

Ottawa, Thursday, February 9, 1995

Inquiry No.: NQ-94-001

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

**FRESH, WHOLE, DELICIOUS, RED DELICIOUS AND
GOLDEN DELICIOUS APPLES, ORIGINATING IN OR EXPORTED
FROM THE UNITED STATES OF AMERICA**

FINDING

The Canadian International Trade Tribunal, under the provisions of section 42 of the *Special Import Measures Act*, has conducted an inquiry following the issuance by the Deputy Minister of National Revenue of a preliminary determination of dumping dated October 12, 1994, and of a final determination of dumping dated January 6, 1995, respecting the importation into Canada of fresh, whole, Delicious, Red Delicious and Golden Delicious apples, originating in or exported from the United States of America, excluding fresh, whole, Delicious, Red Delicious and Golden Delicious apples imported under the authority of a ministerial exemption issued pursuant to the *Canada Agricultural Products Act* and the *Fresh Fruit and Vegetable Regulations*.

Pursuant to subsection 43(1) of the *Special Import Measures Act*, the Canadian International Trade Tribunal hereby finds:

- 1) that the dumping in Canada of fresh, whole, Delicious and Red Delicious apples, originating in or exported from the United States of America, excluding fresh, whole, Delicious and Red Delicious apples imported under the authority of a ministerial exemption issued pursuant to the *Canada Agricultural Products Act* and the *Fresh Fruit and Vegetable Regulations*, has caused, is causing and is likely to cause material injury to the production in Canada of like goods, excluding the period from July 1 to September 30 in each calendar year; and

- 2) that the dumping in Canada of fresh, whole, Golden Delicious apples, originating in or exported from the United States of America, has not caused, is not causing and is not likely to cause material injury to the production in Canada of like goods.

Anthony T. Eyton

Anthony T. Eyton
Presiding Member

Robert C. Coates, Q.C.

Robert C. Coates, Q.C.
Member

Desmond Hallissey

Desmond Hallissey
Member

Michel P. Granger

Michel P. Granger
Secretary

The statement of reasons will be issued within 15 days.

Inquiry No.: NQ-94-001

Place of Hearing: Ottawa, Ontario
Dates of Hearing: January 9 to 14, 1995

Date of Finding: February 9, 1995

Tribunal Members: Anthony T. Eyton, Presiding Member
Robert C. Coates, Q.C., Member
Desmond Hallissey, Member

Director of Research: Marcel J.W. Brazeau
Research Manager: Rose Ritcey
Research Officer: Paule Couët

Economist: Simon Glance

Statistical Officer: Robert Larose

Counsel for the Tribunal: John L. Syme
Shelley Rowe

Registration and Distribution Officer: Pierrette Hébert

Participants:

Margaret L. Eriksson
Greg A. Tereposky
Jacqueline L. Ott
for Canadian Horticultural Council

(Organization representing domestic growers)

Richard S. Gottlieb
Darrel H. Pearson
Peter W. Collins
for Northwest Horticultural Council

(Organization representing Washington growers/exporters)



Ottawa, Friday, February 24, 1995

Inquiry No.: NQ-94-001

**FRESH, WHOLE, DELICIOUS, RED DELICIOUS AND
GOLDEN DELICIOUS APPLES, ORIGINATING IN OR EXPORTED
FROM THE UNITED STATES OF AMERICA**

Special Import Measures Act - Whether the dumping of the above-mentioned goods has caused, is causing or is likely to cause material injury to the production in Canada of like goods.

DECISION: The Canadian International Trade Tribunal hereby finds that the dumping in Canada of fresh, whole, Delicious and Red Delicious apples, originating in or exported from the United States of America, excluding fresh, whole, Delicious and Red Delicious apples imported under the authority of a ministerial exemption issued pursuant to the *Canada Agricultural Products Act* and the *Fresh Fruit and Vegetable Regulations*, has caused, is causing and is likely to cause material injury to the production in Canada of like goods, excluding the period from July 1 to September 30 in each calendar year; and that the dumping in Canada of fresh, whole, Golden Delicious apples, originating in or exported from the United States of America, has not caused, is not causing and is not likely to cause material injury to the production in Canada of like goods.

Place of Hearing:	Ottawa, Ontario
Dates of Hearing:	January 9 to 14, 1995
Date of Finding:	February 9, 1995
Date of Reasons:	February 24, 1995
Tribunal Members:	Anthony T. Eyton, Presiding Member Robert C. Coates, Q.C., Member Desmond Hallissey, Member
Director of Research:	Marcel J.W. Brazeau
Research Manager:	Rose Ritcey
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(Organization representing domestic growers)

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Peter W. Collins
for Northwest Horticultural Council

(Organization representing Washington growers/exporters)

Witnesses:

Herb Williamson
Market Development Manager
Ontario Apple Marketing Commission

Robert W. Anderson
Tax Consultant

Martin Linder
Former Secretary Treasurer
B.C. Tree Fruits Limited

Kenneth M. Porteous
Lingwood Farms Ltd.

Bryan Hardman
Hardman Orchards

Penny Gambell
Commissioner
Provincial Agricultural Land Commission
Province of British Columbia

David Hobson
President
British Columbia Fruit Growers' Association

Errol McKibbin
Economist
Policy & Programs Division
Ministry of Agriculture and Food
Province of Ontario

Crosby Mitchell
Secretary/Statistician
Ontario Apple Marketing Commission

Vince Badame
Director, Produce Procurement
National Grocers Co. Ltd.

Joey Nicastro
Produce Buyer
Morris Brown & Sons Company Limited

G.H. (Greg) Gauthier
General Sales Manager
B.C. Tree Fruits Limited

John Brayiannis
Eastern Canadian Sales Manager
B.C. Tree Fruits Limited

Kraig R. Naasz
Vice-President
Northwest Horticultural Council

Mike Hamblen
Director of Marketing
Stemilt Growers Inc.

Steven L. Lutz
President/CEO
Washington Apple Commission

Address all communications to:

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



Ottawa, Friday, February 24, 1995

Inquiry No.: NQ-94-001

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

**FRESH, WHOLE, DELICIOUS, RED DELICIOUS AND
GOLDEN DELICIOUS APPLES, ORIGINATING IN OR EXPORTED
FROM THE UNITED STATES OF AMERICA**

TRIBUNAL: ANTHONY T. EYTON, Presiding Member
ROBERT C. COATES, Q.C., Member
DESMOND HALLISSEY, Member

STATEMENT OF REASONS

CONDUCT OF THE INQUIRY

The Canadian International Trade Tribunal (the Tribunal), under the provisions of section 42 of the *Special Import Measures Act*¹ (SIMA), has conducted an inquiry following the issuance by the Deputy Minister of National Revenue (the Deputy Minister) of a preliminary determination of dumping² dated October 12, 1994, respecting the importation into Canada of fresh, whole, Delicious, Red Delicious and Golden Delicious apples, originating in or exported from the United States of America, excluding fresh, whole, Delicious, Red Delicious and Golden Delicious apples imported under the authority of a ministerial exemption issued pursuant to the *Canada Agricultural Products Act*³ and the *Fresh Fruit and Vegetable Regulations*.⁴ On January 6, 1995, the Deputy Minister made a final determination of dumping⁵ respecting the subject goods.

On October 14, 1994, the Tribunal issued a notice of commencement of inquiry.⁶ As part of the inquiry, the Tribunal sent detailed questionnaires to agencies for Canadian producers and to purchasers/importers of the subject goods, requesting production, financial, import and market information, as well as other information, covering the crop years 1991-92 to 1993-94. From the replies to the questionnaires and other sources, the Tribunal's research staff prepared public and protected pre-hearing staff reports covering those crop years.

1. R.S.C. 1985, c. S-15.
2. *Canada Gazette* Part I, Vol. 128, No. 44, October 29, 1994, at 4312.
3. R.S.C. 1985, c. 20 (4th Supp.).
4. C.R.C. 1978, c. 285.
5. *Supra*, note 2, Vol. 129, No. 3, January 21, 1995, at 132.
6. *Supra*, note 2, No. 43, October 22, 1994, at 4271.

The record of this inquiry consists of all Tribunal exhibits, including the public and protected replies to questionnaires and all exhibits filed by the parties throughout the inquiry, as well as the transcript of all proceedings. All public exhibits were made available to the parties. Protected exhibits were made available only to independent counsel who had filed a declaration and undertaking with the Tribunal.

Public and *in camera* hearings were held in Ottawa, Ontario, from January 9 to 14, 1995. The organization representing domestic growers, the Canadian Horticultural Council (CHC), and the organization representing Washington growers/exporters, the Northwest Horticultural Council (NHC), were represented by counsel at the hearing.

On February 9, 1995, the Tribunal issued a finding that the dumping in Canada of fresh, whole, Delicious and Red Delicious apples, originating in or exported from the United States of America, excluding fresh, whole, Delicious and Red Delicious apples imported under the authority of a ministerial exemption issued pursuant to the *Canada Agricultural Products Act* and the *Fresh Fruit and Vegetable Regulations*, has caused, is causing and is likely to cause material injury to the production in Canada of like goods, excluding the period from July 1 to September 30 in each calendar year; and that the dumping in Canada of fresh, whole, Golden Delicious apples, originating in or exported from the United States of America, has not caused, is not causing and is not likely to cause material injury to the production in Canada of like goods.

PRODUCT

The subject goods are defined by the Deputy Minister as fresh, whole, Delicious, Red Delicious and Golden Delicious apples, originating in or exported from the United States of America, excluding fresh, whole, Delicious, Red Delicious and Golden Delicious apples imported under the authority of a ministerial exemption issued pursuant to the *Canada Agricultural Products Act* and the *Fresh Fruit and Vegetable Regulations*. Ministerial exemptions are granted when there is a shortage in the domestic market and apples that do not meet minimum grade, labelling or packaging requirements must be imported for processing or repacking.

Red Delicious apples and Golden Delicious apples have an elongated shape, narrowing to a five-point base, and are bright red and yellow, respectively. Delicious apples, the older variety of apples from which Red Delicious apples were derived, continue to be harvested commercially from existing orchards, but they are being replaced by plantings of new Red Delicious strains.

In the past, in Canada, seedling rootstocks were used extensively, producing large or standard trees that could reach 6 m in height and 10 m in width. These trees matured slowly, bearing fruit in 10 to 12 years. Since the mid-1980s, however, Canadian apple growers have gradually begun to replace standard apple trees with smaller trees grown from clonal rootstocks. These smaller trees are referred to as "dwarf trees." Dwarf trees begin to bear apples in commercial quantities five to six years after planting. Because of their shorter branches, dwarf trees lend themselves to denser planting than do large trees, and apples can be picked more easily. The resulting low and continuous tree surface in dwarf tree orchards facilitates spraying, pruning and picking, all of which permit apple growers to improve efficiency and to increase the proportion of high-quality apples.

A substantial labour force is required to pick the apples when they are in their prime to optimize the desirable characteristics of the apples and to maximize their storage life. The contents of the individual picking bags are put into large storage bins located at various points throughout the orchard, which are

subsequently transported to a central assembly point, then hauled to packing houses. Mechanical harvesting, wherein a clamp grasps the tree trunk and shakes the apples off the tree, sometimes replaces hand-picking. However, because apples harvested by this method suffer extensive bruising, they are normally processed into juice or applesauce.

