



Ottawa, Wednesday, June 26, 2002

**Inquiry No. NQ-2001-004**

IN THE MATTER OF an inquiry, under section 42 of the *Special Import Measures Act*,  
respecting:

**FRESH TOMATOES, ORIGINATING IN OR EXPORTED FROM  
THE UNITED STATES OF AMERICA, EXCLUDING  
TOMATOES FOR PROCESSING**

**FINDING**

The Canadian International Trade Tribunal, under the provisions of section 42 of the *Special Import Measures Act*, has conducted an inquiry to determine whether the dumping in Canada of fresh tomatoes, originating in or exported from the United States of America, excluding tomatoes for processing, has caused injury or retardation or is threatening to cause injury to the domestic industry.

This inquiry is further to the issuance by the Commissioner of the Canada Customs and Revenue Agency of a preliminary determination dated March 25, 2002, and of a final determination dated June 24, 2002, that the aforementioned goods had been dumped.

Pursuant to subsection 43(1) of the *Special Import Measures Act*, the Canadian International Trade Tribunal hereby finds that the dumping of the aforementioned goods has not caused material injury or retardation and is not threatening to cause material injury to the domestic industry.

Patricia M. Close

Patricia M. Close  
Presiding Member

Richard Lafontaine

Richard Lafontaine  
Member

Zdenek Kvarda

Zdenek Kvarda  
Member

Michel P. Granger

Michel P. Granger  
Secretary

The statement of reasons will be issued within 15 days.

Date of Finding: June 26, 2002

Tribunal Members: Patricia M. Close, Presiding Member  
Richard Lafontaine, Member  
Zdenek Kvarda, Member

Director of Research: Selik Shainfarber

Research Manager: Richard Cossette

Researcher: Josée St-Amand

Economist: Ihn Ho Uhm

Statistician: Lise Lacombe

Counsel for the Tribunal: John Dodsworth

Registrar Officer: Karine Turgeon

**Participants:** A. Keith Mitchell, Q.C.  
Robert J. McDonell  
Craig T. Munroe  
Allan J. Cocksedge  
for Canadian Tomato Trade Alliance

**(Complainant and those supporting the complaint)**

Richard S. Gottlieb  
Darrel H. Pearson  
Jesse I. Goldman  
Ali Ehsassi  
Eli Fellman  
Peter Collins  
for California Tomato Commission  
Florida Tomato Exchange

C. J. Michael Flavell, Q.C.  
Geoffrey C. Kubrick  
J. Peter Jarosz  
Yasir A. Naqvi  
Raahool Watchmaker  
Jin Han  
for Canadian Restaurant and Foodservices Association

Clifford Sosnow  
Kenneth S. Purchase  
for Wendy's Restaurants of Canada, Inc.

Gregory O. Somers  
Benjamin P. Bedard  
for Wholesale Produce Supply Company

Rod Dengerink  
The Toronto Wholesale Produce Association

Lorie Goldfarb  
Morris Brown & Sons Company Limited

Robert Levine  
Premier Fruits & Légumes BBL Inc.

**(Importers/Exporters/Others)**

Address all communications to:

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



Ottawa, Thursday, July 11, 2002

Inquiry No. NQ-2001-004

**FRESH TOMATOES, ORIGINATING IN OR EXPORTED FROM  
THE UNITED STATES OF AMERICA, EXCLUDING  
TOMATOES FOR PROCESSING**

**DECISION**

The Canadian International Trade Tribunal hereby finds that the dumping in Canada of the aforementioned goods has not caused material injury or retardation and is not threatening to cause material injury to the domestic industry.

Date of Finding: June 26, 2002

Date of Reasons: July 11, 2002

Tribunal Members: Patricia M. Close, Presiding Member  
Richard Lafontaine, Member  
Zdenek Kvarda, Member

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respecting:

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TOMATOES FOR PROCESSING**

TRIBUNAL: PATRICIA M. CLOSE, Presiding Member  
RICHARD LAFONTAINE, Member  
ZDENEK KVARDA, Member

**STATEMENT OF REASONS**

**BACKGROUND**

The Canadian International Trade Tribunal (the Tribunal), under the provisions of section 42 of the *Special Import Measures Act*,<sup>1</sup> has conducted an inquiry to determine whether the dumping in Canada of fresh tomatoes, originating in or exported from the United States of America, excluding tomatoes for processing, has caused injury or retardation or is threatening to cause injury to the domestic industry.

On November 9, 2001, the Commissioner of the Canada Customs and Revenue Agency (the Commissioner), following a complaint filed by the Canadian Tomato Trade Alliance (CTTA), initiated an investigation to determine whether imports of the subject goods were being dumped. On November 13, 2001, pursuant to subsection 34(2) of SIMA, the Tribunal issued a notice advising interested parties that it had initiated a preliminary injury inquiry to determine whether the evidence disclosed a reasonable indication that the dumping of the subject goods had caused material injury or retardation or was threatening to cause material injury. On January 8, 2002, pursuant to subsection 37.1(1), the Tribunal determined that the evidence disclosed a reasonable indication that the dumping of the subject goods had caused injury to the domestic industry.

