioned why the price was so much better, he was informed by R&R that it "was bringing it in as something else". That evidence was not challenged. Mr. Arthur, also an auxiliary RCMP officer, reported the incident to Industry Canada;
- Mr. Pemberton, a Customs officer who inspected transaction 32 (now conceded, but within this category) established that some of the pipe reported as ASTM A513 in the inspected shipment was labelled ASTM A53.

[155] On the basis of the foregoing findings, I am not satisfied that R&R could not sell the ASTM A513 (as specified in an MTR) as ASTM A53 pipe. I conclude that the product in these transactions is pipe that is "usually supplied to meet" ASTM A53 specifications. Thus, the *Customs Act* was contravened and R&R cannot succeed on its appeal in relation to these transactions.

[156] I stated earlier that there were two exceptions in the first group of transactions for this category. The exceptions are transactions 25 and 38. I referred briefly to transaction 25 when I spoke of the MTR displaying a change in the chemical components of the steel. There were four separate MTRs for transaction 25. One designated the product as ASTM A53 specification. Another described it as "chemical tubing", a product that does not exist, at least in relation to

ASTM. Yet another described it as mechanical tubing. There was also the heat number problem. In short, the MTRs for this transaction provide a consummate manifestation of the reasons why the MTRs in this matter cannot be regarded as reliable, let alone determinative.

[157] Mr. Christensen was not able to come to a conclusion regarding transaction 25 because of the number of irregularities and conflicting data in the certificates. He determined that the sizing and descriptors were consistent with the product being pipe, but the testing reported was consistent with the product being tubing.

[158] Mr. Hunt also noted the irregularities in the various certificates. To arrive at a determination, after noting the specifications and commodities, he concluded (on the basis of the test results) that the MTRs were acceptable for ASTM A500 Grade C.

[159] Seizing on Mr. Hunt's determination, and in spite of its consistent position that the designation on the MTR is determinative, R&R asserts that its appeal in relation to transaction 25 should be allowed. The defendant argues contra and maintains that R&R has produced no evidence in this respect and thus has not met its onus. The defendant did not take issue with R&R's inconsistent positions. As a result, and with reluctance, I will not factor the "inconsistency" into my determination regarding transaction 25.

[160] I find the defendant's argument appealing because R&R seeks to establish its case through the mouth of the defendant's witness rather than through its own. The defendant is quite correct that the onus is on R&R. However, I do not see that proposition as one that permits me to disregard the

evidence that is before me. The evidence is what it is, regardless of source. Once admitted, it is open to either party to utilize the evidence to that party's advantage. In a sense, in so doing, R&R is meeting its onus, based on the record.

[161] It is apparent that, in relation to transaction 25, the evidence is not ideal. However, a determination must nonetheless be made. Recognizing that this exercise is not a science, I conclude, on a balance of probabilities, that the product in transaction 25 is ASTM A500 Grade A. If that is so, and I find that it is, the product does not come within the parameters of the CITT order and therefore there would be no contravention of the *Customs Act*. R&R's appeal with respect to transaction 25 must be allowed.

[162] Transaction 38 is not as complex. There is no expert opinion in relation to this transaction because there was no MTR available for it. (This presents a problem, overall, for R&R's position that it "always" obtained an MTR). Indeed, transaction 38 was placed within the first grouping of this category largely for want of a better place to put it. There are a number of documents with respect to this transaction. The product is described variously as "mechanical tubing to A513 with mill coating", "structural tubing to A500 Grade C", "ASTM A53", and "ERW mechanical tubing to ASTM A513, schedule 40". At this stage of the proceedings, the inherent contradictions in these designations are obvious. On the basis of this evidence, and in the absence of any explanation from R&R, I have no hesitation in concluding that R&R has not met its onus regarding this transaction and its appeal with respect to it must fail.

[163] This disposes of the transactions contained in the first group of the experts' report category. I turn now to the second group of transactions, specifically, transactions 11, 12, 16 and 18.

[164] Because there are conflicting documents in relation to these transactions, it is useful to particularize the descriptions of the "product" as provided in the various documents for each transaction.

[165] In transaction 11, the documents consist of in bond manifests, a Canada Customs coding form, commercial invoices, bills of lading, a memo authored by David Bagnall and an MTR. The product is described as mechanical tubing on the Canada Customs form and the Athabasca invoice. The MTR specification is ASTM A513 although Mr. Bagnall's memo indicates that the MTR has been "corrected". All other documents initially describe the product as API 5LA. I say initially because there are subsequent Daewoo Corporation commercial invoices that describe the product as mechanical tubing.

[166] The memo of David Bagnall constitutes a request for the bills of lading to be corrected from API 5L to ASTM A513. The Hyundai "correction advice", also in the record, displays the requested correction. I find the Bagnall memo telling and I reproduce it here. It is forwarded to R&R's Korean agent.

> Re: "Adriana" – 81.357 MT – B/L 3001, 2
>
> We rec'd some corrected docs (com. inv. and pack.list) which
>
> are in order however we need a correction to the 2 B/L's as
> and A513 for marks.
> the description still reads API 5LA ^ Also the spec. on the

> inspection Cert. is corrected but looks poor on our one and only photocopy – could we please have a better MTR. Please rush!