After being transported to packing houses, apples are either packed for immediate sale or, more commonly, put into storage. The better quality apples are generally put into controlled atmosphere (CA) storage, for sale later in the marketing season. In cold storage, apples are cooled to approximately 5°C to retard the maturation process. Apples can be kept successfully in cold storage for three to seven months, but the quality of the fruit deteriorates with time. In CA storage, a large part of the oxygen is removed from the air in the storage room, which further slows the maturation process.⁷ After apples are placed in a CA storage room, the room remains airtight until the apples are removed. Apples must remain in CA storage for 90 days before they can be labelled as “CA storage.” It is possible to successfully store apples in CA storage for up to 12 months.

Several approaches are used by packing houses to wash, size, grade and pack apples. In one typical approach, apples are washed and air dried before being sprayed with a thin coating of edible wax to improve their appearance and increase their shelf life. Next, the apples move over a small fruit eliminator, through a singulator and colour sorter and onto a sorting table, where they are sorted by grade. Sorting by size is done by weighing each apple. The graded and sized apples are then either packed in cartons⁸ or bags or placed loose in bins and put back into cold storage.

Red Delicious apples and Golden Delicious apples are graded under the *Canada Agricultural Products Act* as Canada Extra Fancy, Canada Fancy and Canada Commercial. British Columbia also has regulations that provide for a B.C. Extra Fancy grade for Red Delicious apples. Similarly, in the United States, Red Delicious apples and Golden Delicious apples are graded as U.S. Extra Fancy and U.S. Fancy, with the state of Washington having a Washington premium Extra Fancy grade, a Washington Extra Fancy grade and a Washington Fancy grade. B.C. Extra Fancy and Washington Extra Fancy are perceived as being higher-quality grades than Canada Extra Fancy and U.S. Extra Fancy, respectively, and generally command higher prices in the marketplace. The grading standards in both Canada and the United States are based on uniformity of size and shape, minimum and maximum diameters, colour, maturity, cleanliness, and freedom from disease, damage, injury and other defects. Apples are also pressure tested for firmness to establish internal quality. Typically, graded apples have a minimum diameter of 5.7 cm. Acidity, starch and sugar content are factors that affect the internal quality of apples.

Weather plays a major role in determining the size and quality of a crop in any given year. Frost, hail or drought can result in high cull rates and affect the quality of marketable apples on the fresh market. Hot, dry weather can push a crop ahead of normal harvest. Cool weather at bloom time can result in a softer, lower-quality fruit and lower pack-out. At harvest time, cool nights and clear days may help colour and maturity. Growers also have to contend with diseases of various kinds which can affect the quantity and quality of apples harvested. These factors ultimately influence prices in the marketplace.

7. Low-oxygen storage, a third method of storage, is a modified version of the CA storage method. It involves the further reduction of oxygen levels to approximately 1 percent.

8. In the industry, a carton represents 42 lbs.

DOMESTIC INDUSTRY

For the crop year 1993-94, total domestic apple production (all varieties) was approximately 26 million cartons. The McIntosh apple is the most popular variety of apple grown in Canada and accounts for some 40 percent of total apple production. Red Delicious apples and Golden Delicious apples together account for approximately 20 percent of total domestic apple production. Other popular varieties of apples grown in Canada include Spartan, Cortland and Spy. There are more than 1,000 apple growers in British Columbia and approximately 900 in Ontario.

Red Delicious apples and Golden Delicious apples are grown mostly in British Columbia and Ontario, with British Columbia traditionally being the dominant producer. During the period of examination by the Tribunal, British Columbia produced between 54 and 65 percent of total domestic production of Red Delicious apples and between 71 and 81 percent of Golden Delicious apples. Ontario produced between 30 and 40 percent of total domestic production of Red Delicious apples and between 18 and 29 percent of Golden Delicious apples.⁹ Red Delicious apples and Golden Delicious apples are relatively more important apple varieties in British Columbia than they are in Ontario. In British Columbia, Red Delicious apples and Golden Delicious apples represent approximately 33 and 10 percent,¹⁰ respectively, of total provincial apple production, while in Ontario, Red Delicious apples represent 15 percent of total provincial apple production and Golden Delicious apples represent 2 percent.¹¹ Small quantities of Red Delicious apples are also grown in Nova Scotia, New Brunswick and Quebec.

In British Columbia, apple production is centred in the interior of the province, in the Okanagan, Similkameen and Creston valleys. The principal organization for apple growers in the province is the British Columbia Fruit Growers' Association (BCFGA), which currently represents about 85 percent of growers in British Columbia. B.C. growers produce all grades of Red Delicious apples, from B.C. Extra Fancy to Canada Fancy and Canada Commercial, while they produce Golden Delicious apples in Canada Extra Fancy, Canada Fancy and Canada Commercial grades. In excess of 90 percent of the fresh Red Delicious apple and Golden Delicious apple crops are packed in trays or cell cartons in up to 14 sizes. The orchard size is generally smaller in British Columbia than it is in the state of Washington and in Ontario. Orchard labour is primarily local, with a number of seasonal pickers coming from other provinces.

In Ontario, apple growing is concentrated in the southern part of the province and along the Great Lakes. All growers with orchards of more than 2.5 acres are required to be registered with the Ontario Apple Marketing Commission (OAMC), which is authorized under the Ontario *Farm Products Marketing Act*¹² to organize the marketing of apples in Ontario. Growers pay annual fees to fund the activities of the OAMC, and there are currently more than 900 licensed commercial apple growers. The OAMC establishes minimum prices for sales of provincially grown Canada Fancy and lesser grades of Red Delicious apples and Golden Delicious apples to packers and retailers within the province. Prices are set for three sizes of polyethylene bags (3 lbs, 5 lbs and 10 lbs), as well as for loose apples. The OAMC does not set a minimum price for count size Red Delicious apples sold in tray packs, nor has it set prices for Golden Delicious apples until this year. In Ontario, approximately 15 percent of the Red Delicious apples

9. Public Pre-Hearing Staff Report, December 7, 1994, Tribunal Exhibit NQ-94-001-6, Administrative Record, Vol. 1B at 0.16.

10. Tribunal Exhibit NQ-94-001-11.3, Administrative Record, Vol. 3.1 at 7-9.

11. Tribunal Exhibit NQ-94-001-11.1, Administrative Record, Vol. 3 at 75-78.

12. R.S.O. 1990, c. F-9.

sold in the fresh market are in tray packs. The OAMC also licenses approximately 150 packers of fresh apples, some of which are also growers, and the majority of which are privately owned.

Apples are grown in Ontario in basically the same way as they are in British Columbia; however, Ontario growers depend less on irrigation than do their counterparts in British Columbia. Growers may sell their apples destined for the fresh market to several packers. Growers do a large portion of the grading in the field before sending their crops to packing houses. A large portion of the seasonal orchard labour comes from Mexico and from offshore countries.

MARKETING AND DISTRIBUTION

The most common distribution chain for domestic Red Delicious apples and Golden Delicious apples is for a grower to sell directly to a packing house, which then markets the apples to wholesalers or grocery retailers. According to the CHC, approximately three quarters of the domestic apple crop is distributed in this manner.¹³ Some apples are sold directly to retailers or to consumers by the growers, particularly in Eastern Canada.

The majority of the 1993-94 Red Delicious apple and Golden Delicious apple crops in British Columbia were contracted to B.C. Tree Fruits Limited (BCTFL), a limited company owned by the BCFGA. BCTFL is responsible for marketing apples and other fruits in the fresh and processing markets, in both Canada and offshore countries. Approximately 15 percent of B.C. Red Delicious apples are sold within the province and 35 percent are shipped to other provinces. The balance of Red Delicious apple shipments is destined for export markets. By contrast, 90 percent of Golden Delicious apples produced in British Columbia are sold in Canada.¹⁴

There are five major packing houses in British Columbia, co-operatively owned by growers, of which four contract through BCTFL. These four packing houses are marketing about 70 percent of the B.C. Red Delicious apple and Golden Delicious apple production during the 1994-95 crop year.¹⁵

The marketing of Ontario apples is done by licensed packers. The majority of Ontario Red Delicious apples are packed and marketed in polyethylene bags which may contain a mixture of sizes. Bagged apples are generally of smaller size and of Fancy grade. Most Ontario Golden Delicious apples are also sold in polyethylene bags and are of a lower quality than B.C. and Washington Golden Delicious apples because of russetting due to climatic conditions.¹⁶

Importers of Red Delicious apples and Golden Delicious apples are mostly wholesalers that handle several varieties of apples and different types of fruits and large grocery chains which do their own purchasing. Importers usually purchase Red Delicious apples and Golden Delicious apples directly from shippers/packing houses. Retail chains will occasionally use the services of a broker. Wholesalers sell to smaller chains, independents and specialty stores.

13. Written Submission of the Canadian Horticultural Council, Manufacturer's Exhibit A-1 at 10, Administrative Record, Vol. 9.

14. Public Statement of Martin Linder, Manufacturer's Exhibit A-2, par. 10, Administrative Record, Vol. 9.

15. Transcript of Public Hearing, Vol. 3, January 11, 1995, at 732.

16. Transcript of Public Hearing, Vol. 2, January 10, 1995, at 378.

RESULTS OF THE DEPUTY MINISTER'S INVESTIGATION

In the final determination of dumping, the Deputy Minister found that, during the period of investigation from February 8 to May 31, 1994, 61 percent of Red Delicious apples had been dumped at a weighted average margin of 28 percent, while 59 percent of Golden Delicious apples had been dumped at a weighted average margin of 18 percent.¹⁷ Over 150 exporters and 165 importers of Red Delicious apples and Golden Delicious apples were identified at the time of initiation of the Deputy Minister's investigation. Table 1 summarizes the margins of dumping found by the Deputy Minister for the different grades of Red Delicious apples and Golden Delicious apples.

Table 1		
RESULTS OF THE DEPUTY MINISTER'S INVESTIGATION		
Variety/Grade	Volume of Imports Dumped (%)	Weighted Average Margin of Dumping (%)
Red Delicious		
Normal Value for Assessment of Duty: US\$12.99		
Washington Extra Fancy	49.93	21.51
U.S. Extra Fancy	77.69	30.85
Washington Fancy	99.93	45.01
U.S. Fancy	99.28	40.39
Grade Not Specified ¹	58.43	27.42
Golden Delicious		
Normal Value for Assessment of Duty: US\$13.67		
Washington Extra Fancy	60.68	17.82
U.S. Extra Fancy	50.94	19.79
Washington Fancy	26.28	9.54
Grade Not Specified ¹	57.76	22.83
<hr/> Note: 1. Normal value for Washington Extra Fancy was used.		
Source: Department of National Revenue, Final Determination of Dumping, January 6, 1995, <u>Statement of Reasons</u> , Tribunal Exhibit NQ-94-001-4, Administrative Record, Vol. 1 at 125-27.		

17. Department of National Revenue, Final Determination of Dumping, January 6, 1995, Statement of Reasons, Tribunal Exhibit NQ-94-001-4, Administrative Record, Vol. 1 at 124.

SUMMARY OF POSITION OF PARTIES

Canadian Horticultural Council

In argument, counsel for the CHC addressed the issues of like goods, major proportion, principal cause and material injury. Counsel contended that Canadian growers of Red Delicious apples and Golden Delicious apples, as price-takers in their own domestic market, have suffered and are likely to suffer material injury in the form of price suppression, reduced grower returns, lost sales and lost market shares and that the dumping of the subject goods from the United States is the cause of such injury.

