



Ottawa, Monday, November 30, 1992

Inquiry No.: NQ-92-001

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

**FRESH ICEBERG (HEAD) LETTUCE 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 for Customs and Excise of a preliminary determination of dumping dated July 31, 1992, and of a final determination of dumping dated October 29, 1992, respecting the importation of fresh Iceberg (head) lettuce, originating in or exported from the United States of America, for use or consumption in the province of British Columbia.

Pursuant to subsection 43(1) of the *Special Import Measures Act*, the Canadian International Trade Tribunal hereby finds that the dumping of the aforementioned goods from the United States of America has caused, is causing and is likely to cause material injury to the production in British Columbia of like goods, excluding the periods January 1 to May 31 and October 16 to December 31 in each calendar year (Member Coleman dissenting).

Sidney A. Fraleigh

Sidney A. Fraleigh
Presiding Member

John C. Coleman

John C. Coleman
Member

Michèle Blouin

Michèle Blouin
Member

Michel P. Granger

Michel P. Granger
Secretary

The statement of reasons will be issued within 15 days.

Inquiry No.: NQ-92-001

Place of Hearing: Vancouver, British Columbia
Dates of Hearing: November 2 and 3, 1992

Date of Finding: November 30, 1992

Tribunal Members: Sidney A. Fraleigh, Presiding Member
John C. Coleman, Member
Michèle Blouin, Member

Director of Research: Marcel J.W. Brazeau
Research Manager: Don Shires
Research Officer: Nancy Ross

Statistical Officer: Sonya McEachern

Counsel for the Tribunal: Brenda Swick-Martin

Registration and Distribution Officer: Margaret J. Fisher

Participants:

Marvin R.V. Storrow, Q.C., and
Margaret L. Eriksson
for B.C. Vegetable Marketing Commission

(Complainant)

Marion I. Quesenbery
for Western Growers Association
(Irvine, California)

(Trade Association)



Ottawa, Tuesday, December 15, 1992

Inquiry No.: NQ-92-001

**FRESH ICEBERG (HEAD) LETTUCE 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 British Columbia of like goods.

DECISION: The Canadian International Trade Tribunal hereby finds that the dumping of the aforementioned goods from the United States of America has caused, is causing and is likely to cause material injury to the production in British Columbia of like goods, excluding the periods January 1 to May 31 and October 16 to December 31 in each calendar year (Member Coleman dissenting).

Place of Hearing:	Vancouver, British Columbia
Dates of Hearing:	November 2 and 3, 1992
Date of Finding:	November 30, 1992
Date of Reasons:	December 15, 1992
Tribunal Members:	Sidney A. Fraleigh, Presiding Member John C. Coleman, Member Michèle Blouin, Member
Director of Research:	Marcel J.W. Brazeau
Research Manager:	Don Shires
Research Officer:	Nancy Ross
Statistical Officer:	Sonya McEachern
Counsel for the Tribunal:	Brenda C. Swick-Martin Hugh J. Cheetham
Registration and Distribution Officer:	Margaret J. Fisher
Participants:	Marvin R.V. Storrow, Q.C., and Margaret L. Eriksson for B.C. Vegetable Marketing Commission (Complainant) Marion I. Quesenbery for Western Growers Association (Irvine, California) (Trade Association)

Witnesses:

George B. Rush
General Manager
Cloverdale Lettuce & Vegetable
Co-operative

Charles (Chuck) Amor
General Manager
B.C. Vegetable Marketing
Commission

Wayne Odermatt, B.S.A., P.Ag.
Provincial Fresh Vegetable Industry
Specialist
Development and Extension
South Coastal Region
Ministry of Agriculture,
Fisheries and Food
Province of British Columbia

Lorne Owen, P.Ag.
Provincial Farm Management Specialist
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Ottawa, Tuesday, December 15, 1992

Inquiry No.: NQ-92-001

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

**FRESH ICEBERG (HEAD) LETTUCE ORIGINATING IN OR EXPORTED
FROM THE UNITED STATES OF AMERICA**

TRIBUNAL: SIDNEY A. FRALEIGH, Presiding Member
 JOHN C. COLEMAN, Member
 MICHÈLE BLOUIN, 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 for Customs and Excise (the Deputy Minister) of a preliminary determination of dumping dated July 31, 1992, and of a final determination of dumping dated October 29, 1992, respecting the importation of fresh Iceberg (head) lettuce, originating in or exported from the United States of America, for use or consumption in the province of British Columbia. The Deputy Minister's investigation into dumping covered importations of the subject goods between July 1, 1991, and September 30, 1991.

The notices of preliminary and final determinations of dumping were published in Part I of the August 15, 1992, and November 14, 1992, editions of the Canada Gazette, respectively. The Tribunal's notice of commencement of inquiry issued on August 10, 1992, was published in Part I of the August 22, 1992, edition of the Canada Gazette. The Tribunal's notice concerning the time and location of the public hearing issued on September 16, 1992, was published in Part I of the September 26, 1992, edition of the Canada Gazette.

As part of the inquiry, the Tribunal sent detailed questionnaires to the B.C. Vegetable Marketing Commission (the Commission) and to the growers' co-operatives and major importers of the subject goods. From the replies to the questionnaires and other sources, the Tribunal's research staff prepared a public pre-hearing staff report.

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

The record of this inquiry consists of all Tribunal exhibits, including the public and protected replies to questionnaires, all exhibits filed by the parties at the hearing, 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 given undertakings.

A public hearing was held in Vancouver, British Columbia, starting on November 2, 1992. The complainant, the Commission, was represented by counsel, submitted evidence and made arguments in support of an injury finding. Counsel for the Western Growers Association (the WGA) submitted evidence and made arguments in support of a finding of no injury.

On November 30, 1992, the Tribunal issued a finding that the dumping of the subject goods had caused, was causing and was likely to cause material injury to the production in British Columbia of like goods, excluding the periods January 1 to May 31 and October 16 to December 31 in each calendar year (Member Coleman dissenting).