[167] The point to be made here is that various documents have been corrected. I cannot ascertain from the record, with any degree of certainty, how many documents were changed. More troubling though is Mr. Bagnall's reference to the A513 "marks", which refers to the stencilling. An examination of the shipment referred to in the memo reveals that the "Adriana" (the ship) 8.357 MT (metric tons) shipment related to the following commodities: ½ " x Sch. 80 x 21' and ¾ " x Sch. 80 x 21'. The evidence at trial from all witnesses, without exception, was that pipe less than 1" was not stencilled.

[168] In relation to transaction 12, the documents consist of in bond manifests, two Canada Customs forms, an Athabasca invoice, an R&R invoice and an MTR. All documents, except a single R&R invoice, refer to the product as ASTM 513 mechanical tubing. The R&R invoice describes it as API 5L steel pipe.

[169] The documents for transaction 16 are comprised of in bond manifests, Canada Customs forms and an MTR. All describe the product as ASTM A513, or mechanical tubing, or both. The anomaly in this set of documents is that the "corrected" MTR refers to an "API 5L Gr. A" specification. Mr. Ritchie was questioned in this regard and had no explanation. He stated that the MTR ought to have been the reverse.

[170] Transaction 18 documents include in bond manifests, Canada Customs documents, commercial invoices, a bill of lading, a packing list and an MTR. They are fairly evenly split, that is, half the documents describe the product as ASTM A513 (including the MTR specification) while the other half describe it as API 5L.

[171] Mr. Christensen's report contains the results of his examination of the MTRs with respect to each of these transactions. Each transaction included an MTR depicting an ASTM A513 specification. Transaction 16 had two MTRs, one designating an API 5L specification and the other designating an ASTM A513 designation. The transaction 16 "corrected" MTR is the MTR that puzzled Mr. Ritchie.

[172] Mr. Christensen concluded, in each case, that the contents of the MTRs indicated that the product was consistent with pipe made to ASTM A53 Grade A (rather than ASTM A513 mechanical tubing). In relation to transaction 11, he concluded that the testing and test results were consistent with pipe made to ASTM A53 Grade A, but the certificate was not sufficiently complete to establish that all of the testing required by ASTM A53 had been done successfully.

[173] I do not intend to belabour the contents of Mr. Christensen's report. I have arbitrarily chosen to delineate his findings in relation to transaction 16 for the purpose of illustration. In any event, that transaction is representative of the others. Mr. Christensen's findings for transaction 16 are set out here.

> 1. There is no type number (Type 1, 2, 3, 4, 5, or 6) reported, which is an essential descriptor for ASTM A513.

2. The specification designation is ASTM A513 (which covers mechanical tubing), which is incompatible with the stated kind of article (steel pipe).

3. It is assumed that the “40” in the specification designation refers to “Schedule 40”, given that the wall thickness reported is 0.216 in., which is the appropriate wall thickness for 3 in. Schedule 40 pipe.

4. The type “BPEB” signifies “black plain-end bevelled”. This terminology for end finish is unique to pipe; this end finish is inconsistent with mechanical tubing.

5. The nominal size (3 in.) is a term that is unique to pipe; the designation does not apply to mechanical tubing.

6. The weight designation is unique to pipe; the designation does not apply to mechanical tubing. The weight designation (3.44 kg/ft) is appropriate for the pipe size.

7. The furnishing of tension test results is inconsistent with ASTM A513 unless “Tensile Properties Required” had been specified in the purchase order. The test results are sufficient to qualify the tubular product to ASTM A53 Grade A or API 5L Grade A.

8. The furnishing of hydrostatic test pressure is inconsistent with ASTM A513 unless Supplementary Requirement S7 had been specified in the purchase order. For tubing ordered to S7, the required hydrostatic test pressure is 1730 psi for 3.500 in. OD x 0.216 in. wall thickness. The test pressure reported (2220 psi) is higher than that required to qualify the tubular product to ASTM A513 S7, but is identical to that required to qualify the tubular product to ASTM A53 Grade A or API 5L Grade A.

9. The furnishing of nondestructive electric test results is inconsistent with ASTM A513 unless Supplementary Requirement S8 had been specified in the purchase order. It should be noted that such testing is required for pipe made to ASTM A53 or API 5L.

[174] I accept Mr. Christensen's conclusions and I do so without reservation. There is no credible R&R evidence to the contrary before me. Thus, R&R's appeal in relation to these transactions cannot succeed.

[175] To summarize with respect to the category entitled "experts' reports on the A513 specification", R&R has been successful in relation to transaction 25. Its appeal in relation to all other transactions (subsumed in both groups) within this category fails.

I. *Short Length Pipe*

[176] But for my earlier determination regarding transaction 3 and the possibility that transactions 19, 20, 22 and 23 may include "short length pipe" product, the issue of "short length pipe" would be rendered moot by virtue of my determination in relation to transactions 11, 12, 16 and 18 (the second group of transactions in the "experts' reports" category). Those transactions involved "short length pipe", but even if R&R were to succeed in relation to its "short length pipe" argument, its success would be immaterial with respect to transactions 11, 12, 16 and 18 because of my previous findings. However, in view of the fact that the resolution of some outstanding transactions turns on a determination of the "short length pipe" debate, I turn to it now.