With respect to the issue of like goods, counsel for the CHC submitted that it is not disputed that domestic Red Delicious apples and Golden Delicious apples have the same uses and characteristics and that they are identical to U.S. Red Delicious apples and Golden Delicious apples. In discussing whether Red Delicious apples and Golden Delicious apples are, themselves, like goods, counsel noted that, in Inquiry No. CIT-3-88¹⁸ and Review No. RR-93-002,¹⁹ the Tribunal treated Red Delicious apples and Golden Delicious apples as like goods. Counsel acknowledged that Red Delicious apples and Golden Delicious apples are not usually directly substitutable one for the other. Counsel suggested that the Tribunal should not base its determination of like goods on the significant price discrepancy between Red Delicious apples and Golden Delicious apples in 1993-94, which, they submitted, was an aberration. Counsel also submitted that the Tribunal should not distinguish between methods of storage or grades within each variety in its determination of like goods.

In addressing the issue of whether the requirements of Article 4 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade*²⁰ (the GATT Anti-Dumping Code) had been met, counsel for the CHC submitted that B.C. growers, by themselves, constitute a “major proportion” of the domestic industry, as they produce in excess of 50 percent of Canadian Red Delicious apples and Golden Delicious apples.

With respect to the standard of causation to be applied by the Tribunal, counsel for the CHC submitted that the GATT Anti-Dumping Code does not require that the dumping be a principal cause of material injury. However, counsel further submitted that, for the purpose of this inquiry, the dumping was the principal cause of the material injury.

Counsel for the CHC contended that the landed price of Red Delicious apples and Golden Delicious apples produced in the state of Washington is the major factor establishing Red Delicious apple and Golden Delicious apple prices in Canada and that Canadian growers must set their prices in line with the landed price of comparable grades and sizes of Washington apples. Counsel submitted that, in three previous

18. *Fresh, Whole, Delicious, Red Delicious and Golden Delicious Apples, Originating in or Exported from the United States of America*, Finding, February 3, 1989, Statement of Reasons, February 20, 1989.

19. *Fresh, Whole, Delicious, Red Delicious and Golden Delicious Apples, Originating in or Exported from the United States of America, Excluding Delicious, Red Delicious and Golden Delicious Apples Imported in Non-Standard Containers for Processing*, Order and Statement of Reasons, February 7, 1994.

20. Geneva, March 1980, GATT BISD, 26th Supp. at 171.

findings which dealt with agricultural products,²¹ the Tribunal and its predecessors recognized that Canadian prices for certain agricultural products may be based on the Washington landed price in Canada of those same products. Given the relationship between Washington and Canadian prices, counsel invited the Tribunal to conclude that, as a consequence of the dumping of Washington Red Delicious apples and Golden Delicious apples at significant margins, prices of comparable Canadian Red Delicious apples and Golden Delicious apples were significantly lower than they otherwise would have been. Counsel argued that the lower prices of these higher-grade apples had a cascading effect on Canadian prices for all lower-grade apples and that, but for dumping, prices in the Canadian market would have been substantially higher.

Counsel for the CHC submitted that the evidence demonstrates that Canadian growers have suffered material injury in the form of price suppression, losses of approximately \$1.5 million, lost sales and lost market share as a result of the dumping of Red Delicious apples and Golden Delicious apples. Counsel submitted that, following the rescission of the 1989 finding, Red Delicious apples and Golden Delicious apples produced in the state of Washington were dumped in Canada, thereby causing prices of Canadian Red Delicious apples and Golden Delicious apples to drop by \$4/carton. Marketers had no choice but to drop prices of B.C. Red Delicious apples and Golden Delicious apples to match the landed price of comparable sizes and grades of U.S. imports of each variety. In Ontario, the drop in price forced growers out of the Red Delicious apple tray pack market and into the polyethylene bag market. Given that all other factors affecting the 1993-94 Red Delicious apple and Golden Delicious apple crops, such as weather, quality and size of the Canadian and U.S. crops, remained constant before and after the rescission of the 1989 finding, counsel submitted that the drop in price could only be attributed to the dumping of Washington Red Delicious apples and Golden Delicious apples.

Moreover, counsel for the CHC argued that, absent a material injury finding, there was a likelihood that Canadian growers of Red Delicious apples and Golden Delicious apples would suffer material injury, in the form of price depression, orchard decline, reduced market share, underutilization of equipment and facilities, decreased employment, capitalization of operating debt and perhaps the eventual elimination of the commercial apple industry. Counsel submitted that it is estimated that Washington production of Golden Delicious apples will likely increase from the current level of 16.5 million to 18.0 million cartons in 1995-96. Given their susceptibility to bruising and the low level of exports outside of North America, counsel suggested that the additional production of Golden Delicious apples will be forced into the North American market, further depressing prices and grower returns. Counsel submitted that similar factors existed with respect to Washington Red Delicious apples.

Counsel for the CHC submitted that a number of factors, such as tough phytosanitary requirements, liberalization of trade through international agreements, including the reduction or elimination of tariffs, and economic and political instability, exist which raise doubt concerning the ability of the NHC to establish new

21. See *Whole Potatoes with Netted or Russeted Skin, Excluding Seed Potatoes, Originating in or Exported from the United States of America, for Use or Consumption in the Province of British Columbia*, Anti-dumping Tribunal, Inquiry No. ADT-4-84, Finding and Statement of Reasons, June 4, 1984; *Fresh, Whole, Yellow Onions, Originating in or Exported from the United States of America, for Use or Consumption in the Province of British Columbia*, Canadian Import Tribunal, Inquiry No. CIT-1-87, Finding and Statement of Reasons, April 30, 1987; and *Fresh, Whole, Delicious, Red Delicious and Golden Delicious Apples, Originating in or Exported from the United States of America*, Canadian International Trade Tribunal, Inquiry No. CIT-3-88, Finding, February 3, 1989, Statement of Reasons, February 20, 1989.

export markets for Red Delicious apples and Golden Delicious apples in order to offset increased production levels and negligible growth in U.S. demand.

Counsel for the CHC submitted that several other factors considered throughout the hearing were not a cause of the dramatic decline in Canadian prices. With respect to the issue of BCTFL's profitability, counsel submitted that, when prices go down, marketing agencies and packing houses cover all of their expenses first, and any reduction in prices realized is passed on directly to the grower, which is at the end of the chain. In counsel's view, there is no causal link between the volume of apples in regular storage and the dramatic decline in prices, since regular storage apples were not being offered in substantial quantities in the market during the period of investigation established by the Deputy Minister.

Finally, counsel for the CHC submitted that the Tribunal should not grant product exclusions, such as for premium grades of either Red Delicious apples or Golden Delicious apples or bagged apples, source exclusions, such as New York and Michigan, or a region exclusion, such as for imports into Ontario.

Northwest Horticultural Council

Counsel for the NHC submitted that, in the present inquiry, the CHC had relied on the same facts and advanced the same arguments in support of its position as it had in Review No. RR-93-002. Counsel suggested that the present inquiry is, itself, merely a disguised review or appeal of the Tribunal's order in Review No. RR-93-002. In reviewing the Statement of Reasons in that review, counsel suggested that the Tribunal anticipated that, following the rescission of the 1989 finding, certain categories of "delicious apples" might be offered in British Columbia at prices below normal values, but stated that it was not convinced that the price differential, assuming there was dumping, would be such as to cause material injury to the production in Canada of like goods. Counsel submitted that the Tribunal's prediction that imports of lower grades from the United States would increase following the rescission of the 1989 finding was correct. However, they argued that this increase did not cause Canadian growers to lose market share, as these lower-grade apples were sold through outlets which, had these lower-grade apples not been available, may not have sold apples at all.

Counsel for the NHC also pointed out that B.C. growers had experienced poor financial returns in the five years preceding the rescission of the 1989 finding, notwithstanding the fact that anti-dumping duties were being levied against U.S. Red Delicious apples and Golden Delicious apples during that period.

Counsel for the NHC suggested that the Tribunal should consider the fact that the normal values found by the Deputy Minister are substantially lower than they were prior to the rescission of the 1989 finding. Counsel argued that the decline in price after the rescission of the 1989 finding accounted for most of the difference between the old normal values and the new normal values. Further, counsel directed the Tribunal's attention to the fact that, in the final determination of dumping, the Deputy Minister found that Washington Golden Delicious (excluding Washington Fancy grade) apples were sold at a profit and that there were sales of Washington Extra Fancy Red Delicious apples also made at a profit.

Counsel for the NHC argued that the dumping found by the Deputy Minister was "technical dumping." Counsel suggested that, since the normal values were based on one average selling price for all sizes and qualities of apples of a particular grade, it was an arithmetic certainty that, when the average selling prices were compared to the daily export prices, about half of the apples would be found to have been dumped.

Counsel for the NHC invited the Tribunal to assess whether any material injury was suffered by Canadian growers based on the difference between the average price and the normal value for Washington Extra Fancy Red Delicious apples, which they suggested is approximately 2 percent. Counsel submitted that a decrease of 2 percent in the price of B.C. Extra Fancy Red Delicious apples and, accordingly, in the price of all other grades of Canadian Red Delicious apples and Golden Delicious apples is not material.

The evidence of material injury provided by the CHC was, in the view of counsel for the NHC, flawed and unrelated to dumping. First, counsel submitted that BCTFL's cost of production figure does not take into account different yields of Red Delicious apples and Golden Delicious apples. Second, with respect to the alleged loss of \$1.5 million, counsel submitted that this figure fails to take into account differences in volume, quality, inventory levels, grade pack-out and sizes sold between the two periods examined to derive the figure.

Counsel for the NHC submitted that a finding that there is a causal link between the dumping and the injury requires more than a determination of dumping and the presence of injury. In counsel's view, if the injury in this inquiry consists of price reductions, which counsel stated had not been demonstrated, such reductions were due to the rescission of the 1989 finding and the removal of the floor price, not to dumping. Counsel submitted that dumping was found to exist from February 8, 1994, onward and could only apply to the future.

Counsel for the NHC argued that the evidence presented by the CHC with respect to pricing and the product mix actually being offered for sale is inadequate and unreliable. In particular, counsel pointed out that the CHC did not produce actual prices for sales of specific apples to specific customers to show price suppression, loss of sales or other indications of material injury. Moreover, counsel submitted that there is no evidence of direct competition between the CHC and the NHC in relation to specific customers. Counsel observed that the only direct evidence that the Tribunal heard concerning prices came from the Tribunal's witnesses who stated that B.C. prices were considerably lower than Washington prices. Counsel referred to a BCTFL master price list²² and submitted that the prices on that list did not reflect actual selling prices, but that they were merely points of departure for subsequent negotiations. Counsel noted that there are other price lists and that actual prices are negotiated on a case-by-case basis. Moreover, the CHC did not provide details regarding promotions or other benefits to establish its actual sale prices to customers.

Counsel for the NHC suggested that the alleged overnight price reduction in February 1994 never actually occurred. Rather, counsel suggested that there was a reduction in the price of regular storage apples, which, if not sold by the end of February, would probably have been unsuitable for anything but processing. In counsel's view, adverse weather conditions and the overhanging unsold inventory of both CA and regular storage apples had a depressing effect on prices. In counsel's view, the CHC panicked when it was informed of the rescission of the 1989 finding, as it knew that it had excessive inventory which it had been selling at inflated prices.