PRODUCT

The product that is the subject of this inquiry is described in the Deputy Minister's preliminary determination of dumping as fresh Iceberg (head) lettuce originating in or exported from the United States of America for use or consumption in the province of British Columbia.

Iceberg lettuce is distinguished from other members of the lettuce (*Lactuca*) genus by the arrangement of its leaves on the plant. It is a large firm head with crisp, brittle and tightly packed leaves. More than 80 percent of lettuce consumption in North America is of the Iceberg type, and much of it is grown in California, which accounts for over two thirds of U.S. production. The Salinas/Watsonville district of California accounts for over 50 percent of California production, and this production comes to market at about the same time as the B.C. marketing season for local lettuce.

Lettuce is a sensitive crop to grow because of the effects different growing conditions can have on quality and yields. In recent years, B.C. growers have converted from Ithica, a small variety, to a Salinas variety to better compete with U.S. imports. The Salinas variety grown in British Columbia is said to be wetter and lighter than its California counterpart largely because of differences in growing conditions. In California, the climate is dry, and growers use trough irrigation to supply the plant with water and thus avoid the head getting wet. In British Columbia, unpredictable rainfalls can contribute to deterioration caused by wetness, thereby shortening the shelf life of B.C.-grown lettuce.

Lettuce matures quickly and must be harvested promptly or destroyed because mature lettuce is susceptible to certain viruses that may spread to younger plants and affect subsequent lettuce crops. Growers have a three- to five-day period in which they must harvest lettuce.

The perishability of lettuce has established its use in fresh form. This characteristic also makes the product susceptible to short-term surpluses and shortages, thereby causing significant price swings, sometimes over a matter of a few days.

Without cooling, lettuce will only last two to three days. Properly cooled lettuce may be successfully stored for up to two weeks. In British Columbia, the Cloverdale Lettuce & Vegetable Co-operative (Cloverdale) operates a vacuum cooling facility on its premises. The Island Vegetable Co-operative Association (Island) cools its products in a refrigerated warehouse. In California, some growers do the packing, cooling and wrapping in the field.

Harvested lettuce is graded according to packaging unit. There are five packaging units common to the North American market. The industry standard is the carton 24-naked (naked-24s), which is a waxed carton containing 24 unwrapped heads in 2 layers weighing roughly 50 lbs. Over 75 percent of the lettuce grown in British Columbia is marketed in this type of packaging unit. Other packaging units include the carton 30-naked, carton 24-cello wrap and carton 30-cello, all of which weigh approximately 50 lbs, and bulk or bin units which weigh between 800-1,000 lbs.

IMPORTERS AND EXPORTERS

The importers of the subject goods are fresh produce wholesalers, the wholesale purchasing divisions of the major retail grocery chains and foodservices operations. Most are members of the B.C. Fruit Wholesalers' Association and purchase a great variety of local and imported fruits and vegetables. Independent wholesalers are the major suppliers to the hotel, restaurant, institutional and foodservices sector.

California is the major exporting state to British Columbia. In its initial investigation, the Department of National Revenue, Customs and Excise, identified 58 exporters to British Columbia, of which 56 were located in California. Of these, 35 were located in the Salinas Valley, which is the largest principal growing area of California during the B.C. crop year.

The WGA represents virtually all of the fresh produce growers, packers and shippers located in California and Arizona.

RESULTS OF THE DEPUTY MINISTER'S INVESTIGATION

The period of investigation chosen by the Deputy Minister covered imports of the subject goods during the period July 1, 1991, to September 30, 1991.

In his final determination of dumping dated October 29, 1992, the Deputy Minister found that 87.5 percent of the goods exported to British Columbia had been dumped by a weighted average margin of 31.0 percent

B.C. INDUSTRY

The B.C. lettuce industry consists of some 21 growers who grow lettuce in rotation with other crops. Most are located in the southern coastal region of the province. These growers, who account for over 95 percent of B.C. production, sell through two authorized sales agencies - Cloverdale, which represents eighteen growers, and Island, which sells for the other three producers. In addition, approximately twelve smaller unregulated growers sell directly to local grocery stores and through roadside stands.

The co-operatives derive their authority from the Commission which, under the B.C. Vegetable Scheme enacted in 1980 under the *Natural Products Marketing (BC) Act*,² is empowered to promote, control and regulate the production, transportation, packing, storage and marketing of vegetables in the province. The Commission delegates certain of its powers to Cloverdale and Island, which act as sales agents for growers in their respective regions. A quota system is applied to lettuce for the purpose of regulating the flow of product to the marketplace, not its production.

The pricing of fresh Iceberg lettuce is determined by the Commission. It subscribes to "Pronet," an electronic information service which provides daily shipping point availability and prices for U.S. fruits and vegetables, and utilizes F.O.B. information that is available 24 hours a day by telephone and provided by the United States Department of Agriculture in Salinas, California. On the basis of these services, the Commission can determine prices and availability of U.S. lettuce on a daily and weekly basis. By factoring in the appropriate duty, freight and other importing costs, as well as the exchange rate, it can estimate a landed Vancouver price at any given time. Once this import price is determined, the Commission and sales agencies discuss prevailing market conditions within the province and agree upon a final price for B.C. lettuce, usually for the coming week. This price is primarily based upon the landed Vancouver price of U.S. imported lettuce coming into British Columbia from the Salinas region of California, adjusted to reflect local supply conditions.

The co-ops sell mostly to the wholesale produce trade that supplies the retail grocery trade, particularly the larger chains, which can readily switch from local to imported lettuce, depending on availability and price. The hotel, restaurant and institutional trade appears to prefer the heavier and drier California lettuce which better meets its storability requirements.

ECONOMIC INDICATORS

The B.C. market for Iceberg lettuce grew from 449,000 cartons in crop year 1988 to 661,000 cartons in 1990, an increase of 47 percent. It grew marginally to 664,000 cartons in 1991. Growth accelerated during June and July 1992, increasing 16 percent over the corresponding period in 1991, from 268,000 to 312,000 cartons.