[177] The departmental ruling contained in the correspondence dated June 14, 1993 and December 9, 1993, emanating from the enforcement officer, Anti-dumping and Countervailing Division, has been summarized previously. At this point, it is useful to reproduce salient excerpts from that correspondence. The June 14th letter contained the following comments:

> It has come to our attention that pipe certified as API 5L grade A and B imported into Canada and originating in or exported from Korea is

> being substituted for standard pipe uses such as water well casing, piling pipe, sprinkler pipe and fencing pipe etc. The intent of the exclusion in the product definition was to exclude oil and gas line pipe made to API specifications when used for oil and gas line applications only. However, the definition is intended to include as subject goods all carbon pipe used for the above applications.
>
> It is understood that standard pipe applications usually consist of pipe in 20' – 21' lengths. In view of the foregoing, the Department will be collecting anti-dumping duty on all shipments released from Customs possession on or after the date of this letter at a rate of 19% under Ministerial specification on all shipments of API 5L pipe originating in or exported from Korea in lengths other than the 40' – 43', the lengths usually used for the transmission of oil and gas.
>
> However, if an importer is able to provide adequate documentation to the Department that shorter lengths of pipe are to be used for oil and gas line applications, anti-dumping duties will not be applied.
>
> If you should have any questions concerning the above, I may be reached at (613) 954-7394 or fax at (613) 941-2612.

[178] Mr. Ritchie availed himself of the opportunity to communicate with the enforcement officer and, as a result, the 40' determination was subsequently reduced to 37'. This amendment was reflected in the December 9th correspondence. Additionally, the R&R shipments in transit (containing products that would fall within the parameters of the ruling) were grandfathered in (exempted from anti-dumping duty).

[179] R&R argues that there is no basis for concluding that some lengths of API 5L pipe are subject to anti-dumping duty. This position is based on a submission that Canada Customs acknowledges that longer length API 5L is not subject to anti-dumping duty. This, it is said, constitutes an acceptance of the fact that there is no end use test based on the reference to "oil and gas line pipe made to API specifications exclusively". Thus, R&R "does not have to prove what

happens to its pipe after import – the words are descriptive of API pipe". Moreover, it would be impractical to try to do so in Canada's multi-level steel distribution market. Here, API 5L pipe that was not dual specification or in 21' lengths was not assessed.

[180] R&R suggests that regard should be had to the genesis of the departmental ruling. From 1986 to 1993, there was no 21' rule. The CITT did not address the issue in its original ruling or by way of amendment to its original order. The decision to add this interpretation was made by a Canada Customs employee responsible for administering the anti-dumping order. It was not made on the basis of a legal opinion although the author consulted with certain industry players, including IPSCO. That, according to R&R, is not "the basis by which the defendant should administer a CITT order". Neither the order nor SIMA provides Canada Customs officers with the right to issue regulations that have the force of law.

[181] R&R did not appeal the interpretation ruling. It contends that there is no provision in the *Customs Act* or SIMA, providing such an avenue. The interpretation position taken by Canada Customs is that if the API 5L pipe is not used for an oil and gas purpose, it does not qualify for the exemption. Canada Customs, says R&R, is inserting an "end use test". It would have been necessary for CITT to have included very specific wording, such as the words "for use in", as part of the order to achieve the imposition of an end use test.

[182] There are additional R&R arguments that need not be referred to because they relate to transactions that are contained in my earlier findings under the "experts' reports" category and are therefore no longer relevant to this issue.

[183] It seems to me that there is some internal inconsistency in R&R's argument. However, I will not dwell on it because, given the view I take of this issue, nothing turns on it in any event. I do note that subsection 56(1) of SIMA vests a Customs officer with power to determine whether particular imported goods are of the class subject to anti-dumping duty as a result of a CITT ruling. As a practical matter, it only stands to reason that those who are entrusted with the enforcement of the CITT order will be required to interpret it.

[184] The interpretation ruling of the enforcement officer was based on the premise that API 5L pipe in lengths under 37' would not be used for oil and gas pipeline applications, but would be presumed to be imported for introduction into the ASTM A53 market, in the absence of the importer's evidence to the contrary.

[185] I do not regard the departmental ruling as a "regulation" in the sense in which R&R uses the word. Rather, it is analogous to the Interpretation Bulletins that are regularly issued in relation to the *Income Tax Act*, R.S.C. 1985, c. I (5th Supp.). If R&R disagreed with the ruling, it was open to it to declare a shipment of API 5L 21' pipe and appeal the assessment. This it chose not to do. The "coincidence" that the MTRs designating R&R's product as ASTM A513 specification (which I have determined to be ASTM A53 pipe) were issued in the months immediately following the departmental ruling is highly suspect.

[186] The evidence reviewed earlier in this regard was to the effect that while ASTM A53 is commonly ordered in lengths of 21', API 5L pipe is generally ordered in double or triple random

lengths to minimize welding and the potential for leaks. The use of API 5L in single random lengths would be the exception and it would be supplied only when specifically ordered.

[187] The CITT order, in my view, is not merely related to API specified pipe. It is for "oil and gas line pipe made to API specifications exclusively". The context and intent of the order incorporate two features. The first is the end use of the pipe: "oil and gas line pipe". The second is that the oil and gas line pipe must be "made to API specifications exclusively".