On March 25, 2002, the Commissioner issued a preliminary determination of dumping. The Commissioner was satisfied, as a result of his preliminary investigation, that the subject goods had been dumped, that the margins of dumping were not insignificant and that the volume of dumped goods was not negligible.<sup>2</sup>

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1. R.S.C. 1985, c. S-15 [hereinafter SIMA].
  2. Canada Customs and Revenue Agency, *Preliminary Determination of Dumping*, 25 March 2002, Tribunal Exhibit NQ-2001-004-01, Administrative Record, Vol. 1 at 24.

On March 26, 2002, the Tribunal issued a notice of commencement of inquiry.<sup>3</sup> As part of the inquiry, the Tribunal sent questionnaires to domestic growers, importers, purchasers and foreign growers. From the replies to the questionnaires and other sources, the Tribunal's research staff prepared public and protected pre-hearing staff reports.

A public hearing had been scheduled to commence in Ottawa on June 24, 2002. On June 19, 2002, the CTTA, with the support of the major participants in this proceeding, sent a letter to the Tribunal stating that it did not wish to advance its case at the scheduled hearing and requested that the Tribunal cancel the hearing and terminate the proceedings. On June 20, 2002, the Tribunal, in light of the fact that the domestic industry wished to withdraw from the proceedings, agreed to cancel the scheduled hearing, but advised the parties that it would proceed to conclude the inquiry on the basis of the written record.

On June 24, 2002, the Commissioner issued a final determination that fresh tomatoes, originating in or exported from the United States of America, excluding tomatoes for processing, had been dumped and that the margins of dumping were not insignificant.<sup>4</sup>

The record of this inquiry consists of all Tribunal exhibits, including the public and protected replies to questionnaires, all briefs, witness statements, exhibits filed by the parties throughout the inquiry and their replies to the requests for information. All public exhibits were made available to the parties. Protected exhibits were made available only to counsel who had filed a declaration and confidentiality undertaking with the Tribunal in respect of confidential information.

The Tribunal issued its finding on June 26, 2002.

## **RESULTS OF THE COMMISSIONER'S INVESTIGATION**

The Commissioner's investigation covered imports of the subject goods during the period from October 1, 2000, to September 30, 2001.

The investigation revealed that 87 percent of the volume of subject goods from all exporters were dumped and that the weighted average margin of dumping of all goods, expressed as a percentage of the export price, was 33 percent.

## **ANALYSIS**

Pursuant to subsection 42(1) of SIMA, the Tribunal is required to make inquiry as to whether the dumping of the subject goods has caused injury or retardation or is threatening to cause injury. "Injury" is defined in subsection 2(1) as "material injury to a domestic industry". "Domestic industry", in turn, is defined, in part, as "the domestic producers as a whole of the like goods or those domestic producers whose collective production of the like goods constitutes a major proportion of the total domestic production of the like goods".

Therefore, the Tribunal must identify the like goods and the domestic industry that produces those goods before addressing the injury issue.

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3. C. Gaz. 2002.I.944.

4. Canada Customs and Revenue Agency, *Final Determination of Dumping*, 24 June 2002, Tribunal Exhibit NQ-2001-004-04, Administrative Record, Vol. 1 at 110.20.

## **Like Goods/Classes of Goods**

The Tribunal notes that, in his preliminary and final determinations of dumping, the Commissioner defined the subject goods as “fresh tomatoes, excluding tomatoes for processing” (fresh tomatoes). This definition includes tomatoes for fresh consumption that are field grown, as well as tomatoes that are grown in greenhouses. The Tribunal notes that, pursuant to subsection 2(1) of SIMA, like goods are goods that are “identical to” or that “closely resemble” the subject goods. The Tribunal affirms and reiterates its preliminary determination of injury that Canadian fresh tomatoes, while not identical to imported fresh tomatoes, “closely resemble” the latter. Therefore, the Tribunal finds that domestically grown fresh tomatoes are “like goods”.

The issue that arises in this case is whether fresh tomatoes are comprised of two distinct classes of goods: field and greenhouse tomatoes. In evaluating classes of goods, the Tribunal typically looks at a number of criteria, such as the physical characteristics of the goods, their production and distribution, their market characteristics (such as substitutability and pricing), and whether the goods fulfil the same customer needs. The Tribunal weighs all these criteria; no single factor is determinative of the issue.

The Tribunal examined this issue at the preliminary determination of injury stage and found that there was only one class of goods, namely, fresh tomatoes. The Tribunal has re-examined the issue at this stage and affirms its preliminary determination of injury for the reasons provided in that statement of reasons.