During crop year 1988-89, total imports entering the B.C. market, all from the United States, increased 125 percent, from 177,000 to 398,000 cartons. They grew another 5 percent to 417,000 cartons in 1991. They advanced by a further 53 percent during June and July 1992 over the same period in 1991.

From 1988 to 1990, sales by domestic producers declined by 3 percent, from 272,000 to 263,000 cartons. In 1991, they declined a further 6 percent to 247,000 cartons. During June and July 1992, shipments by B.C. growers were 16 percent lower than in the corresponding period in 1991.

The market share held by B.C. producers has declined from 60 percent in 1988 to 40 percent in 1990, 37 percent in 1991 and 32 percent during June and July of 1992. In 1988, California accounted for 36 percent of the B.C. market while other states had

2. R.S.B.C. 1979, c. 296.

3 percent. By July 1992, California had increased its share of the B.C. market to 56 percent while other states increased their share to 12 percent.

Marketable production (production available for sale) declined steadily from 321,000 cartons in 1988 to 300,000 cartons in 1990, then increased by 30 percent, to 390,000 cartons, in 1991. Total grower shipments declined steadily from 316,000 cartons in 1988 to 295,000 in 1990 and 282,000 in 1991. Volume not harvested due to plough downs was reported as being equivalent to 97,500 cartons in 1991.

B.C. producers' weighted average selling prices increased from \$7.31 per carton in crop year 1988 to \$7.94 in 1990 before dropping by 25 percent, to \$5.92, in 1991. During the first six weeks of the 1992 crop year, prices averaged \$7.61 per carton. By the end of July, they were up to \$10.77 and, by September 5, had climbed to \$14.10. Since 1988, average U.S. F.O.B. selling prices, in Canadian funds, went from a \$5.00-\$6.00 range to roughly \$8.00 in 1990, then back below \$6.00 in 1991. They started the 1992 crop year at about \$3.60 per carton. They remained in the \$3.60-\$4.80 range until about August 1 when they more than doubled within a week to over \$8.00. Prices then climbed to almost \$12.00 the following week and have been mostly in the \$10.00-\$13.00 range since. The price spread between B.C. growers' prices and the price of imports was less than \$1.00 in 1988, but rose to between \$2.00 and \$2.75 per carton in crop years 1989 to 1991.

Average net returns to B.C. growers, per carton of naked-24s, went from \$6.45 in 1988 to \$7.09 in 1990, dropped by 28 percent, to \$5.09, in 1991, then recovered to about \$7.30 in June and July 1992.

Financial losses were reported in 1988 and 1989. In 1990, a marginal profit was declared. Substantial losses were incurred in 1991. By August 1992, the industry was once again in a profitable position because of substantial increases in prices.

The total cost of producing a carton of naked-24s, which is the industry standard, was estimated by the Ministry of Agriculture, Fisheries and Food, Province of British Columbia (the Ministry) at \$7.92 (of which \$4.18 is the estimated cost of harvesting) based on a target yield of 750 cartons per acre. This includes direct costs of \$3.56, overhead of \$2.09 and co-op charges and carton costs of \$2.26, but not cooling costs of \$0.75 per carton. The break-even point is reached at \$8.67 per carton.

COMPLAINT

Counsel for the complainant argued that the Tribunal should find that the dumping of the subject Iceberg lettuce has caused, is causing and is likely to cause material injury to the production of like goods in the province of British Columbia. Counsel submitted that injury from dumping has appeared in the form of price erosion and suppression, lost sales and reduced market share, loss of profitability, lost crops and a decrease in the number of growers cultivating the subject lettuce.

Counsel stated that the case for injury for lettuce was stronger than in previous cases involving potatoes, onions and apples where the Tribunal found injury. The survival of the industry is at stake, and the imposition of an anti-dumping duty cannot be harmful to U.S. producers.

Counsel argued that British Columbia is a regional market for purposes of subsection 42(3) of SIMA and that all the conditions of Article 4 of the GATT Anti-Dumping Code³ (the Code) have been met. Also, B.C. and U.S. Iceberg lettuce are like goods within the meaning of subsection 2(1) of SIMA as they have the same characteristics and qualities, have the same end use and can be substituted for one another.

Concerning price levels, counsel referred to the evidence of one industry witness who summarized the downward trend in U.S. prices between 1988-91. Counsel pointed out that, in each year, U.S. prices were extremely low on several occasions during the B.C. crop year and that, in 1991, these low prices persisted for most of the season. F.O.B. selling prices in 1991 were in the US\$3.45-US\$4.50 per carton range during the B.C. crop year. According to counsel, average selling prices for B.C.-grown lettuce declined from \$7.94 to \$5.92 per carton, from 1990 to 1991, in response to dumped imports.

Counsel noted that the 1991 selling price of \$5.92 per carton was below the growers' cost of production which was estimated at \$7.92 per carton by the Ministry.

At an F.O.B. price of US\$3.00 a carton, California lettuce lands in British Columbia at about CAN\$6.75. Counsel submitted that, at this price, growers incur a substantial loss per carton.

In 1989, according to counsel, B.C. producers incurred a loss. In 1990, the industry achieved a marginal profit on rising selling prices. In 1991, the industry incurred severe losses. Production was profitable in only one week out of twenty. Between June 1 and August 31, 1992, growers made a profit in seven out of thirteen weeks. The severity of the losses incurred in 1991 was exacerbated by the ploughing down of equivalent to some 75,000 cartons (later revised to 97,500 cartons). This ploughing under of marketable lettuce in such quantities was, according to counsel, indicative of the plight of growers.

Counsel argued that the losses incurred in 1991 because of low prices, and ploughing under were the result of producers having to compete with cheap U.S. dumped imports which filled the "pipeline." Counsel also presented evidence of individual grower losses due to low prices and ploughing under, and submitted that a number of growers were either forced out of business or had to reduce acreage devoted to lettuce production because of dumping.

On the questions of like goods and quality differences, counsel pointed to the evidence of witnesses regarding the characteristics, qualities and substitutability of U.S. and B.C. Iceberg lettuce.