[188] Further, the CITT implicitly adopted the departmental ruling in its reasons in relation to the 1995 review (1995), C.I.T.T. No. 32, Review No: RR-94-004 when it stated:

> [C]ounsel for the domestic industry alleged that Korean exporters and Canadian importers of the subject goods have been attempting to circumvent the finding by describing the subject goods as other goods at the time of entry into Canada. The Tribunal recognized the difficulty in bringing forward hard evidence to support these allegations. However, the evidence shows that, on at least two occasions, Revenue Canada advised importers that all API line pipe which is being used in standard pipe applications and which originates in Korea is subject to anti-dumping duties at a rate of 19 percent. The Tribunal also notes that, following similar allegations by the U.S. producers, the U.S. Department of Commerce ruled that the Korean line pipe used in standard pipe applications is within the scope of its anti-dumping order.

[189] The departmental ruling is not inconsistent with the provisions of the CITT order. Moreover, the ruling is in keeping with the spirit and intent of the order. It is only Korean oil and gas line pipe (meaning for use in the oil and gas industry) made to API specifications exclusively that is exempt from anti-dumping duty.

[190] The impact of this determination, for R&R, is that its appeal in relation to transaction number 3 must fail. Additionally, its appeal with respect to shipments of short length pipe in transactions 19, 20, 22 and 23, if any, will also fail.

[191] Before concluding, I want to address the issue of the R&R records. It is common ground that Canada Customs seized some 14 boxes of documents from R&R. Throughout the trial, when questioned (particularly regarding the paucity of purchase orders) about documents that would be expected to be in R&R's files, Mr. Ritchie repeatedly implied that documents may have gone astray because Canada Customs had seized them. I am satisfied that all documents seized from R&R were returned to it. Mr. Ritchie cannot visit R&R's failure to comply with subsection 40(1) of the *Customs Act* on others.

X. Conclusion

[192] R&R's appeal with respect to transactions 9 and 25 will be allowed. Its appeal with respect to transactions 19, 20, 22 and 23 will also be allowed, subject to the caveat that shipments contained within the latter group of transactions that consist of 21' pipe, if any, will nonetheless be subject to anti-dumping duty. Judgment will issue accordingly.

XI. Costs

[193] Both parties have requested costs. R&R has been only marginally successful. Counsel are encouraged to endeavour to resolve the issue of costs by agreement. Absent resolution, counsel are to serve and file written submissions (not exceeding three pages, double-spaced) within 20 days of the date of judgment. Responses to those submissions (not exceeding two pages, double-spaced)

are to be served and filed within 10 days of service of the first submissions, or within 30 days of the date of judgment, at the election of counsel. I retain jurisdiction over this matter with respect to the determination of costs, if necessary.

"Carolyn Layden-Stevenson"
Judge

Ottawa, Ontario
July 19, 2006

SCHEDULE "A"
to the
Reasons for Judgment dated July 19, 2006
in
R & R TRADING CO. LTD.
and
MINISTER OF NATIONAL REVENUE

T-997-01

ACROSS	Accelerated Review Operating Support System (Canada Customs software for commercial importations)
API	American Petroleum Institute
ASTM	American Society for Testing and Materials
BBE	Black bevelled end
BL	Bill of lading
BPEB	Black plain-end bevelled
CITT	Canadian International Trade Tribunal
DRL	Double random length
ERW	Electric resistance welded
Export price	Price goods sold at in Canada (less than normal price)
GPEB	Galvanized plain-end bevelled
ID	Inside diameter
MT	Metric tons
MTR	Mill test report
NAPS	North American Pipe and Steel Limited
NDT	Nondestructive (Electric) testing
Normal price	Price goods sold at in country of origin

NPS	Nominal pipe size
OD	Outside diameter
psi	Pounds per square inch
RFQ	Request for quote
SIMA	Special Import Measures Act
SRL	Single random length
TRL	Triple random length
VFD	Value for duty

SCHEDULE "B"
to the
Reasons for Order dated July 19, 2006
in
R & R TRADING CO. LTD.
and
MINISTER OF NATIONAL REVENUE
T-997-01

Customs Act
R.S., 1985, c. 1 (2nd Supp.)

2. (1) In this Act
…

"bonded warehouse" means a place licensed as a bonded warehouse by the Minister under subsection 91(1) of the *Customs Tariff*;

"duties" means any duties or taxes levied or imposed on imported goods under the *Customs Tariff*, the *Excise Act, 2001*, the *Excise Tax Act*, the *Special Import Measures Act* or any other Act of Parliament, but, for the purposes of subsection 3(1), paragraphs 59(3)(*b*) and 65(1)(*b*), sections 69 and 73 and subsections 74(1), 75(2) and 76(1), does not include taxes imposed under Part IX of the *Excise Tax Act*;

"import" means import into Canada;

"Minister" means, except in Part V.1, the Minister of Public Safety and Emergency Preparedness;

"person" means an individual, a partnership, a corporation, a trust, the estate of a deceased individual or a body that is a society, a union, a club, an association, a commission or other organization of any kind;

Loi sur les douanes
L.R., 1985, ch. 1 (2e suppl.)

2. (1) Les définitions qui suivent s'appliquent à la présente loi.
[…]
« entrepôt de stockage » Établissement agréé comme tel par le ministre en vertu du paragraphe 91(1) du Tarif des douanes.