With respect to future injury, counsel for the NHC submitted that the imposition of provisional anti-dumping duties has not restored Canadian apple growers to financial good health, as is indicated by the current depressed prices of both tray pack and polyethylene-bagged Red Delicious apples and

22. Manufacturer's Exhibit A-60 (protected), Administrative Record, Vol. 10.1. The public description of this exhibit states that it is a list of BCTFL prices for the period from September 3, 1991, to January 3, 1995, by product and by market region.

Golden Delicious apples as compared to previous years. Moreover, counsel submitted that the NHC is aggressively expanding its existing export markets and seeking new markets and has effectively increased demand for its Red Delicious apples and Golden Delicious apples. Counsel submitted that the evidence indicates that the state of Washington's production of Red Delicious apples has reached a plateau and that there may be a small increase in production of Golden Delicious apples.

Counsel for the NHC further submitted that the decline in prices from February 7, 1994, onward may be explained by the "W" effect, where prices start out high at the beginning of the season and decline, then rise again when CA storage apples are introduced, decline until the end of the marketing season and then rise again.

Based on the foregoing arguments, counsel for the NHC submitted that the Tribunal should make a finding of no past, present or future injury in respect of Red Delicious apples and of Golden Delicious apples.

ECONOMIC INDICATORS

Table 2 summarizes key economic indicators pertaining to Red Delicious apples.

Table 2						
KEY ECONOMIC INDICATORS						
RED DELICIOUS APPLES						
	1991-92	1992-93	1993-94	1994-95¹	Jan.-July 1993	Jan.-July 1994
Total Domestic Production						
(000 cartons)						
British Columbia	2,406	2,372	2,823	3,143		
Ontario	1,802	1,732	1,285	1,647		
Other Provinces	<u>224</u>	<u>274</u>	<u>224</u>	<u>N/A</u>		
Total Canada	4,432	4,378	4,332	4,790		
Fresh Domestic Production						
(000 cartons)						
British Columbia	1,867	1,905	1,878			
Ontario	1,665	864	1,036			
Other Provinces	<u>134</u>	<u>164</u>	<u>134</u>			
Total Canada	3,666	2,933	3,048			
Exports (000 cartons)						
British Columbia	908	931	812			
Ontario	164	217	101			
Apparent Imports (000 cartons)	1,149	865	1,066		442	800
Market (000 cartons)	3,733	2,633	3,198			
Market Share (%)						
British Columbia	26	37	33			
Ontario	40	25	29			
Other provinces	3	6	4			
Imports	31	33	33			
Import Price (\$/carton)	20.17	20.07	17.84		19.96	16.22
Nov. 1 Storage Holdings						
British Columbia	2,081	1,825	2,630	1,817		
Ontario	794	776	460	731		
Grower Returns² (¢/lb.)						
British Columbia	20.88	20.85	13.66			
Ontario	15.49	16.29	18.37			
Notes:						
Figures may not add up due to rounding.						
N/A = Not available.						
1. Data are estimated.						
2. Grower returns is the amount received by the grower, including all bonuses and premiums.						
Source: <u>Public Pre-Hearing Staff Report</u> , December 7, 1994, Tribunal Exhibit NQ-94-001-6, Administrative Record, Vol. 1B; Tribunal Exhibit NQ-94-001-32B, Administrative Record, Vol. 1B at 64.5; and Tribunal Exhibit NQ-94-001-11.3, Administrative Record, Vol. 3.1 at 7-9.						

Total domestic production²³ of Red Delicious apples has remained stable during the last three crop years, but is expected to rise by about 10 percent in 1994-95. Domestic production for the fresh market declined by 20 percent in 1992-93 because of a large decline in the proportion of Ontario Red Delicious apples going to the fresh market due to poor quality caused by adverse weather conditions. Also, in 1993-94, about one third of the B.C. crop was culled largely because of hail damage.

The United States, mostly the state of Washington, accounts for virtually all imports of Red Delicious apples into Canada. In 1992-93, the volume of imports declined by about 25 percent, before increasing again by 23 percent in 1993-94. During the period from January to July 1994, imports of Red Delicious apples were 80 percent higher than they were during the same period in 1993. The average annual import prices of Red Delicious apples remained unchanged from 1991-92 to 1992-93, but fell by 11 percent in 1993-94. In the first seven months of 1994, the average price of imports dropped by 19 percent compared to the same period in 1993.

The size of the apparent market for Red Delicious apples declined by 29 percent in 1992-93 before recovering by 21 percent in the following year. Imports increased their share of the market by 2 percentage points over the three years analysed.

On November 1, 1993, storage holdings were at a four-year high in British Columbia. They were at a four-year low on November 1, 1994. Ontario storage holdings have been fairly steady except for 1993-94.

In 1993-94, grower returns for Ontario sales of fresh Red Delicious apples were 18.4¢/lb., which was the largest amount received during the three-year period. By contrast, the returns in British Columbia remained virtually unchanged from 1991-92 to 1992-93, but fell more than 7.0¢/lb. in 1993-94.

23. Total domestic production includes apples for both the fresh and processing markets.

Table 3 summarizes key economic indicators pertaining to Golden Delicious apples.

Table 3						
KEY ECONOMIC INDICATORS GOLDEN DELICIOUS APPLES						
	1991-92	1992-93	1993-94	1994-95¹	Jan.-July 1993	Jan.-July 1994
Total Domestic Production (000 cartons)						
British Columbia	782	873	704	893		
Ontario	244	198	284	335		
Other Provinces	<u>N/A</u>	<u>N/A</u>	<u>N/A</u>	<u>N/A</u>		
Total Canada	1,026	1,071	988	1,228		
Fresh Domestic Production (000 cartons)						
British Columbia	576	672	487			
Ontario	239	178	208			
Other Provinces	<u>N/A</u>	<u>N/A</u>	<u>N/A</u>			
Total Canada	815	850	695			
Exports (000 cartons)						
British Columbia	29	22	49			
Ontario	7	13	3			
Apparent Imports (000 cartons)	658	644	752		422	450
Market (000 cartons)	1,436	1,458	1,396			
Market Share (%)						
British Columbia	38	45	31			
Ontario	16	11	15			
Other provinces	0	0	0			
Imports	46	44	54			
Import Price (\$/carton)	20.22	20.32	22.47		20.15	23.21
Nov. 1 Storage Holdings						
British Columbia	712	719	576	785		
Ontario	140	190	106	154		
Grower Returns² (¢/lb.)						
British Columbia	18.67	20.84	20.39			
Ontario	18.11	10.02	20.15			

Notes:
N/A = Not available.
1. Data are estimated.
2. Grower returns is the amount received by the grower, including all bonuses and premiums.

Source: Public Pre-Hearing Staff Report, December 7, 1994, Tribunal Exhibit NQ-94-001-6, Administrative Record, Vol. 1B; Tribunal Exhibit NQ-94-001-32B, Administrative Record, Vol. 1B at 64.6; and Tribunal Exhibit NQ-94-001-11.3, Administrative Record, Vol. 3.1 at 7-9.

As Table 3 indicates, total domestic production of Golden Delicious apples has remained fairly steady over the three-year period, but is expected to increase by 24 percent in 1994-95. Total production for fresh consumption declined significantly in 1993-94 because of hail damage in British Columbia.

The United States, again mostly the state of Washington, accounts for virtually all imports of Golden Delicious apples into Canada. In 1992-93, the volume of imports declined slightly and then increased by 17 percent in 1993-94. During the period from January to July 1994, the volume of imports of Golden Delicious apples was 7 percent higher than it was during the same period in 1993. The average annual import prices of Golden Delicious apples increased steadily over the three-year period. In the first seven months of 1994, the average price of imports increased by 15 percent compared to the same period in 1993, to reach more than \$23/carton.

The size of the apparent market for Golden Delicious apples remained steady over the three-year period. However, imports increased their share of the market by 10 percentage points in 1993-94, largely because of the smaller crop in British Columbia.

As of November 1, 1994, domestic storage holdings of Golden Delicious apples were at a four-year high because of the substantial increase in the size of the 1994-95 crop.

Grower returns were over 20¢/lb. in both producing provinces in 1993-94.

REASONS FOR DECISION

Pursuant to section 42 of SIMA, the Tribunal must determine whether the dumping of the subject goods, as found by the Deputy Minister, has caused, is causing or is likely to cause material injury to the production in Canada of like goods. In arriving at its decision, the Tribunal must first determine which goods constitute like goods to the subject goods. The Tribunal must then be satisfied that the domestic industry constitutes a major proportion of total domestic production of like goods. Finally, the Tribunal must determine whether the domestic industry has suffered, or is threatened with, material injury and whether there is a causal link between the material injury suffered and the dumping of the subject goods.

Counsel for the NHC have argued that this inquiry is a disguised review or appeal of the Tribunal's order in Review No. RR-93-002 and that the CHC has relied on the same facts and advanced the same arguments in support of its position as it had in that review. Pursuant to section 42 of SIMA, the Tribunal is required to inquire into whether the dumping of goods, to which the Deputy Minister's preliminary determination of dumping applies, has caused, is causing or is likely to cause material injury to the production in Canada of like goods. This inquiry was initiated following the issuance by the Deputy Minister of a preliminary determination of dumping dated October 12, 1994, in which it was found that there was dumping of fresh, whole, Delicious, Red Delicious and Golden Delicious apples, originating in or exported from the United States, during the period from February 8 to May 31, 1994.

The Tribunal acknowledges that the period of examination in this inquiry covers a broader period than that chosen by the Deputy Minister to make the preliminary determination of dumping and that the period of examination overlaps, in part, with the period under review in Review No. RR-93-002. The Tribunal notes that it is a well-established practice to choose a broader period of examination than that chosen by the Deputy Minister. This assists in providing the Tribunal with a more complete picture of the trends in the market for the subject goods. The Federal Court of Appeal, in *Japan Electrical Manufacturers*

Association v. Anti-dumping Tribunal,²⁴ recognized that the Anti-dumping Tribunal (the ADT) had the discretion to choose a period of examination different from that chosen by the Deputy Minister.

Like Goods

Before considering the question of injury to the domestic industry, the Tribunal must decide what Canadian-produced goods are like goods to the subject goods.

The present inquiry was initiated following receipt by the Tribunal of a preliminary determination of dumping made by the Deputy Minister, in which three varieties of the subject goods were listed, namely, Delicious, Red Delicious and Golden Delicious. However, for purposes of the investigation, the Deputy Minister included the Delicious variety, an older variety of Red Delicious apples, with the Red Delicious variety (Delicious and Red Delicious hereinafter referred to as Red Delicious). Accordingly, the preliminary and final determinations of dumping set out weighted average margins of dumping for Red Delicious apples and for Golden Delicious apples.

In *Noury Chemical Corporation and Minerals & Chemicals Ltd. v. Pennwalt of Canada Ltd.*,²⁵ the Federal Court of Appeal reviewed a material injury finding of the ADT. In making that finding, notwithstanding the fact that the Deputy Minister's preliminary determination of dumping had identified four separate classes of goods and provided margins of dumping for each class, the ADT considered the aggregate impact of the four classes of dumped subject goods on all like goods produced in Canada. In overturning the ADT's finding, the Federal Court of Appeal stated that the ADT had a duty to inquire into whether the dumping of each class of goods, for which separate margins of dumping had been provided, had caused, was causing or was likely to cause material injury to the production in Canada of goods that could be considered like goods in relation to each class.²⁶

In the present inquiry, the Tribunal sought pre-hearing submissions on whether Red Delicious apples and Golden Delicious apples should be divided into separate classes. In written submissions, counsel for both the CHC and the NHC submitted unequivocally that the Tribunal should treat the two varieties of apples as separate classes. In their submissions, counsel referred to, among other things, the fact that the Deputy Minister had provided separate margins of dumping for each class of apples and the differing uses and characteristics of each class of apples.