Counsel submitted that California Iceberg lettuce producers overproduced in 1991 and that this led to the dumping found by the Deputy Minister. On the question of future injury, counsel contended that California producers have been overproducing during the past four years and that there is no evidence that this will not continue in the future. The demise of the California Lettuce Commission, in 1991, left the California industry without an organization capable of planning appropriate production volumes.

3. *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade*, signed in Geneva on April 12, 1979.

Without the protection of anti-dumping duties, there is every likelihood, according to counsel, that the United States will continue to dump its products in the B.C. market during the harvesting season, thereby causing injury.

Finally, counsel for the complainant submitted that anti-dumping duties must be imposed on all packs of fresh Iceberg lettuce imported from the United States. Otherwise, exporters will ship low-priced fresh Iceberg lettuce in other than naked-24s cartons.

RESPONSE

In its submission and at the hearing, the WGA took the position that it was not the importation of the subject goods that was causing injury to B.C. growers. Rather, other factors affected the production and marketing of B.C.-grown Iceberg lettuce.

Counsel for the WGA contended that California growers did not overproduce in 1991, as evidenced by information in the record, and that the loss of market share experienced by B.C. producers during the review period was the result of their not expanding production sufficiently to meet increasing demand. Counsel noted that B.C. growers did increase production in 1991, but their inability to sell their lettuce was a function of oversupply due to an early maturing crop which came to market when the pipeline was full.

It was argued that the B.C. product is of inferior quality, as evidenced by sales under cost of production as well as below landed cost of U.S. lettuce, and by preference for the California product by some wholesalers.

Counsel argued that the financial losses experienced by B.C. growers in 1991 were the result of overproduction, unsatisfactory quality and selling below the landed cost of U.S. imports. In counsel's view, even the 1991 plough downs were due more to other factors such as weather conditions than to imports.

Counsel contended that California and B.C.-grown Iceberg lettuce are not like goods because the B.C. product is not acceptable to some market segments for reasons of quality and shelf life.

Counsel held that, in 1992, average selling prices for B.C.-grown lettuce increased, the industry became profitable and profit levels achieved by B.C. growers in 1992 offset the losses incurred in 1991. Counsel also submitted that, in view of rising market prices, the provisional anti-dumping duty had no effect on B.C. Iceberg lettuce price levels in 1992.

In counsel's view, bulk and cello-wrapped lettuce should not be an issue as B.C. production of these goods was so negligible that material injury could not have occurred. Also, according to the WGA, B.C. growers should be able to make a profit even at an F.O.B. price of US\$3.00 per carton as this price translates into a landed duty-paid price of CAN\$7.90 per carton.

Finally, it was the position of the WGA that, if anti-dumping duties have to be assessed, they should apply only during the B.C. harvesting season.

REASONS FOR DECISION

Under section 42 of SIMA, the Tribunal is required to determine whether the dumping of fresh (head) Iceberg lettuce, as found by the Deputy Minister, has caused, is causing or is likely to cause material injury to the production in British Columbia of like goods.

The Tribunal must consider three main issues in this inquiry. First, the Tribunal must determine whether B.C. producers of Iceberg lettuce represent a separate regional industry. Second, the Tribunal must determine whether B.C.-produced Iceberg lettuce and U.S.-produced Iceberg lettuce are like goods. Third, the Tribunal must determine whether the dumping of subject imports has caused, is causing or is likely to cause material injury to domestic production of like goods.

REGIONAL INDUSTRY

At the outset, the Tribunal must address the issue of whether B.C. producers constitute a separate regional industry. In an anti-dumping case, pursuant to paragraph 42(3)(a) of SIMA, the Tribunal must take fully into account paragraph 1 of Article 4 of the Code, which sets out the definition of domestic industry. Paragraph 1(ii) of Article 4 provides:

[I]n exceptional circumstances the territory of a Party may, for the production in question, be divided into two or more competitive markets and the producers within each market may be regarded as a separate industry if (a) the producers within such market sell all or almost all of their production of the product in question in that market, and (b) the demand in that market is not to any substantial degree supplied by producers of the product in question located elsewhere in the territory. In such circumstances, injury may be found to exist even where a major portion of the total domestic industry is not injured provided there is a concentration of dumped imports into such an isolated market and provided further that the dumped imports are causing injury to the producers of all or almost all of the production within such market.

In the view of the Tribunal, paragraph 1(ii) of Article 4 of the Code involves a two-part analysis. First, producers within a particular geographic market may be considered as a regional industry where: (i) they sell all, or almost all, of their production within that market; and (ii) the demand in that market is not supplied to any substantial degree by producers outside that market. In other words, a separate regional industry may be found to exist provided there is an isolated market. Second, where a regional industry exists, injury may be found to exist only if: (i) there is a concentration of dumped imports into the isolated market; and (ii) the dumped imports are causing injury to producers of all, or almost all, of the production within that market.

The Tribunal finds that the complainant represents a separate regional industry in this case. With respect to the first requirement, the evidence shows that, since 1988, B.C. producers have sold in excess of 88 percent of their Iceberg lettuce production in British Columbia. Therefore, the Tribunal is satisfied that the first requirement is met, i.e. that the producers sell all, or almost all, of their production in the regional market.

As regards the second requirement for an isolated market, the evidence indicates that no Iceberg lettuce produced in the rest of Canada was shipped into British Columbia

during the review period. The Tribunal, therefore, considers that demand in British Columbia for Iceberg lettuce is not supplied to any substantial degree by producers located elsewhere in Canada.

Having established that there is an isolated market, the Tribunal concludes that B.C. producers of Iceberg lettuce may be regarded as a separate regional industry within the meaning of paragraph 1(ii) of Article 4 of the Code.

Having determined that B.C. producers represent a separate regional industry, the two mandatory conditions concerning injury to that industry need to be examined. The first element is whether there is a "concentration" of dumped imports into the B.C. market.