« droits » Les droits ou taxes imposés, en vertu de la Loi de 2001 sur l'accise, de la Loi sur la taxe d'accise, de la Loi sur les mesures spéciales d'importation, du Tarif des douanes ou de toute autre loi fédérale, sur les marchandises importées. En sont exclues, pour l'application du paragraphe 3(1), des alinéas 59(3) b) et 65(1) b), des articles 69 et 73 et des paragraphes 74(1), 75(2) et 76(1), les taxes imposées en vertu de la partie IX de la Loi sur la taxe d'accise.

« importer » Importer au Canada

« ministre » Sauf dans la partie V.1, le ministre de la Sécurité publique et de la Protection civile.

« personne » Particulier, société de personnes, personne morale, fiducie ou succession, ainsi que l'organisme qui est un syndicat, un club, une association, une commission ou autre organisation, ces notions étant visées dans des formulations générales, impersonnelles ou comportant des pronoms ou adjectifs indéfinis.

7.1 Les renseignements fournis à un agent pour l'application et l'exécution de la présente loi,

7.1 Any information provided to an officer in the administration or enforcement of this Act, the *Customs Tariff* or the *Special Import Measures Act* or under any other Act of Parliament that prohibits, controls or regulates the importation or exportation of goods, shall be true, accurate and complete.

du *Tarif des douanes* ou de la *Loi sur les mesures spéciales d'importation*, ou sous le régime d'une autre loi fédérale prohibant, contrôlant ou réglementant l'importation ou l'exportation de marchandises doivent être véridiques, exacts et complets.

12. (1) Subject to this section, all goods that are imported shall, except in such circumstances and subject to such conditions as may be prescribed, be reported at the nearest customs office designated for that purpose that is open for business.

(2) Goods shall be reported under subsection (1) at such time and in such manner as the Governor in Council may prescribe.

(3) Goods shall be reported under subsection (1)
…
(*b*) in the case of goods, other than goods referred to in paragraph (*a*) or goods imported as mail, on board a conveyance arriving in Canada, by the person in charge of the conveyance; and
(*c*) in any other case, by the person on behalf of whom the goods are imported.

12. (1) Sous réserve des autres dispositions du présent article, ainsi que des circonstances et des conditions prévues par règlement, toutes les marchandises importées doivent être déclarées au bureau de douane le plus proche, doté des attributions prévues à cet effet, qui soit ouvert.

(2) La déclaration visée au paragraphe (1) est à faire selon les modalités de temps et de forme fixées par le gouverneur en conseil.

(3) Le déclarant visé au paragraphe (1) est, selon le cas :
[…]
b) le responsable du moyen de transport arrivé au Canada à bord duquel se trouvent d'autres marchandises que celles visées à l'alinéa *a*) ou importées comme courrier;
c) la personne pour le compte de laquelle les marchandises sont importées.

(3.1) For greater certainty, for the purposes of the reporting of goods under subsection (1), the return of goods to Canada after they are taken out of Canada is an importation of those goods.

(3.1) Il est entendu que le fait de faire entrer des marchandises au Canada après leur sortie du Canada est une importation aux fins de la déclaration de ces marchandises prévue au paragraphe (1).

13. Every person who reports goods under section 12 inside or outside Canada or is stopped by an officer in accordance with section 99.1 shall
(*a*) answer truthfully any question asked by an officer with respect to the goods; and
(*b*) if an officer so requests, present the goods to the officer, remove any covering from the goods, unload any conveyance or open any part of the conveyance, or open or unpack any package or container that the officer wishes to examine.

13. La personne qui déclare, dans le cadre de l'article 12, des marchandises à l'intérieur ou à l'extérieur du Canada, ou qu'un agent intercepte en vertu de l'article 99.1 doit :
a) répondre véridiquement aux questions que lui pose l'agent sur les marchandises;
b) à la demande de l'agent, lui présenter les marchandises et les déballer, ainsi que décharger les moyens de transport et en ouvrir les parties, ouvrir ou défaire les colis et autres contenants que l'agent veut examiner.

17. (1) Imported goods are charged with duties thereon from the time of importation thereof until such time as the duties are paid or the charge is otherwise removed.

(2) Subject to this Act, the rates of duties on imported goods shall be the rates applicable to the goods at the time they are accounted for under subsection 32(1), (2) or (5) or, where goods have been released in the circumstances set out in paragraph 32(2)(*b*), at the time of release.

(3) Whenever the importer of the goods that have been released or any person authorized under paragraph 32(6)(*a*) or subsection 32(7) to account for goods becomes liable under this Act to pay duties on those goods, the owner of the goods at the time of release becomes jointly and severally, or solidarily, liable, with the importer or person authorized, to pay the duties.

17. (1) Les marchandises importées sont passibles de droits à compter de leur importation jusqu'à paiement ou suppression des droits.

(2) Sous réserve des autres dispositions de la présente loi, le taux des droits à payer sur les marchandises importées est celui qui leur est applicable au moment où elles font l'objet de la déclaration en détail ou provisoire prévue aux paragraphes 32(1), (2) ou (5) ou, en cas d'application de l'alinéa 32(2)b), au moment de leur dédouanement.