On the basis of the law as set out in *Noury Chemical* and the pre-hearing submissions of the parties, and notwithstanding apparent inconsistencies in the final argument of counsel for the CHC on this issue,²⁷ the Tribunal is of the view that it should make a separate determination of like goods with respect to Red Delicious apples and to Golden Delicious apples.

24. [1982] 2 F.C. 816 at 818-19.

25. [1982] 2 F.C. 283.

26. *Ibid.* at 285-86.

27. Transcript of Argument, January 14, 1995, at 33.

Subsection 2(1) of SIMA defines “like goods” as follows:

“like goods”, in relation to any other goods, means

(a) goods that are identical in all respects to other goods, or

(b) in the absence of any goods described in paragraph (a), goods the uses and other characteristics of which closely resemble those of the other goods.²⁸

In deciding what Canadian-produced goods are “like goods” to the subject Red Delicious apples, the Tribunal must consider all of the characteristics of the goods, including physical characteristics and market considerations.²⁹ The Tribunal must undertake that same analysis in respect of Golden Delicious apples.

In the Tribunal’s view, it is beyond dispute that Canadian Red Delicious apples are like goods to the subject Red Delicious apples. Canadian and U.S. Red Delicious apples of all grades and sizes and from regular and CA storage compete against each other in the marketplace, are generally substitutable for each other and are similar in terms of physical attributes.³⁰ The Tribunal is also satisfied that Canadian Golden Delicious apples are like goods to the subject Golden Delicious apples.³¹ However, there remains the question of whether there are other Canadian-produced goods which are “like” the subject Red Delicious apples or Golden Delicious apples.

With respect to market considerations, the evidence suggests that other varieties of apples, as well as other fruits, such as bananas and oranges, may, in some instances, serve as substitutes for Red Delicious apples and for Golden Delicious apples. However, the evidence also indicates that, if different fruits, including different varieties of apples, maintain price differentials, consumers will continue to purchase the same variety.³² Moreover, with respect to apples in particular, the evidence indicates that, in the view of consumers, all varieties are distinct and that consumers do prefer specific taste and firmness attributes provided by particular varieties.³³

The Tribunal notes that Red Delicious apples and Golden Delicious apples have some physical characteristics in common, for example, their elongated shape that narrows to a five-point base. However, they differ in terms of colour, skin, flesh and taste. Generally, Red Delicious apples have a thin, smooth skin and are crunchier than Golden Delicious apples; Golden Delicious apples have a tender thin skin that can be shiny, velvety or russeted and a flesh that is softer and more susceptible to bruising.³⁴ While both varieties are eating apples, Golden Delicious apples are also widely used in baking.³⁵ The Tribunal observes that other types of fruits, including other varieties of apples, have physical characteristics different from both Red Delicious apples and Golden Delicious apples.

28. In *Noury Chemical*, the Federal Court of Appeal stated that paragraphs (a) and (b) of the definition of “like goods” did not have to be read distinctively.

29. *Sarco Canada Limited v. Anti-dumping Tribunal*, [1979] 1 F.C. 247.

30. Transcript of Public Hearing, Vol. 1, January 9, 1995, at 216, and Vol. 3, January 11, 1995, at 536-37 and 604.

31. *Ibid.*

32. Transcript of Public Hearing, Vol. 1, January 9, 1995, at 230-32.

33. Transcript of Public Hearing, Vol. 3, January 11, 1995, at 549-51, 573, 632 and 635-36, and Vol. 5, January 13, 1995, at 1052-54.

34. Transcript of Public Hearing, Vol. 5, January 13, 1995, at 1024.

35. Transcript of Public Hearing, Vol. 3, January 11, 1995, at 574.

Based on the foregoing, the Tribunal is satisfied that, for the purpose of this inquiry, Canadian Red Delicious apples are “like goods” to the subject Red Delicious apples and that Canadian Golden Delicious apples are “like goods” to the subject Golden Delicious apples. Furthermore, Canadian Red Delicious apples and Golden Delicious apples can be differentiated from other varieties of apples and other types of fruits on the basis of market considerations and physical characteristics, such as shape, colour and lustre.

Domestic Industry

Pursuant to paragraph 42(3)(a) of SIMA, the Tribunal must take fully into account the provisions of paragraph 1 of Article 4 of the GATT Anti-Dumping Code, which defines the domestic industry as “the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products.”

The Tribunal finds that this requirement has been met for both Red Delicious apples and Golden Delicious apples. The CHC has, as its members, the producer organizations of each apple-producing province, namely, the BCFGa, the OAMC, the Fédération des producteurs de pommes du Québec, the Nova Scotia Fruit Growers’ Association and the New Brunswick Fruit Growers Association. The representatives of the BCFGa, its marketing arm, BCTFL, and the OAMC actively participated in the inquiry. The BCFGa and the OAMC account for over 95 percent of the production in Canada of Red Delicious apples and of Golden Delicious apples and, therefore, meet the requirement of paragraph 1 of Article 4 of the GATT Anti-Dumping Code.

The remaining sections of these reasons are presented separately for Red Delicious apples and for Golden Delicious apples. Data concerning BCTFL cannot be discussed in detail because they are confidential in nature; however, these data follow the same trends as those for the B.C. industry as a whole, which are public and summarized in these reasons. All data concerning the Ontario industry are public.

RED DELICIOUS APPLES

Material Injury

In assessing whether the domestic industry has suffered or is suffering material injury, the Tribunal took cognizance of Article 3 of the GATT Anti-Dumping Code, which provides guidance as to the factors that may be considered in making a determination of injury.

This case is unusual in that the period during which past and present material injury could have occurred is relatively short. Until February 7, 1994, a finding of injury against imports of Red Delicious apples and Golden Delicious apples from the United States was in place and, accordingly, prior to that date, there could have been no injury from dumping. Therefore, in assessing whether the domestic industry has suffered or is suffering material injury, the Tribunal focussed on events which took place after February 7, 1994.

Analysis of Economic Indicators

As shown in Table 2, during the first seven months of 1994, the volume of imports of Red Delicious apples from the United States was 81 percent higher than it was during the same seven months in 1993.

Furthermore, the average price of imports of Red Delicious apples from the United States for the period from January to July 1994 was 19 percent lower than what it was from January to July 1993.

Against this background of a dramatic increase in the volume of imports of Red Delicious apples from the United States, the industry's principal claim of material injury relates to the ensuing price erosion and suppression and the resulting negative effects on returns to growers.

The Tribunal notes that, in the week immediately following the rescission of the 1989 finding, BCTFL list prices for comparable grades and sizes of Red Delicious apples sold in the B.C. and Ontario markets were generally lower than they were in the preceding week, in amounts ranging from approximately \$2 to more than \$5/carton.³⁶ The evidence on actual weekly volumes and values of domestic sales by grade and type of storage submitted by BCTFL reveals that, during the weeks following the rescission of the 1989 finding, average prices obtained for most grades of both CA and regular storage Red Delicious apples declined by several dollars per carton.³⁷ Finally, other evidence submitted by BCTFL shows that annual average prices of Red Delicious apples were lower in 1993-94 than they were in either of the two preceding crop years.³⁸

With regard to the pricing trends for Ontario Red Delicious apples, the Tribunal notes that the minimum price set by the OAMC for polyethylene-bagged Red Delicious apples rose during the first months of 1994, for example, the minimum price of 12 3-lb. polyethylene bags, the most popular configuration of polyethylene bags,³⁹ increased from \$15.00 on January 30, 1994, to \$16.20 on February 27, 1994.⁴⁰ This increase was explained by witnesses for the Ontario industry as being the result of low inventories for that time of the year.⁴¹ By comparison, witnesses for the Ontario industry testified that prices of Ontario tray pack apples, which account for approximately 15 percent of Red Delicious apple sales, decreased by \$4.00 to \$5.00/carton following the rescission of the 1989 finding.⁴² As a result, growers had to market apples which had been intended for the tray pack market in polyethylene bags, at lower prices.⁴³

The Tribunal heard that marketing agencies and packing houses in both Canada and the United States cover all their packing and selling expenses before remitting monies to growers that are at the end of the chain and, therefore, bear the brunt of price reductions in the marketplace.⁴⁴ Therefore, the Tribunal is persuaded that the decreases in the selling price of Red Delicious apples experienced in the B.C. and Ontario markets following the rescission of the 1989 finding would have been passed, for the most part, directly to growers in the form of reduced returns. Furthermore, the Tribunal is satisfied that any reduction in returns to

36. Manufacturer's Exhibits A-66 and A-67 (protected), Administrative Record, Vol. 10.

37. Manufacturer's Exhibit A-65 (protected), Administrative Record, Vol. 10.

38. Manufacturer's Exhibits A-49 and A-65 (protected), Administrative Record, Vol. 10.

39. Transcript of Public Hearing, Vol. 2, January 10, 1995, at 382.

40. Manufacturer's Exhibit A-21, Administrative Record, Vol. 9.

41. Transcript of Public Hearing, Vol. 2, January 10, 1995, at 403.

42. Transcript of Public Hearing, Vol. 1, January 9, 1995, at 72 and 148-49, and Vol. 2, January 10, 1995, at 270-72 and 326-28.

43. Transcript of Public Hearing, Vol. 1, January 9, 1995, at 74 and 157-61, and Vol. 2, January 10, 1995, at 326-27.

44. Transcript of Public Hearing, Vol. 4, January 12, 1995, at 795-96, and Vol. 5, January 13, 1995, at 1012-13.

growers directly affects their profitability in a given season because the costs of production are essentially fixed in the short run.

The preceding conclusions about the reductions in grower returns are corroborated by provincial-wide statistics published by the B.C. Ministry of Agriculture and Fisheries, which show that returns for fresh Red Delicious apples were markedly lower in 1993-94 than they were in either of the two preceding crop years, falling from approximately 20¢ to 14¢/lb.⁴⁵ on fairly steady volumes of sales of fresh Red Delicious apples. The Tribunal notes that these results include export sales of B.C. fresh Red Delicious apples. In its consideration of the evidence on grower returns, the Tribunal was concerned by the significant differences in the financial data given for growers that marketed their crops through BCTFL in 1991-92 and 1992-93 as presented in this inquiry and in Review No. RR-93-002⁴⁶ and was reluctant to give much weight to these data. In the case of Ontario, the evidence shows that grower returns for fresh Red Delicious apples increased by 2¢/lb. during 1993-94 to approximately 18¢/lb.⁴⁷

The domestic industry also claimed that it suffered material injury in the form of lost sales and lost market share. Except for the evidence regarding the loss of sales of tray pack apples in Ontario referred to previously, the Tribunal finds that the domestic industry presented no specific evidence regarding sales or accounts that were lost to the dumped imports. Similarly, other than a reference to the increase in the volume of imports of Red Delicious apples from the United States,⁴⁸ the domestic industry presented no convincing evidence to support its claim of material injury with regard to loss of market share.