In the past, the Tribunal and its predecessor, the Canadian Import Tribunal (the CIT), have used several alternative tests in determining whether or not there is concentration. These have been identified as the "density" test, the "distribution" test and the "ratio" test, which is a variant of the distribution test.

The density test compares the volume of dumped imports within the regional market to total regional market volume. The distribution test compares the volume of imports into the regional market to the volume of imports into the national territory. The ratio test compares British Columbia's share of the subject imports into Canada to its share of total Iceberg lettuce consumption in Canada.

In the CIT *Recreational Vehicle Entrance Doors*⁴ case, it was stated that there were two alternative tests that could be used in determining the concentration issue: (1) the "penetration test" (hereinafter referred to as the "distribution test"), which compares the volume of imports used in the regional market to the volume of imports used in the national territory as a whole; and (2) the "density test," which compares the volume of dumped imports within the regional market to total regional market volume. In that case, the CIT found both tests to be met.

The Tribunal observes that industries and their relevant markets vary tremendously. Therefore, the concentration of dumped imports into a regional market must be assessed according to the circumstance of each case.

In this case, the application of the density test reveals that, in 1991, dumped imports accounted for 56 percent of the B.C. market, which is eight times greater than the share held by non-dumped subject imports and is one and one-half times greater than the share held by local growers.

In support of the density test, the distribution test reveals that, for the 1991 crop year, 17 percent of the total subject imports were consumed in British Columbia. In addition, the ratio test indicates that, for the 1991 crop year, British Columbia's share of total subject imports into Canada was 1.22 times British Columbia's share of total Canadian consumption of Iceberg lettuce. In the view of the majority of the Tribunal,

4. *Recreational Vehicle Entrance Doors, Produced or Exported by, or on Behalf of, Elixir Industries, Gardena, California, United States of America, for Use or Consumption in the Provinces of Alberta and British Columbia*, Canadian Import Tribunal, Inquiry No. CIT-12-87, March 18, 1988; [1989] 16 C.E.R. 174.

the distribution and ratio tests take on added significance given that dumped subject imports accounted for 56 percent of the total B.C. market in the 1991 crop year.

For the foregoing reasons, the majority of the Tribunal concludes that there is a concentration of dumped imports into the regional market.

The Tribunal determines that the complainant represents "all, or almost all, of the production" within British Columbia. Sales of fresh Iceberg lettuce by the complainant represent producers who account for over 95 percent of domestic production of like goods in British Columbia. Whether all, or almost all, of these producers have been injured by the dumped imports is a question that the Tribunal considers later in its analysis of material injury and causality.

LIKE GOODS

Under subsection 42(1) of SIMA, the Tribunal must inquire into whether the dumping of goods is causing material injury to the "production in Canada of like goods." Therefore, as part of its task in determining material injury to production in Canada, the Tribunal must determine what like goods are, within the meaning of subsection 42(1) of SIMA.

During the hearing, the issue was raised of whether domestically produced Iceberg lettuce and imported fresh Iceberg lettuce are "like goods." Counsel for the WGA argued that B.C. lettuce and imported lettuce are not like goods because of differences in quality, shelf life and end use. Counsel for the complainant submitted that domestic and imported lettuce are like goods.

Subsection 2(1) of SIMA defines "like goods" in relation to other goods, as:

- (a) goods that are identical in all respects to the 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.*

In the opinion of the Tribunal, all lettuce is not identical in all respects within the meaning of paragraph (a) of the definition of "like goods" under subsection 2(1) of SIMA. Consideration must therefore be given to whether the uses and other characteristics of imported and domestic Iceberg lettuce closely resemble one another, including the degree of substitutability between both.

The Tribunal is of the view that the uses and characteristics of imported and domestic Iceberg lettuce closely resemble each other and are, therefore, like goods. Domestic and imported Iceberg lettuce have similar physical characteristics in that they have a large firm head with crisp, tightly packed leaves, and are both of the Salinas type or variety. Consumers do not make a distinction between B.C.-grown and imported Iceberg lettuce. B.C. and U.S. Iceberg lettuce have the same general use, namely, that it is sold for human consumption, whether in the retail, hotel, restaurant or institutional sector.

Upon reviewing the evidence, the Tribunal is also satisfied that imported and domestic Iceberg lettuce compete directly with one another in the marketplace and can be substituted for one another.

MATERIAL INJURY

Having found a regional industry, the next step is to consider whether that industry has suffered material injury caused by the dumped imports. The Tribunal proposes to address the issues of material injury and causality by reviewing the events that have occurred in the B.C. marketplace since 1988. Such a review is necessary to discern the movements and trends in the marketplace respecting market shares, prices and profitability. A number of other issues come into play in this case and will be discussed in the following pages.

In addressing the issues, the Tribunal has looked at events on a crop-year basis, which is defined as the period from June to October of each year. Secondly, the financial analysis is based primarily on data provided by Cloverdale, which accounts for well over 90 percent of industry sales. Moreover, profitability was measured on the basis of a cost-of-production (COP) model created by the Ministry for crop year 1991 and applied to all years under review. Lastly, market data were converted to cartons of naked-24s equivalents, as this is the industry's standard (marketing unit) and accounts for the vast majority of sales by the two sales agencies authorized by the Commission to market the subject lettuce in British Columbia. Furthermore, the naked-24s is the predominant import unit.

The Tribunal recognizes that California is the price setter for lettuce throughout North America, as it is by far the major producing region on the continent. In British Columbia, as elsewhere, price for the local product is generally established on the basis of landed costs of imports from California, adjusted to take into consideration local marketing conditions. The Tribunal also notes that California prices are subject to free market supply and demand conditions and may fluctuate widely within very short periods of time, reflecting changes in growing, harvesting and marketing conditions.

In 1988, B.C. Iceberg lettuce growers produced over 320,000 cartons of marketable product. In that crop year, growers experienced normal losses from cullage and plough downs of some 10,000 cartons. Of the balance, over 270,000 cartons, more than 80 percent, were sold on the B.C. market. The industry's market share was approximately 60 percent. The balance of the market was supplied by imports from the United States, of which more than 90 percent came from California. The average selling price for B.C.-grown Iceberg lettuce was \$7.30 per carton in 1988. U.S. prices tended toward the low end of the US\$3.00 to US\$7.00 per carton range in that year. On sales of over \$1.9 million, the B.C. industry recorded a loss of about \$0.62 per carton.