(3) Dès que l'importateur de marchandises dédouanées ou quiconque est autorisé à faire une déclaration en détail ou provisoire de marchandises conformément à l'alinéa 32(6)a) ou au paragraphe 32(7) devient redevable, en vertu de la présente loi, des droits afférents, la personne qui est propriétaire des marchandises au moment du dédouanement devient solidaire du paiement des droits.

31. Subject to section 19, no goods shall be removed from a customs office, sufferance warehouse, bonded warehouse or duty free shop by any person other than an officer in the performance of his or her duties under this or any other Act of Parliament unless the goods have been released by an officer or by any prescribed means.

31. Sous réserve de l'article 19, seul l'agent, dans l'exercice des fonctions que lui confère la présente loi ou une autre loi fédérale, peut, sauf s'il s'agit de marchandises dédouanées par lui ou par un autre agent, ou dédouanées de toute manière prévue par règlement, enlever des marchandises d'un bureau de douane, d'un entrepôt d'attente, d'un entrepôt de stockage ou d'une boutique hors taxes.

32. (1) Subject to subsections (2) and (4) and any regulations made under subsection (6), and to section 33, no goods shall be released until
(a) they have been accounted for by the importer or owner thereof in the prescribed manner and, where they are to be accounted for in writing, in the prescribed form containing the prescribed information; and
(b) all duties thereon have been paid.

32. (1) Sous réserve des paragraphes (2) et (4), des règlements d'application du paragraphe (6), et de l'article 33, le dédouanement des marchandises est subordonné :
a) à leur déclaration en détail faite par leur importateur ou leur propriétaire selon les modalités réglementaires et, si elle est à établir par écrit, en la forme et avec les renseignements déterminés par le ministre;
b) au paiement des droits afférents.

40. (1) Every person who imports goods or causes goods to be imported for sale or for any industrial, occupational, commercial, institutional or other like use or any other use that may be prescribed shall keep at the person's place of business in Canada or at any other place that may be designated by the Minister any records in respect of those goods in any manner and for any period of time that may be prescribed and shall, where an officer so requests, make them available to the officer, within the time specified by the officer, and answer truthfully any questions asked by the officer in respect of the records.

40. (1) Toute personne qui importe ou fait importer des marchandises en vue de leur vente ou d'usages industriels, professionnels, commerciaux ou collectifs, ou à d'autres fins analogues ou prévues par règlement, est tenue de conserver en son établissement au Canada ou en un autre lieu désigné par le ministre, selon les modalités et pendant le délai réglementaires, les documents réglementaires relatifs aux marchandises et, à la demande de l'agent et dans le délai qu'il précise, de lui communiquer ces documents et de répondre véridiquement aux questions qu'il lui pose à leur sujet.

124. (1) Where an officer believes on reasonable grounds that a person has contravened any of the provisions of this Act or the regulations in respect of any goods or conveyance, the officer may, if the goods or conveyance is not found or if the seizure thereof would be impractical, serve a written notice on that person demanding payment of
(a) an amount of money determined under subsection (2) or (3), as the case may be; or
(b) such lesser amount as the Minister may direct.

124. (1) L'agent qui croit, pour des motifs raisonnables, à une infraction à la présente loi ou à ses règlements du fait de marchandises ou de moyens de transport peut, si on ne les trouve pas ou si leur saisie est problématique, réclamer par avis écrit au contrevenant :
a) soit le paiement du montant déterminé conformément au paragraphe (2) ou (3), selon le cas;
b) soit le paiement du montant inférieur ordonné par le ministre.

127. The debt due to Her Majesty as a result of a notice served under section 109.3 or a demand under section 124 is final and not subject to review or to be restrained, prohibited, removed, set aside or otherwise dealt with except to the extent and in the manner provided by sections 127.1 and 129.

127. La créance de Sa Majesté résultant d'un avis signifié en vertu de l'article 109.3 ou d'une réclamation effectuée en vertu de l'article 124 est définitive et n'est susceptible de révision, de restriction, d'interdiction, d'annulation, de rejet ou de toute autre forme d'intervention que dans la mesure et selon les modalités prévues aux articles 127.1 et 129.

129. (1) The following persons may, within ninety days after the date of a seizure or the service of a notice, request a decision of the Minister under section 131 by giving notice in

129. (1) Les personnes ci-après peuvent, dans les quatre-vingt-dix jours suivant la saisie ou la signification de l'avis, en s'adressant par écrit, ou par tout autre moyen que le ministre juge indiqué, à l'agent qui a saisi les biens ou les moyens de transport ou a signifié ou fait signifier l'avis, ou à un agent du bureau de

writing, or by any other means satisfactory to the Minister, to the officer who seized the goods or conveyance or served the notice or caused it to be served, or to an officer at the customs office closest to the place where the seizure took place or closest to the place from where the notice was served:
(a) any person from whom goods or a conveyance is seized under this Act;
(b) any person who owns goods or a conveyance that is seized under this Act;
(c) any person from whom money or security is received pursuant to section 117, 118 or 119 in respect of goods or a conveyance seized under this Act; or
(d) any person on whom a notice is served under section 109.3 or 124.

(2) The burden of proof that notice was given under subsection (1) lies on the person claiming to have given the notice.