The Tribunal notes, however, that, while imports did not increase their share of the market in 1993-94, they did increase by 23 percent in volume over the previous crop year, while B.C. sales grew by 10 percent and Ontario sales by 44 percent (on the strength of a more normal crop). Overall market demand grew by 21 percent in 1993-94. Available monthly data also show that imports into British Columbia and Ontario increased significantly after the rescission of the 1989 finding.⁴⁹

The Tribunal acknowledges that, on average, F.O.B. Washington prices converted to Canadian funds were higher than B.C. prices, even after the rescission of the 1989 finding. The Tribunal is of the view that this price premium is due, at least in part, to the willingness of importers to pay more for a wider range of sizes and grades which are available from the state of Washington on a year-round basis and to meet certain consumer preferences for a higher-quality product, such as Washington premium Extra Fancy Red Delicious apples. The Tribunal notes, however, that, during the period of investigation, 61 percent of Red Delicious apples imported into Canada were dumped at a weighted average margin of 28 percent.

The CHC estimated the extent of material injury to B.C. growers of fresh Red Delicious apples, that market their apples through BCTFL, at \$1.5 million. The methodology used to derive this figure was to compare average prices of the top three grades of Red Delicious apples during the period from February 7, 1994, to the end of the 1993-94 selling season to what average prices had been during the same

45. Tribunal Exhibit NQ-94-001-11.3, Administrative Record, Vol. 3.1 at 7-9.

46. Tribunal Exhibit NQ-94-001-32A (protected), Administrative Record, Vol. 2A at 63.

47. Tribunal Exhibit NQ-94-001-32B, Administrative Record, Vol. 1B at 64.5.

48. Public Statement of Martin Linder, Manufacturer's Exhibit A-2, par. 36, Administrative Record, Vol. 9.

49. Public Pre-Hearing Staff Report, December 7, 1994, Tribunal Exhibit NQ-94-001-6A, Administrative Record, Vol. 1B at 0.76-0.77.

period in 1993, and then to multiply the difference by the actual volume of apples sold in 1993-94.⁵⁰ The Tribunal questions whether it is comparing “apples with apples” to compare, without any adjustment, prices in 1993-94, a year which produced a relatively small, poor-quality crop, to prices in 1992-93, a year which produced a bountiful, high-quality crop. In this sense, the estimate may be biased upward. On the other hand, as a measure of injury to the domestic industry as a whole, the estimate excludes any injury to Ontario production and to the 15 percent⁵¹ of B.C. production that was not marketed through BCTFL in 1993-94.

Considering the totality of the evidence, the Tribunal is satisfied that the domestic industry did suffer and continues to suffer material injury with regard to Red Delicious apples, primarily in the form of price erosion and reduced grower returns.

Causality

The Tribunal must next consider whether there is a causal link between the material injury suffered by the domestic industry and the dumped imports. As SIMA provides little guidance concerning the standard to be applied by the Tribunal in determining whether a causal relationship exists between dumping and material injury or what factors should be considered in performing a causal analysis, the Tribunal finds it instructive to refer to paragraph 4 of Article 3 of the GATT Anti-Dumping Code. In the Tribunal’s view, paragraph 4 of Article 3 contemplates that dumping need only be a cause of material injury and that material injury caused by factors other than dumping should not be attributed to dumping. Moreover, the Tribunal observes that paragraph 4 of Article 3 does not contemplate that the dumping be the “only” cause, “principal” cause or “major” cause of material injury or that an investigating authority quantify the extent of injury caused by factors other than dumping or isolate the injury caused by these other factors from the injury caused by dumping.

Effects of Dumped Imports

In considering the effects of dumped imports on domestic prices, the Tribunal took the view that Canada is a price taker with regard to Red Delicious apples and that the F.O.B. Washington price essentially establishes the North American price level⁵² for all grades and sizes. The Tribunal is persuaded that, prior to the rescission of the 1989 finding, the majority of Red Delicious apples being exported to Canada were of the Washington Extra Fancy grade because the landed costs of lower grades of U.S. apples would have been below the normal values established by the Deputy Minister and would have attracted anti-dumping duties.⁵³ In other words, prior to February 7, 1994, the domestic industry had only to meet the prices of the top grade of Washington apples. By comparison, following the rescission of the 1989 finding, the domestic industry again became a price taker for all grades of U.S. Red Delicious apples.

The General Sales Manager of BCTFL described at length how that company assessed the market situation following the rescission of the 1989 finding and decided to lower its list prices because F.O.B. Washington prices, adjusted for freight, other delivery costs and the exchange rate, were lower than

50. Tribunal Exhibit NQ-94-001-12.3E (protected), Administrative Record, Vol. 4 at 154.4.

51. Transcript of Public Hearing, Vol. 3, January 11, 1995, at 732-33.

52. Transcript of Public Hearing, Vol. 5, January 13, 1995, at 1032, and Vol. 4, January 12, 1995, at 785.

53. Transcript of Public Hearing, Vol. 2, January 10, 1995, at 406-8, and Vol. 3, January 11, 1995, at 650-52.

the prices that BCTFL had been offering.⁵⁴ He testified that “[s]hortly after [the rescission], within a day or so ... we began to receive information through our branches and from customers that the market price for Red Delicious ... was coming down, that they were able to purchase Red Delicious ... apples substantially lower than what we were quoting and that, unless we matched those prices which were coming from the state of Washington, they would discontinue buying from us.⁵⁵” Speaking of the Ontario market, the Eastern Canadian Sales Manager of BCTFL testified that “[o]nce the minimum SIMA level was removed ... we had customers calling in complaining that our prices were out of line, so we had to adjust accordingly.⁵⁶”

The evidence on actual weekly volumes and values of domestic sales by grade and type of storage submitted by BCTFL shows that, in the weeks following the rescission of the 1989 finding, the average price of CA storage apples fell to a proportionately greater extent than did the average price of regular storage apples.⁵⁷ The Tribunal is of the view that the additional price decline seen in CA storage apples reflects the fact that the dumped imports of U.S. Red Delicious apples were also CA storage apples.⁵⁸

Three grower witnesses from British Columbia each testified that they were informed by their respective packing house of a decrease in price of \$4 to \$5/carton immediately following the rescission of the 1989 finding.⁵⁹ Similarly, in Ontario, a large grower testified that “virtually the day after the duty was removed,” prices for tray pack apples fell by \$4 to \$5/carton.⁶⁰

By comparison to the above evidence of a sudden and significant decline in prices, both Tribunal witnesses testified that they did not recall such a phenomenon in the market following the rescission of the 1989 finding. The Tribunal notes that, during the period of examination, National Grocers Co. Ltd. was buying B.C. Extra Fancy apples,⁶¹ which experienced more modest price declines.⁶² Similarly, Morris Brown & Sons Company Limited was not buying large volumes of domestic apples during this period.⁶³

Based on the totality of the evidence, the Tribunal is persuaded that there is a causal link between the dumping following the rescission of the 1989 finding and the price erosion experienced by the domestic industry. This price erosion had a significant impact on B.C. grower returns. Moreover, in the absence of dumping, Ontario growers of tray pack apples would not have had to sell bagged apples, the price of which would have been higher because of short supply.

The Tribunal is further persuaded by the evidence that there was an increase in imports of the lower-priced, lower-grade apples from the United States following the rescission of the 1989 finding. At the macro level, this is evidenced by the fact that average import prices fell at a faster rate than did average F.O.B. Washington prices, which suggests that, all other things being equal, the mix of apples imported for

54. Transcript of In Camera Hearing, January 9 to 13, 1995, at 109-13.

55. Transcript of Public Hearing, Vol. 4, January 12, 1995, at 789-90.

56. Transcript of Public Hearing, Vol. 4, January 12, 1995, at 792.

57. Manufacturer’s Exhibit A-65 (protected), Administrative Record, Vol. 10.

58. Tribunal Exhibit NQ-94-001-17D, Administrative Record, Vol. 1A at 279.7; and Transcript of Public Hearing, Vol. 5, January 13, 1995, at 1026 and 1039.

59. Transcript of Public Hearing, Vol. 1, January 9, 1995, at 43, 47 and 129-30.

60. Transcript of Public Hearing, Vol. 1, January 9, 1995, at 148-49.

61. Transcript of Public Hearing, Vol. 3, January 11, 1995, at 557-58.

62. Manufacturer’s Exhibit A-65 (protected), Administrative Record, Vol. 10.

63. Transcript of Public Hearing, Vol. 3, January 11, 1995, at 683.

the state of Washington was shifting toward lower-priced, lower-grade apples. The Tribunal witness for Morris Brown & Sons Company Limited testified that “[n]othing happened immediately, but over the course of a month and a half we sampled these lower grades of apples available out of the state of Washington which previously we never had.”⁶⁴ Responses to the Tribunal’s purchaser’s/importer’s questionnaire corroborate the fact that imports of lower-grade apples increased following the rescission of the 1989 finding.⁶⁵ Finally, the Director of Marketing for Stemilt Growers Inc., a large Washington packing house, testified that the company’s exports of lower-grade apples to Canada did increase following the rescission of the 1989 finding.⁶⁶ At the same time, general price levels for Washington Red Delicious apples were declining. For example, CA storage Fancy grade apples fetched an average of US\$11.61 during 1992-93, but only US\$8.30 during 1993-94.⁶⁷

Other Factors

There was a variety of other factors at play in the domestic market for Red Delicious apples during the second half of 1993-94 that could have contributed to the injury sustained by the domestic industry.

Crop Quality

The 1993-94 crop of Red Delicious apples in British Columbia sustained significant damage due to hail.⁶⁸ This resulted in one third of the harvest being processed as juice, compared to only 20 percent in the preceding two crop years.⁶⁹ Furthermore, damage from the hail negatively affected the quality of that portion of the crop which was eventually sold in the fresh market.⁷⁰ The evidence shows that, in 1993-94, B.C. Extra Fancy Red Delicious apples represented a lower proportion of BCTFL domestic sales in the fresh market than they did in either 1991-92 or 1992-93.⁷¹ The Tribunal notes that the total 1993-94 crop of Red Delicious apples in Ontario was much smaller than it was the previous year, but of much better quality.⁷²

The Tribunal recognizes that, all other things being equal, the quality of the 1993-94 crop of Red Delicious apples in British Columbia would have led to a lower level of average prices that year. However, the Tribunal is not convinced that the poorer quality of the crop caused the accelerated decline in prices which occurred following the rescission of the 1989 finding. In other words, the Tribunal would have expected the quality of the 1993-94 B.C. crop to have been reflected in price levels from the beginning of the season and not to have made itself felt only from February onward.

64. Transcript of Public Hearing, Vol. 3, January 11, 1995, at 651.

65. Replies to questionnaire. The exhibit, volume and page numbers are withheld to protect the confidentiality of the parties.

66. Transcript of Public Hearing, Vol. 5, January 13, 1995, at 980 and 1050-51.

67. Purchaser’s/Importer’s Exhibit B-20, Administrative Record, Vol. 11.

68. Transcript of Public Hearing, Vol. 1, January 9, 1995, at 132-33 and 140.

69. Public Pre-Hearing Staff Report, December 7, 1994, Tribunal Exhibit NQ-94-001-6, Administrative Record, Vol. 1B at 0.18.

70. Transcript of Public Hearing, Vol. 4, January 12, 1995, at 874.

71. Tribunal Exhibit NQ-94-001-32A (protected), Administrative Record, Vol. 2A at 66, 68 and 70.

72. Transcript of Public Hearing, Vol. 2, January 10, 1995, at 374; and Public Pre-Hearing Staff Report, December 7, 1994, Tribunal Exhibit NQ-94-001-6, Administrative Record, Vol. 1B at 0.16.