In 1989, B.C. marketable production declined marginally to just over 314,000 cartons. B.C. producers sold about 268,000 cartons to the local market, a slight drop from the previous year. However, in 1989, the total B.C. market grew by 20 percent, from 449,000 cartons in 1988 to about 538,000 cartons. This growth was supplied entirely by U.S. imports. Consequently, B.C. producers' market share fell from 60 percent to about 50 percent, while California took almost 9 of the 10 points of market share gained by the U.S. imports.

U.S. prices firmed considerably in 1989, particularly in the July to October period. Consequently, average selling prices for B.C.-grown Iceberg lettuce also improved, rising more than \$0.50 per carton to \$7.83 per carton. On the strength of those higher prices, the B.C. industry's financial losses declined to about \$0.09 per carton in 1989.

In 1990, the industry produced approximately the same marketable volume as in 1989. Reported losses from cullage and plough downs doubled in 1990. The effect was a slight decline in total sales volume to 263,000 cartons. The total B.C. market for Iceberg lettuce increased again by about 23 percent in 1990, to 661,000 cartons. As in the previous year, U.S. imports supplied all of the growth in demand. Imports increased by some 128,000 cartons or 47 percent. The market share held by U.S. imports rose to approximately 60 percent, a gain of almost 21 percent over two years. The B.C. producers' market share declined to just under 40 percent.

U.S. prices increased again in 1990, particularly from August to the end of the B.C. harvesting season. As in the previous year, prices for B.C.-grown Iceberg lettuce responded to rising U.S. prices, increasing, on average, to \$7.94 per carton, a gain of \$0.11 over 1989. The combination of rising prices and a reduction in average carton costs from approximately \$1.73 per carton to \$1.48 per carton resulted in a small profit for the industry despite another substantial loss of market share.

In 1991, there was a dramatic increase to 389,000 cartons (24 percent over 1990) in marketable production by B.C. growers. A number of events help to explain this surge in production. The strengthening of prices through 1990 and the early 1991 crop year and the industry's return to profitability were strong incentives. Forecasts of possible water shortages in California may have led to expectations of a shortfall in U.S. supply and higher prices. There may also have been expectations of improved competitiveness as the industry completed its conversion from the Ithica to the Salinas variety of Iceberg lettuce.

In May and early June 1991, U.S. prices were considerably higher than those experienced during the same period in the previous three years and were comparable to the high prices recorded through September 1990. Early June prices for B.C.-grown lettuce were similarly high. These initial price levels appeared to reflect the positive market trends anticipated by B.C. growers when they made their 1991 planting decisions. Over the month of June, however, U.S. prices plummeted from a high of over US\$12.00 per carton to a low of US\$3.00 and remained low until late October. This had disastrous effects on the prices of B.C. lettuce, which invariably follow U.S. prices. Average selling prices of B.C. lettuce dropped by more than \$2.00 per carton in 1991 to \$5.92 per carton. This price erosion led to a financial loss of over \$400,000, or about \$2.00 per carton sold, for the crop year, based on the Ministry's average cost of production of \$7.92 per carton. The Tribunal observes that the Deputy Minister found that U.S. imports were dumped by an average of 31 percent during the period from July to September 1991.

To compound the industry's difficulties, the B.C. market remained flat in 1991. B.C. producers' sales actually declined by about 16,000 cartons, or 6 percent, while U.S. imports increased by 19,000 cartons, or almost 5 percent. This had two effects on the B.C. industry.

First, the B.C. industry's share of market declined to 37 percent from 40 percent in 1990, while the share held by U.S. imports rose to 63 percent. The Tribunal notes that, initially, B.C. producers improved their market share in 1991, which increased to approximately 48 percent for the June and July period from a 40-percent share for crop year 1990. This coincided with very high U.S. selling prices in June. However, as prices declined, the B.C. producers' market position also deteriorated. By the end of 1991, the industry's share of market had declined to 37 percent, from 60 percent in 1988.

Second, as dumped imports improved their position in the B.C. market and the anticipated market growth did not materialize, B.C. growers were faced with a substantial excess volume of marketable lettuce. The industry's estimate of 75,000 cartons ploughed down, subsequently revised to 97,500 cartons, resulted in an additional and substantial financial loss for the year.

During the inquiry, different views were expressed by the parties as to what the actual B.C. landed cost of U.S. lettuce was in 1991. The Tribunal observes that the F.O.B. price was indeed in the range of US\$3.00 to US\$4.50 per carton throughout the better part of the 1991 B.C. harvesting season. The record indicates additional costs of CAN\$3.25 to CAN\$3.50 (including exchange) to land U.S. lettuce in British Columbia, resulting in landed costs in the range of \$6.25 and \$8.00 per carton. These prices are well below the estimated cost of production of \$8.67 for B.C. producers.

In 1992, in response to severe financial losses incurred in 1991, three major producers ceased their Iceberg lettuce production. The Tribunal heard evidence that other growers reduced their plantings in 1992. In total, the area planted in Iceberg lettuce in 1992 was reduced by approximately 40 percent. Consequently, marketable production in the 1992 June to July period was down by about 37 percent. Total shipments declined by approximately 23 percent compared to the same period in 1991.

The B.C. market for the subject goods increased by 16 percent in the June and July period of 1992 over the same period in 1991. During this two-month period, domestic sales declined by 22 percent, while U.S. imports increased by 53 percent over the corresponding period in 1991. By the end of July 1992, U.S. imports had 68 percent of the B.C. market as compared to 32 percent for B.C. production.