131. (1) After the expiration of the thirty days referred to in subsection 130(2), the Minister shall, as soon as is reasonably possible having regard to the circumstances, consider and weigh the circumstances of the case and decide
(a) in the case of goods or a conveyance seized or with respect to which a notice was served under section 124 on the ground that this Act or the regulations were contravened in respect of the goods or the conveyance, whether the Act or the regulations were so contravened;
(b) in the case of a conveyance seized or in respect of which a notice was served under section 124 on the ground that it was made use of in respect of goods in respect of which this Act or the regulations were contravened, whether the conveyance was made use of in that way and whether the Act or the regulations were so contravened; or
(c) in the case of a penalty assessed under section 109.3 against a person for failure to comply with subsection 109.1(1) or (2) or a provision that is designated under subsection

douane le plus proche du lieu de la saisie ou de la signification, présenter une demande en vue de faire rendre au ministre la décision prévue à l'article 131 :
a) celles entre les mains de qui ont été saisis des marchandises ou des moyens de transport en vertu de la présente loi;
b) celles à qui appartiennent les marchandises ou les moyens de transport saisis en vertu de la présente loi;
c) celles de qui ont été reçus les montants ou garanties prévus à l'article 117, 118 ou 119 concernant des marchandises ou des moyens de transport saisis en vertu de la présente loi;
d) celles à qui a été signifié l'avis prévu aux articles 109.3 ou 124.

(2) Il incombe à la personne qui prétend avoir présenté la demande visée au paragraphe (1) de prouver qu'elle l'a présentée.

131. (1) Après l'expiration des trente jours visés au paragraphe 130(2), le ministre étudie, dans les meilleurs délais possible en l'espèce, les circonstances de l'affaire et décide si c'est valablement qu'a été retenu, selon le cas :
a) le motif d'infraction à la présente loi ou à ses règlements pour justifier soit la saisie des marchandises ou des moyens de transport en cause, soit la signification à leur sujet de l'avis prévu à l'article 124;
b) le motif d'utilisation des moyens de transport en cause dans le transport de marchandises ayant donné lieu à une infraction aux mêmes loi ou règlements, ou le motif de cette infraction, pour justifier soit la saisie de ces moyens de transport, soit la signification à leur sujet de l'avis prévu à l'article 124;
c) le motif de non-conformité aux paragraphes 109.1(1) ou (2) ou à une disposition désignée en vertu du paragraphe 109.1(3) pour justifier l'établissement d'une pénalité en vertu de l'article 109.3, peu importe s'il y a réellement eu non-conformité.
d) [Abrogé, 2001, ch. 25, art. 72]

109.1(3), whether the person so failed to comply.
(d) [Repealed, 2001, c. 25, s. 72]

(1.1) A person on whom a notice is served under section 130 may notify the Minister, in writing, that the person will not be furnishing evidence under that section and authorize the Minister to make a decision without delay in the matter.

(2) The Minister shall, forthwith on making a decision under subsection (1), serve on the person who requested the decision a detailed written notice of the decision.

(3) The Minister's decision under subsection (1) is not subject to review or to be restrained, prohibited, removed, set aside or otherwise dealt with except to the extent and in the manner provided by subsection 135(1).

133. (1) Where the Minister decides, under paragraph 131(1)(a) or (b), that there has been a contravention of this Act or the regulations in respect of the goods or conveyance referred to in that paragraph, and, in the case of a conveyance referred to in paragraph 131(1)(b), that it was used in the manner described in that paragraph, the Minister may, subject to such terms and conditions as the Minister may determine,
(a) return the goods or conveyance on receipt of an amount of money of a value equal to an amount determined under subsection (2) or (3), as the case may be;
(b) remit any portion of any money or security taken; and
(c) where the Minister considers that insufficient money or security was taken or where no money or security was received, demand such amount of money as he considers sufficient, not exceeding an amount determined under subsection (4) or (5), as the case may be.

(1.1) If the Minister decides under paragraph 131(1)(c) that the person failed to comply, the

(1.1) La personne à qui a été signifié un avis visé à l'article 130 peut aviser par écrit le ministre qu'elle ne produira pas de moyens de preuve en application de cet article et autoriser le ministre à rendre sans délai une décision sur la question.

(2) Dès qu'il a rendu sa décision, le ministre en signifie par écrit un avis détaillé à la personne qui en a fait la demande.

(3) La décision rendue par le ministre en vertu du paragraphe (1) n'est susceptible d'appel, de restriction, d'interdiction, d'annulation, de rejet ou de toute autre forme d'intervention que dans la mesure et selon les modalités prévues au paragraphe 135(1).

133. (1) Le ministre, s'il décide, en vertu des alinéas 131(1)a) ou b), que les motifs d'infraction et, dans le cas des moyens de transport visés à l'alinéa 131(1)b), que les motifs d'utilisation ont été valablement retenus, peut, aux conditions qu'il fixe :
a) restituer les marchandises ou les moyens de transport sur réception du montant déterminé conformément au paragraphe (2) ou (3), selon le cas;
b) restituer toute fraction des montants ou garanties reçus;
c) réclamer, si nul montant n'a été versé ou nulle garantie donnée, ou s'il estime ces montant ou garantie insuffisants, le montant qu'il juge suffisant, à concurrence de celui déterminé conformément au paragraphe (4) ou (5), selon le cas.