Regular Storage Holdings

Closely related to the issue of the effect of the quality of the 1993-94 B.C. Red Delicious apple crop on domestic prices is the issue of what impact the higher-than-average volumes of apples held in regular storage may have had on prices. Data compiled by the Department of Agriculture show that, as of February 1, 1994, 35 percent of total B.C. holdings of Red Delicious apples were in regular storage, compared to 14 percent and 9 percent, respectively, as of the same date in 1992 and 1993.⁷³

There was considerable discussion at the hearing as to what proportion of these excess volumes was sold in the fresh market, what proportion was sold for juice processing and what impact this may have had on domestic prices and, in turn, on returns to growers. The evidence on actual weekly volumes and values of domestic sales of fresh Red Delicious apples by grade and type of storage submitted by BCTFL shows that, in fact, substantial volumes of regular storage apples were being sold through to the end of February.⁷⁴ The undesirability of this situation was confirmed by the General Sales Manager of BCTFL, who testified that “for Canada, the end of January, beginning of February, is probably where we would like to see the end of the regular [storage] season and beginning of CA [storage].⁷⁵” The evidence on weekly sales submitted by BCTFL also shows that the prices that it was able to realize on the overhang of regular storage apples during February 1994 were significantly lower than the prices for CA storage apples of a comparable grade.⁷⁶

The Tribunal is of the opinion that, even without the dumping of imports of Red Delicious apples from the United States, BCTFL would have had to discount the price of its regular storage apples, a proportion of which were hail-damaged, in order to induce the market to accept them at that time of the marketing season. However, if not for the dumping, the Tribunal concludes that BCTFL might have been able to obtain higher prices for its regular storage apples and would have obtained better prices for its CA storage apples.

Seasonal Pricing Patterns

The typical pricing pattern for apples is “W-shaped,” with prices declining from harvest through to December or January as regular storage holdings are depleted, then rising briefly as the first CA storage apples reach the market, before gradually declining as the bulk of CA storage apples are sold, with prices sometimes rising at the end of the season when supplies become limited again. Accordingly, the Tribunal would have expected to see domestic prices of both regular storage apples and CA storage apples falling to some extent from February onward, but not to the extent that they did following the rescission of the 1989 finding.

73. Public Pre-Hearing Staff Report, December 7, 1994, Tribunal Exhibit NQ-94-001-6A, Administrative Record, Vol. 1B at 0.82-0.84.

74. Manufacturer’s Exhibit A-65 (protected), Administrative Record, Vol. 10.

75. Transcript of Public Hearing, Vol. 4, January 12, 1995, at 890.

76. Manufacturer’s Exhibit A-65 (protected), Administrative Record, Vol. 10.

Cost Structure of the B.C. Industry

The evidence shows that costs of production and marketing of Red Delicious apples appear to be higher in British Columbia than they are in Ontario.⁷⁷ Further, it was argued by counsel for the NHC that growers in British Columbia sustained significant losses even in years when anti-dumping protection was in place.⁷⁸ Be that as it may, it is the Tribunal's view that the dumping exacerbated an otherwise precarious situation and contributed significantly to the decline in B.C. grower returns in 1993-94.

The Tribunal believes that prices of B.C. Red Delicious apples and, subsequently, the returns to growers were adversely affected by the poor quality and low pack-out of the 1993-94 crop and by the excess volume of regular storage apples still on hand in early February. Further, the Tribunal would have expected domestic apple prices to have fallen from February onward as part of normal seasonal pricing trends. Nonetheless, the Tribunal is convinced that these other factors do not explain the magnitude of the price erosion experienced by the domestic industry in the period following the rescission of the 1989 finding and the consequent decline in grower returns in British Columbia.

The Tribunal also believes that the prices of Ontario apples were negatively affected by the presence of dumped imports. Tray pack business was lost, and bagged apples were priced on the basis of competitive factors, including the presence of low-priced dumped imports from the United States.

"Technical Dumping"

The Tribunal observes that it is a well-established principle that the calculation of the margin of dumping is a matter for the Deputy Minister and a fact which must be accepted by it.⁷⁹ Therefore, for the purpose of this inquiry, the Tribunal does not give any weight to the argument of counsel for the NHC that the dumping found by the Deputy Minister was "technical dumping."

In conclusion, the Tribunal finds that, based on the evidence, the dumping of Red Delicious apples from the United States has caused and is causing material injury to the production in Canada of like goods.

Threat of Material Injury

With respect to the threat of material injury, the Tribunal finds that the production of Red Delicious apples in the state of Washington may be close to being at a peak and is unlikely to continue to experience dramatic increases. There is ample evidence on the record to support this conclusion. First, the 1993 Washington Fruit Survey shows that, since 1985, the majority of new trees planted each year have been varieties other than Red Delicious, with plantings of the Fuji and Gala varieties being five times larger than those of the Red Delicious variety in 1990, 1991 and 1992.⁸⁰ This was corroborated by an NHC witness who testified that Washington growers tend to be replanting fewer Red Delicious trees and switching to newer varieties of apples, such as Fuji and Gala.⁸¹ Finally, a study by

77. Tribunal Exhibit NQ-94-001-32B, Administrative Record, Vol. 1B at 64.5; and Tribunal Exhibit NQ-94-001-32A (protected), Administrative Record, Vol. 2A at 64.

78. Transcript of Argument, January 14, 1995, at 47.

79. *Remington Arms of Canada Limited v. Les Industries Valcartier Inc.*, [1982] 1 F.C. 586 at 591.

80. Purchaser's/Importer's Exhibit B-7, Administrative Record, Vol. 11.

81. Transcript of Public Hearing, Vol. 5, January 13, 1995, at 1040-41.

Dr. A Desmond O'Rourke, a well-known academic in this area, forecasts that production of Red Delicious apples should level out by the mid-1990s and decrease slightly thereafter.⁸²

However, even if production levels of Red Delicious apples in the state of Washington are stabilizing, the absolute level of production remains significant in relation to the Canadian market. In 1993-94, fresh Red Delicious apple production in the state of Washington was 18 times greater than fresh Red Delicious apple production in all of Canada,⁸³ and Canada was ranked as the sixth destination for exports of Washington Red Delicious apples.⁸⁴ The Tribunal also notes that sales of fresh Washington Red Delicious apples have experienced a phenomenal growth in the last 10 years, increasing by more than 150 percent since 1985.⁸⁵ The Tribunal is of the view that, in the foreseeable future, Canada will remain an important export destination for Washington Red Delicious apples because of its geographical proximity and the absence of trade barriers. Shipments to other destinations can be disrupted, if only temporarily, by changes in the trading climate and currency fluctuations.

The Tribunal has noted the extensive marketing efforts of the Washington industry to open up new export markets in China and Japan, among other countries,⁸⁶ and the growth in exports in recent years.

Following the rescission of the 1989 finding, exports of lower-grade Red Delicious apples to Canada increased, as various companies made use of the availability of these lower-priced apples to service the needs of a wider range of market niches. The evidence before the Tribunal, which was not before the Tribunal in Review No. RR-93-002, is that not all consumers prefer a high-grade apple, but, rather, that there is a diversity of preferences, with some consumers being more willing to trade off quality for price. Accordingly, the Tribunal concludes that, in the absence of a finding of injury, domestic growers will face unfair competition from the entire range of grades and sizes of Washington Red Delicious apples.

The Tribunal notes that, in the final determination of dumping, the Deputy Minister found that overall U.S. sales of Red Delicious apples by the Washington shippers investigated were made at a loss during the period of investigation from February 8 to May 31, 1994.⁸⁷ However, the final determination of dumping found that U.S. sales of Washington Extra Fancy Red Delicious apples had been made at a profit.

A careful examination of Washington Red Delicious apple pricing data reveals that, on average, regular storage apples sold for US\$13.10/carton in 1992-93, US\$12.00 in 1993-94 and US\$11.06 during the period from August to December 1994.⁸⁸ CA storage apples sold for US\$12.72/carton in 1992-93 on a volume of 9.9 million cartons and US\$10.87 in 1993-94 on a volume of 13.6 million cartons.⁸⁹ The normal value established by the Deputy Minister is US\$12.99/carton.

82. Manufacturer's Exhibit A-32, Administrative Record, Vol. 9A.

83. Public Pre-Hearing Staff Report, December 7, 1994, Tribunal Exhibit NQ-94-001-6, Administrative Record, Vol. 1B at 0.18; and Tribunal Exhibit NQ-94-001-17D, Administrative Record, Vol. 1A at 279.7.

84. Tribunal Exhibit NQ-94-001-17B, Administrative Record, Vol. 1A at 152-53.

85. Manufacturer's Exhibit A-38, Administrative Record, Vol. 9A.

86. Transcript of Public Hearing, Vol. 5, January 13, 1995, at 1014, 1060 and 1076.

87. Tribunal Exhibit NQ-94-001-4, Administrative Record, Vol. 1 at 123.

88. Purchaser's/Importer's Exhibits B-20 and B-21, Administrative Record, Vol. 11.

89. *Ibid.*

The Tribunal notes that the November 1, 1994, holdings of fresh Red Delicious apples in the state of Washington stood at 54 million cartons, as compared to 52 million cartons on November 1, 1993.⁹⁰ The 1994-95 Washington Red Delicious apple crop is estimated at 64 million cartons, an increase of 13 percent over 1993-94.⁹¹

In light of the high level of production, price and inventory levels, geographical proximity and absence of trade barriers, the Tribunal is of the opinion that the dumping of Red Delicious apples from the United States is likely to cause material injury to the production in Canada of like goods.

Seasonal Exclusion

Pursuant to subsection 43(1) of SIMA, the Tribunal is required to make such order or finding with respect to the goods to which the final determination of dumping applies “as the nature of the matter may require” and to declare to what goods the order or finding applies. The Tribunal and its predecessors have, in past inquiries involving agricultural products,⁹² interpreted this provision as giving them the discretion to make a finding excluding goods imported during certain periods of the year. In the Tribunal’s view, it is appropriate in this inquiry to exclude Red Delicious apples imported from the United States during the period from July 1 to September 30 in each calendar year.

The Tribunal finds that anti-dumping duties on imports of Red Delicious apples from the United States should be in force during the period from October 1 to June 30 in each crop year.

In arriving at its decision on a seasonal exclusion, the Tribunal reviewed several pieces of evidence. First, the evidence submitted by BCTFL on weekly sales of Red Delicious apples shows that, from 1991-92 to 1993-94, sales during the period from July to September accounted for no more than 15 percent of total sales in each crop year and significantly less than 15 percent in two of the three crop years examined.⁹³ Moreover, responses to questionnaires indicate that Red Delicious apples from domestic sources are not available year-round.⁹⁴

Second, the Tribunal examined the evidence on total domestic storage holdings of Red Delicious apples and found that the June 1 holdings as a percentage of the November 1 holdings were 7 percent,

90. Tribunal Exhibit NQ-94-001-17C, Administrative Record, Vol. 1A at 279.

91. Manufacturer’s Exhibit A-38, Administrative Record, Vol. 9A.

92. See *Fresh Iceberg (Head) Lettuce Originating in or Exported from the United States of America*, Canadian International Trade Tribunal, Inquiry No. NQ-92-001, Finding, November 30, 1992, Statement of Reasons, December 15, 1992; *Fresh, Whole, Yellow Onions, Originating in or Exported from the United States of America, for Use or Consumption in the Province of British Columbia*, Canadian Import Tribunal, Inquiry No. CIT-1-87, Finding and Statement of Reasons, April 30, 1987; and *Whole Potatoes with Netted or Russeted Skin, Excluding Seed Potatoes, Originating in or Exported from the United States of America, for Use or Consumption in the Province of British Columbia*, Anti-dumping Tribunal, Inquiry No. ADT-4-84, Finding and Statement of Reasons, June 4, 1984.