U.S. prices, in June and July 1992, were at about the same low level as in 1991, but B.C. prices were higher during the first two months of the 1992 crop year, in part, because of the support received from some wholesalers to assist the industry. Both U.S. and domestic prices firmed considerably, starting in late July coincident with the imposition of anti-dumping duties by the Deputy Minister. B.C. selling prices were significantly higher in August 1992 than in June and July because of higher prices in the United States and because of the imposition of the anti-dumping duty on U.S. imports. The industry returned to a profitable position in late July 1992.

In summary, between 1988 and July 1992, the B.C. Iceberg lettuce industry lost 28 points of market share to U.S. imports. Prices in the marketplace firmed in 1989 and 1990, enabling the industry to become marginally profitable in 1990 after incurring losses in 1988 and 1989. The year 1991 was a disastrous one for B.C. growers as sales declined substantially in both volume and value, reflecting the low prices prevailing throughout the crop year. Substantial financial losses were incurred in 1991 as a result of price erosion caused by dumped imports and the industry's inability to sell a significant volume of lettuce which had to be ploughed under.

B.C. producers have steadily lost market share in absolute and relative terms since 1988, when they satisfied 60 percent of market demand despite growing a product, the Ithica variety, which is acknowledged to be of a lesser quality than the Salinas variety now grown in British Columbia. By 1991, the share of market held by U.S. imports had increased by 23 percentage points to 63 percent. The Deputy Minister's final determination of dumping established that, in 1991, 87.5 percent of these imports into British Columbia were dumped, and at a weighted average margin of 31.0 percent.

Therefore, 55 percent of the B.C. market was held by dumped imports, 8 percent, by undumped imports, and 37 percent, by local production.

In light of the foregoing, the Tribunal is satisfied that the dumping of the subject imports has caused and is causing material injury to the producers and production of like goods in British Columbia as all, or almost all, of the B.C. industry has been materially injured by the dumped imports. The Tribunal is therefore satisfied that the fourth condition relating to regional industry is now met.

With regard to the future, the evidence on pricing persuades the majority of the Tribunal that material injury is likely to occur without the imposition of anti-dumping duties. The record shows that, during every crop year since 1988, imports have frequently been sold at very low prices, which have been found to be dumped at significant margins. The majority of the Tribunal is of the opinion that, if anti-dumping duties are not kept in place, U.S. exporters will resume dumping. The majority of the Tribunal therefore finds that the dumping of the subject goods is likely to cause material injury to the production in British Columbia of like goods.

EXCLUSIONS

The B.C. industry has requested protection from dumping during the period from June 1 to October 15 of each year because this period coincides with the harvesting season of B.C. Iceberg lettuce. The evidence indicates that, each year, the B.C. product generally comes to market on or about June 1 and that the last local product is usually not readily available after October 15. Given the perishability of fresh Iceberg lettuce, it is obvious that B.C. growers cannot supply the domestic market during the full year.

Anti-dumping remedies under SIMA are usually applied on a continuous basis while a finding of injury is in place. This is less suitable when the subject goods are perishable in nature or agricultural goods that cannot be stored for any length of time beyond the harvesting season. In this case, any order under SIMA must be tailored to meet the reality of the production cycle and the marketplace in order to avoid penalizing end users during periods when the industry is not in production and, therefore, does not require the protection of anti-dumping measures.

Consequently, the Tribunal cannot find that imports of fresh Iceberg lettuce, during a period when B.C. growers have not traditionally supplied the marketplace, can have any material effect on the growers' performance and, therefore, no injury can be caused during those months of the year. In this respect, the Tribunal excludes from its finding of material injury imports of the subject Iceberg lettuce into British Columbia during the periods January 1 to May 31 and October 16 to December 31 in each calendar year.

The WGA claimed that bulk and cello-wrapped lettuce should not be an issue as B.C. supply in these types of packaging units is negligible. On the question of exclusions, the Tribunal has a discretion which has been recognized in the past by the courts and binational panels under the *Canada-United-States Free Trade Agreement*.⁵

5. Canada Treaty Series, 1989, No. 3 (C.T.S.), signed on January 2, 1988.

In this case, the Tribunal, having had regard to the margins of dumping and the price-sensitive nature of the B.C. lettuce market, finds that the dumping of almost all imported Iceberg lettuce, regardless of the type of packaging, has contributed to the price erosion and material injury suffered by the industry. The Tribunal is also of the opinion that the subject imported lettuce, regardless of its packaging, is competitive with and substitutable for domestic production. While the Tribunal recognizes that there is limited availability of the subject goods in packaging other than naked-24s, it is convinced that the removal of anti-dumping duties on bulk and cello-wrapped lettuce would give rise to circumvention of the injury finding.

CONCLUSION

In light of all of the foregoing, the Tribunal finds that the dumping of fresh Iceberg (head) lettuce originating in or exported from the United States of America, for use or consumption in the province of British Columbia has caused, is causing and is likely to cause material injury to the production in British Columbia of like goods, excluding the periods January 1 to May 31 and October 16 to December 31 in each calendar year (Member Coleman dissenting).

Sidney A. Fraleigh

Sidney A. Fraleigh

Presiding Member

Michèle Blouin

Michèle Blouin

Member

DISSENTING OPINION OF MEMBER JOHN C. COLEMAN

There are two important issues in this case on which I disagree with my colleagues' decision. First, I do not consider that the evidence demonstrates that British Columbia is a separate regional industry, as defined by paragraph 1(ii) of Article 4 of the Code. Second, I am not persuaded that there is a likelihood of material injury in the future sufficient to justify the imposition of anti-dumping duties for up to five years.

Paragraph 42(3)(a) of SIMA requires the Tribunal to take fully into account paragraph 1 of Article 4 of the Code when deciding, in each case, on the definition of the "domestic industry" and, within that, on whether one or more separate regional markets may be found. I agree with my colleagues that paragraph 1(ii) of Article 4 of the Code involves a two-part analysis and that B.C. producers of Iceberg lettuce may be regarded as a separate regional industry. My difficulty lies with their conclusion that there is a "concentration" of dumped imports into the B.C. market.