## **Domestic Industry**

On the question of the domestic industry, the record shows that Canadian growers of both field tomatoes and greenhouse tomatoes produce fresh tomatoes, with growers of greenhouse tomatoes producing over 85 percent of total production of fresh tomatoes in 2001. Moreover, growers of greenhouse tomatoes located in Ontario and British Columbia that are represented by the CTTA produced over 80 percent of total production of fresh tomatoes in Canada in 2001, according to the available data. Therefore, the Tribunal concludes, as it did at the preliminary determination of injury stage, that the growers of greenhouse tomatoes represented by the CTTA constitute at least “a major proportion” of the domestic production of fresh tomatoes pursuant to subsection 2(1) of SIMA and they, therefore, are the domestic industry for the purposes of this inquiry.

## **Injury**

In its complaint, the domestic industry alleged that it had suffered injury, principally in the form of price erosion and suppression, as a result of dumped U.S. imports, and that, “but for the dumping,” its financial performance and growth would have been more robust. The domestic industry pursued its claims of injury by filing evidence and argument. However, as noted above, just days prior to the hearing, the domestic industry notified the Tribunal that it wished to withdraw from any further participation in the proceedings. As a result, the Tribunal cancelled the hearing and advised the parties that it would proceed to conclude the inquiry on the basis of the written record and that it would draw the appropriate inferences from the domestic industry’s withdrawal.

The Tribunal has reviewed the written record and is not convinced from the evidence therein that the domestic industry has suffered material injury as a result of the dumped subject goods. In this connection, the Tribunal first notes that there are significant gaps in the information filed by the domestic industry in response to the Tribunal’s questionnaires, especially in regard to financial performance. For



example, the questionnaire response from the Ontario Greenhouse Vegetable Growers, whose members collectively represent some 60 percent of domestic production, reflected the views and performance of only 3 out of 85 growers.<sup>5</sup> The information filed by BC Hot House Foods Inc., a grower-controlled private company that marketed the majority of B.C. greenhouse tomatoes during the Tribunal's period of inquiry, also does not present a clear picture of the financial performance of B.C. growers, in the Tribunal's estimation.

Nevertheless, it is quite clear from the record that, over the period of inquiry, growers of greenhouse tomatoes in both British Columbia and Ontario experienced substantially rising production, as they simultaneously increased their sales and domestic market share. This rapidly increasing supply of greenhouse tomatoes occurred over a period when the market share of imported U.S. tomatoes was relatively stable. This indicates to the Tribunal that, while prices may not have been as high as growers may have wished, the cause of the problem was not necessarily dumped imports.

Furthermore, although the industry has argued that prices of domestic greenhouse tomatoes are determined by, and closely follow, the price of U.S. imports, the evidence is far from clear, in the Tribunal's opinion. Indeed, according to the data available to the Tribunal, there appear to be significant divergences between the price of Canadian greenhouse tomatoes and U.S. field tomatoes at certain times of the year. Moreover, even though greenhouse tomatoes normally can command a premium over U.S. field tomatoes, there are times when this premium disappears, as well as times when greenhouse tomatoes are actually priced below U.S. field tomatoes.

Having regard to the foregoing, the Tribunal is not convinced that there is sufficient evidence on the record to establish that there is a causal connection between the prices of U.S. imports and those of the domestic industry. Nor is it convinced that the domestic industry, "but for the dumping," would have done materially better than it did over the past few years. In addition, the domestic industry's decision to terminate its participation in the Tribunal's proceedings clearly detracts from the probative value and the persuasiveness of the domestic industry's evidence and arguments.

### **Threat of Injury**

As to threat of injury, the Tribunal must determine, where no past injury has been found, if there is any evidence that discloses a change in circumstances which suggests that dumped imports might have a different effect in the future than they have had in the past. In this case, the Tribunal can see no such change in circumstances. Specifically, there is nothing to indicate any imminent major increase in U.S. fresh tomato plantings, production or shipments to Canada. Indeed, by all accounts, the North American fresh tomato market is a relatively stable market, and this is not likely to change in the near future.

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5. Some additional information on growers was filed by the industry in its replies to interrogatories, as well as in its reply brief, to which parties opposite objected. The Tribunal ruled that this information had not been properly filed and would be given the weight that it deserves. The Tribunal gives little weight to this information. The Tribunal further notes the concerns expressed by counsel regarding the overall completeness of the CTTA's responses to the U.S. growers' requests for information.

## CONCLUSION

The Tribunal finds that the dumping in Canada of fresh tomatoes, originating in or exported from the United States of America, excluding tomatoes for processing, has not caused material injury or retardation<sup>6</sup> and is not threatening to cause material injury to the domestic industry.

Patricia M. Close

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6. Retardation is the inability of a domestic industry to establish itself. There is no such issue in this case.