93. Tribunal Exhibit NQ-94-001-12.3 (protected), Administrative Record, Vol. 4 at 79.

94. Replies to questionnaires. The exhibit, volume and page numbers are withheld to protect the confidentiality of the parties.

13 percent and 2 percent, respectively, for the crop years 1991-92, 1992-93 and 1993-94.⁹⁵ The fact that July 1 storage data are not routinely collected by the Department of Agriculture in and of itself suggests to the Tribunal that the volumes involved are small. Moreover, as the year progresses, the range of grades and sizes of Red Delicious apples offered by BCTFL diminishes.⁹⁶

Finally, the evidence on the record for the years 1992 and 1993 shows that, during the period from July to September, the volume of imports of Red Delicious apples into Canada from the United States is usually much higher than it is during the other months of the year.⁹⁷

Based on the foregoing, the Tribunal is of the opinion that the domestic industry is unable to supply the market with sufficient volumes of Red Delicious apples from July 1 to September 30 in each calendar year.

GOLDEN DELICIOUS APPLES

Material Injury

The Tribunal finds that the situation with respect to material injury to the domestic production of Golden Delicious apples is different from that for Red Delicious apples. Table 3 shows that, during the first seven months of 1994, the volume of imports of Golden Delicious apples from the United States was 7 percent higher than it was during the corresponding period in 1993. The volume of imports into Ontario, Canada's largest market region for apples, actually decreased by 13 percent. Furthermore, the average price of imports of Golden Delicious apples was 15 percent higher in 1994 than it was in 1993 and, in fact, was higher in 1994 than it was at any time since the 1991-92 crop year.⁹⁸

As regards domestic prices as an indicator of material injury, the Tribunal notes that BCTFL list prices of Golden Delicious apples did decline in the week following the rescission of the 1989 finding.⁹⁹ According to data submitted by BCTFL on actual weekly volumes and values of domestic sales by grade and type of storage, average prices did fall gradually from late January through to the end of the 1993-94 selling season.¹⁰⁰ However, the Tribunal is of the view that these price declines reflect, first, normal seasonal pricing trends (the "W" pattern) and, second, the poor quality of the 1993-94 Golden Delicious apple crop in British Columbia, 31 percent of which was sold in the processing market.¹⁰¹ The cull rate for growers selling through BCTFL was significantly higher.¹⁰² The OAMC did not set minimum prices for

95. Public Pre-Hearing Staff Report, December 7, 1994, Tribunal Exhibit NQ-94-001-6A, Administrative Record, Vol. 1B at 0.79-0.81.

96. Transcript of Public Hearing, Vol. 3, January 11, 1995, at 570.

97. Public Pre-Hearing Staff Report, December 7, 1994, Tribunal Exhibit NQ-94-001-6A, Administrative Record, Vol. 1B at 0.77.

98. Public Pre-Hearing Staff Report, December 7, 1994, Tribunal Exhibit NQ-94-001-6A, Administrative Record, Vol. 1B at 0.78.

99. Manufacturer's Exhibits A-66 and A-67 (protected), Administrative Record, Vol. 10.

100. Manufacturer's Exhibit A-65 (protected), Administrative Record, Vol. 10.

101. Public Pre-Hearing Staff Report, December 7, 1994, Tribunal Exhibit NQ-94-001-6, Administrative Record, Vol. 1B at 0.18.

102. Tribunal Exhibit NQ-94-001-32A (protected), Administrative Record, Vol. 2A at 76.

Golden Delicious apples in 1993-94,¹⁰³ and there is no tray pack market for Ontario Golden Delicious apples.

With respect to grower returns, the Tribunal notes that, in British Columbia, grower returns for fresh Golden Delicious apples remained virtually unchanged in 1993-94 at 21¢/lb.,¹⁰⁴ while, in Ontario, grower returns actually doubled from 10¢ to 20¢/lb.¹⁰⁵ The Tribunal can find no evidence of lost sales to support a claim of material injury to the domestic production of Golden Delicious apples. In the Tribunal's view, the 10 percentage points of market share gained by imports in 1993-94 is attributable to the sharp drop (33 percent) in sales of fresh B.C. Golden Delicious apples. In fact, British Columbia actually lost 14 percentage points of market share in 1993-94 due to its smaller, damaged Golden Delicious apple crop, of which 4 percentage points were gained by Ontario and 10 percentage points by U.S. imports.

The Tribunal found a paucity of evidence with respect to material injury to the domestic production of Golden Delicious apples. In particular, the Tribunal notes that, unlike the situation with respect to Red Delicious apples, it did not have sufficient evidence as to the aggregate injury alleged to have been suffered by the domestic industry.

Therefore, in light of the totality of the evidence on the record, the Tribunal finds that the dumping of Golden Delicious apples from the United States has not caused and is not causing material injury to the production in Canada of like goods.

Threat of Material Injury

The Tribunal is of the view that the situation with respect to the threat of material injury to the domestic production of Golden Delicious apples is also different from that for Red Delicious apples.

First, the Tribunal notes that the growth in Golden Delicious apple production in the state of Washington since the 1980s has been much more moderate than the growth in Red Delicious apple production.¹⁰⁶ Estimated production for 1994-95 in the state of Washington is slightly lower than it was in 1992-93 and only 4 percent higher than it was in 1989-90. According to the 1993 Washington Fruit Survey, relatively few of the new trees planted each year in the state of Washington have been of the Golden Delicious variety.¹⁰⁷ Further, the forecasts of Dr. O'Rourke also suggest that production of this variety is likely to peak by the mid-1990s.¹⁰⁸ On balance, the Tribunal is persuaded that the production of Golden Delicious apples in the United States has reached a plateau and is not likely to grow significantly.

The General Sales Manager of BCTFL testified that 80 percent of the Golden Delicious apples marketed domestically by the company are sold in Western Canada, with the remainder mostly being shipped to Eastern Canada.¹⁰⁹ At the same time, import statistics show that the great majority of

103. Transcript of Public Hearing, Vol. 2, January 10, 1995, at 299.

104. Tribunal Exhibit NQ-94-001-11.3, Administrative Record, Vol. 3.1 at 7-9.

105. Tribunal Exhibit NQ-94-001-32B, Administrative Record, Vol. 1B at 64.6.

106. Manufacturer's Exhibit A-38, Administrative Record, Vol. 9A.

107. Purchaser's/Importer's Exhibit B-7, Administrative Record, Vol. 11.

108. Manufacturer's Exhibit A-32, Administrative Record, Vol. 9A.

109. Transcript of Public Hearing, Vol. 4, January 12, 1995, at 790.

Golden Delicious apples imported into Canada find their way to markets in Central Canada.¹¹⁰ A Tribunal witness testified that he does not purchase B.C. Golden Delicious apples because they do not have the same buttery yellow colour as Washington Golden Delicious apples.¹¹¹ Quality and appearance, as well as availability, were cited by respondents to the Tribunal's questionnaires as factors favouring Washington Golden Delicious apples. The Tribunal is of the view that, on the basis of the evidence, Washington Golden Delicious apples and B.C. Golden Delicious apples meet in head-to-head competition in only a limited number of markets, mostly in Western Canada and mostly for only part of the year, and that, therefore, the ability of imports to cause injury to domestic production in the future is limited. Moreover, the availability of fresh Golden Delicious apples from British Columbia fluctuates from year to year because of the size and quality of the crop. The Tribunal also notes that Golden Delicious apples are a distant fourth in terms of volume in British Columbia and, in 1993-94, accounted for 9 percent of provincial apple production.¹¹²

In Ontario, the volume of fresh Golden Delicious apples produced has averaged about 210,000 cartons in the last three crop years, which in 1993-94 represented 3 percent of total provincial apple production and 30 percent of Canadian fresh production.¹¹³ Ontario Golden Delicious apples are sold mostly in polyethylene bags and within the boundaries of the province. It was acknowledged by a witness for the Ontario industry that "Ontario doesn't grow year after year a good-quality Golden Delicious. Our climate conditions indicate that we have a lot of russeting on our Golden Delicious, and they really can't compete with the imports."¹¹⁴

While the Tribunal acknowledges that the November 1, 1994, Washington fresh inventory of 15 million cartons of Golden Delicious apples was higher than the November 1, 1993, Washington fresh inventory of 11 million cartons, it notes that the 1992 level, another high production year, was equal to the November 1, 1994, level.¹¹⁵ This observed trend in inventory levels corroborates the testimony of several witnesses that Golden Delicious apples tend to be a biennial crop, with a large harvest one year followed by a smaller harvest the following year.¹¹⁶ Similarly, the fact that F.O.B. Washington prices were lower from September to December 1994 than during the same period in 1993 is not unexpected, given that year's small crop of Golden Delicious apples.¹¹⁷ The Tribunal is also aware that Canada is the second most important destination for Washington Golden Delicious apples and received nearly 20 percent of total state exports of this variety in 1993-94.¹¹⁸

In light of the foregoing, the Tribunal is of the opinion that the dumping of Golden Delicious apples from the United States is not likely to cause material injury to the production in Canada of like goods.

110. Public Pre-Hearing Staff Report, December 7, 1994, Tribunal Exhibit NQ-94-001-6A, Administrative Record, Vol. 1B at 0.76-0.77.

111. Transcript of Public Hearing, Vol. 3, January 11, 1995, at 558.

112. Tribunal Exhibit NQ-94-001-11.3, Administrative Record, Vol. 3.1 at 7-9.

113. Public Pre-Hearing Staff Report, December 7, 1994, Tribunal Exhibit NQ-94-001-6, Administrative Record, Vol. 1B at 0.18; and Tribunal Exhibit NQ-94-001-11.1, Administrative Record, Vol. 3 at 75.

114. Transcript of Public Hearing, Vol. 2, January 10, 1995, at 378.

115. Tribunal Exhibit NQ-94-001-17C, Administrative Record, Vol. 1A at 279.

116. Transcript of Public Hearing, Vol. 1, January 9, 1995, at 47, and Vol. 4, January 12, 1995, at 788.

117. Purchaser's/Importer's Exhibits B-20 and B-21, Administrative Record, Vol. 11.

118. Tribunal Exhibit NQ-94-001-17B, Administrative Record, Vol. 1A at 152-53.

CONCLUSION

Based on the foregoing and on its examination of all of the information on the record and the evidence adduced at the hearing, the Tribunal finds:

- 1) that the dumping in Canada of fresh, whole, Delicious and Red Delicious apples, originating in or exported from the United States of America, excluding fresh, whole, Delicious and Red Delicious apples imported under the authority of a ministerial exemption issued pursuant to the *Canada Agricultural Products Act* and the *Fresh Fruit and Vegetable Regulations*, has caused, is causing and is likely to cause material injury to the production in Canada of like goods, excluding the period from July 1 to September 30 in each calendar year; and
- 2) that the dumping in Canada of fresh, whole, Golden Delicious apples, originating in or exported from the United States of America, has not caused, is not causing and is not likely to cause material injury to the production in Canada of like goods.

Anthony T. Eyton

Anthony T. Eyton
Presiding Member

Robert C. Coates, Q.C.

Robert C. Coates, Q.C.
Member

Desmond Hallissey

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