(1.1) Le ministre, s'il décide en vertu de l'alinéa 131(1)c) que la personne ne s'est pas conformée, peut, aux conditions qu'il fixe :
a) remettre à la personne une portion de la pénalité établie en vertu de l'article 109.3;
b) réclamer une somme supplémentaire.

Minister may, subject to any terms and conditions that the Minister may determine,
(a) remit any portion of the penalty assessed under section 109.3; or
(b) demand that an additional amount be paid.

If an additional amount is demanded, the total of the amount assessed and the additional amount may not exceed the maximum penalty that could be assessed under section 109.3.

Toutefois, la totalité de celle-ci et de la somme établie ne doit pas dépasser le montant maximal de la pénalité qui peut être établie en vertu de l'article 109.3.

135. (1) A person who requests a decision of the Minister under section 131 may, within ninety days after being notified of the decision, appeal the decision by way of an action in the Federal Court in which that person is the plaintiff and the Minister is the defendant.

(2) The Federal Courts Act and the rules made under that Act applicable to ordinary actions apply in respect of actions instituted under subsection (1) except as varied by special rules made in respect of such actions.

135. (1) Toute personne qui a demandé que soit rendue une décision en vertu de l'article 131 peut, dans les quatre-vingt-dix jours suivant la communication de cette décision, en appeler par voie d'action devant la Cour fédérale, à titre de demandeur, le ministre étant le défendeur.

(2) La Loi sur les Cours fédérales et les règles prises aux termes de cette loi applicables aux actions ordinaires s'appliquent aux actions intentées en vertu du paragraphe (1), sous réserve des adaptations occasionnées par les règles particulières à ces actions.

152. (1) In any proceeding under this Act relating to the importation or exportation of goods, the burden of proof of the importation or exportation of the goods lies on Her Majesty.

(2) For the purpose of subsection (1), proof of the foreign origin of goods is, in the absence of evidence to the contrary, proof of the importation of the goods.

(3) Subject to subsection (4), in any proceeding under this Act, the burden of proof in any question relating to
(a) the identity or origin of any goods,
(b) the manner, time or place of importation or exportation of any goods,
(c) the payment of duties on any goods, or
(d) the compliance with any of the provisions of this Act or the regulations in respect of any goods

152. (1) Dans toute procédure engagée sous le régime de la présente loi en matière d'importation ou d'exportation de marchandises, la charge de prouver l'importation ou l'exportation incombe à Sa Majesté.

(2) Pour l'application du paragraphe (1), la preuve de l'origine étrangère des marchandises constitue, sauf preuve contraire, celle de leur importation.
(3) Sous réserve du paragraphe (4), dans toute procédure engagée sous le régime de la présente loi, la charge de la preuve incombe, non à Sa Majesté, mais à l'autre partie à la procédure ou à l'inculpé pour toute question relative, pour ce qui est de marchandises :
a) à leur identité ou origine;
b) au mode, moment ou lieu de leur importation ou exportation;
c) au paiement des droits afférents;
d) à l'observation, à leur égard, de la présente loi ou de ses règlements.

lies on the person, other than Her Majesty, who is a party to the proceeding or the person who is accused of an offence, and not on Her Majesty.

(4) In any prosecution under this Act, the burden of proof in any question relating to the matters referred to in paragraphs (3)(a) to (d) lies on the person who is accused of an offence, and not on Her Majesty, only if the Crown has established that the facts or circumstances concerned are within the knowledge of the accused or are or were within his means to know.

(4) Dans toute poursuite engagée sous le régime de la présente loi, la charge de la preuve incombe, pour toute question visée aux alinéas (3)a) à d), non à Sa Majesté, mais au prévenu, à condition toutefois que la Couronne ait établi que les faits ou circonstances en cause sont connus de l'inculpé ou que celui-ci est ou était en mesure de les connaître.

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	T-997-01
STYLE OF CAUSE:	R & R TRADING CO. LTD. v. MINISTER OF NATIONAL REVENUE
PLACE OF HEARING:	Vancouver, B.C.
DATES OF HEARING:	June 12 to 16, 2006 June 19 to 23, 2006
REASONS FOR JUDGMENT:	LAYDEN-STEVENSON J.
DATED:	July 19, 2006

APPEARANCES:

Mr. Douglas Morley	FOR THE PLAINTIFF
Mr. David Jacyk Mr. Stacey Repas	FOR THE DEFENDANT

SOLICITORS OF RECORD:

Davis and Company Vancouver, British Columbia	FOR THE APPLICANT
John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENT

Date: 20060719

Docket: T-997-01

Ottawa, Ontario, July 19, 2006

PRESENT: The Honourable Madam Justice Layden-Stevenson

BETWEEN:

R & R TRADING CO. LTD.

Plaintiff

and

MINISTER OF NATIONAL REVENUE

Defendant

JUDGMENT

THIS COURT ORDERS AND ADJUDGES THAT:

The plaintiff's appeal with respect to transaction numbers 9 and 25 is allowed. The plaintiff's appeal with respect to transaction numbers 19, 20, 22 and 23 is allowed subject to the caveat that shipments contained within the latter group of transactions that consist of 21' pipe, if any, will be subject to anti-dumping duty. In all other respects, the appeal is dismissed.

"Carolyn Layden-Stevenson"
Judge