My colleagues suggest that the Tribunal and its predecessor, the CIT, have relied on two main tests in the past to define the concept of concentration. The first is the "density" test, which expresses the value of sales of dumped subject imports in the region as a percentage of total sales of the subject goods in the region. In the present case, the figure is impressive, compared to previous cases for which we have numbers. Dumped imports of lettuce accounts for 56 percent of the B.C. market for lettuce during the 1991 crop year, compared with percentages derived by the staff from the public records of previous cases, of 33 percent for *Recreational Vehicle Entrance Doors*, 37 percent for *Solid Urea*,⁶ and 8 percent for *Beer*.⁷

The second test which the Tribunal has applied measures "distribution" by comparing the volume of subject imports into the region with the volume of subject imports into the rest of the national territory. In the present case, the figure is 17 percent, compared with percentages for past cases where we have numbers of 75 percent for *Recreational Vehicle Entrance Doors*, 100 percent for *Solid Urea*, 23 percent for *Yellow Onions*,⁸ and 29 percent for *Beer*.

In the *Beer* case, the Tribunal used a "ratio" test to supplement the distribution test. The ratio relates the region's share of subject imports into Canada to the region's share of total consumption of the subject goods in Canada. In my view, the ratio test is valuable because it allows the Tribunal to judge how the region is affected by the subject imports, compared to the national territory as a whole. Applying the ratio test

6. *Solid Urea Originating in or Exported from the German Democratic Republic and the Union of Soviet Socialist Republics for Use or Consumption in Eastern Canada (Canadian Territory East of the Ontario-Manitoba Border)*, Canadian Import Tribunal, Inquiry No. CIT-9-87, December 24, 1987; [1989] 15 C.E.R. 277.

7. *Certain Beer Originating in or Exported from the United States of America by or on Behalf of Pabst Brewing Company, G. Heileman Brewing Company Inc. and The Stroh Brewery Company, their Successors and Assigns, for Use or Consumption in the Province of British Columbia*, Canadian International Trade Tribunal, Inquiry No. NQ-91-002, October 2, 1991.

8. *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 International Trade Tribunal, Review No. RR-91-004, May 22, 1992.

in this case gives a figure of 1.22:1, compared to ratios for past cases for which we have figures of 1.5:1 for *Yellow Onions*, and 2.9:1 for *Beer*.

While the Tribunal has discussed both the density and distribution tests in past cases, it has applied both only in the *Recreational Vehicle Entrance Doors* case. In the other cases, *Solid Urea*, *Beer* and *Yellow Onions*, the Tribunal relied on the distribution test alone. While the Tribunal in the *Beer* case did not comment directly on the appropriateness of the density test, it had this to say to explain its sole reliance on the distribution test:

In this case, the Tribunal believes that it is appropriate to apply the distribution test to determine whether there is a concentration of dumped imports into the isolated market. A plain reading of subparagraph 1(ii) of Article 4, which refers to "a concentration of dumped imports into such an isolated market," suggests that the issue of concentration is to be examined by comparing the volume of imports into the regional market to the volume of imports into the rest of the country.

I agree with the Tribunal's reasoning in *Beer*. Indeed, it persuades me that the density test, by itself, is not useful or relevant in assessing concentration in regional market cases. The whole scheme of paragraph 1 of Article 4 of the Code requires that various comparisons be made between the situation in the regional market and the national territory as a whole. This is particularly true of the last sentence setting out the concentration requirement, where the opening phrase makes it clear that the Tribunal may find injury in the regional market, "even where a major portion of the total domestic industry is not injured." This suggests that the Tribunal must have some understanding of the situation of the entire domestic industry before it can come to a judgement on concentration of dumped imports into the regional market.

Can the density test be of some use in measuring concentration, either by itself or as support for the distribution test? In particular, is it meaningful in this case that 56 percent of the B.C. lettuce market is served by lettuce imported from the United States? In my view, this number by itself is not helpful in judging concentration. The number is of more interest in considering material injury under Article 3 of the Code, but, here again, not by itself. The high penetration of the B.C. lettuce market by dumped imports from the United States is relevant to the consideration of injury only if it can be shown that the penetration is much higher than it was in some earlier period and that the increase was caused by the dumped imports.

Where the density test can be helpful, I suggest, is as a check on the distribution test, provided it is related to the density in the rest of the national territory. Such a "market penetration" test has been applied by the U.S. authorities. It relates the market share of subject imports in the region to their market share in the rest of the national territory. In the present case, Revenue Canada has estimated that the share of dumped imports in the rest of Canada is 44 percent, compared with 56 percent for British Columbia. While such estimates must be used with caution, the high reliability of import statistics in this industry, the fact that 88.7 percent of the subject imports into British Columbia were found to be dumped, and the cost of production method of calculating the margins of dumping which would give the same result for dumped imports into the rest of Canada suggest that this estimate is reliable. The ratio of dumped imports into British Columbia to dumped imports into the rest of Canada, under this form of the "market penetration" test is 1.3:1. This is slightly higher than the ratio of 1.22:1 calculated according to the "ratio" method used in the *Beer* case.

The question now is whether the Tribunal should be satisfied, on the basis of either of these ratios, that the concentration condition has been met. As the Tribunal observed in its reasons in the *Beer* case, the Code speaks only of "a concentration" and it may be supposed that the condition is satisfied if either of the ratios considered above is greater than 1, which they are. However, the Code also states that a separate regional industry finding may be made only in "exceptional circumstances." To my mind, ratios which show that the B.C. lettuce market is affected in the order of 20 percent to 30 percent more than the rest of Canada by imports of dumped U.S. lettuce are not sufficient to lead to a conclusion that exceptional circumstances exist in this case.

As can be seen from the figures cited earlier, the ratio test for lettuce is considerably lower than the ratios for earlier cases where injury was found. (There was a finding of no injury in the *Recreational Vehicle Entrance Doors* case.) I would not wish to suggest that any minimum ratio should apply to all cases, because of the different facts in each case. However, I suggest that the ratio of 2.9:1 on which the Tribunal relied in *Beer* is consistent with the notion of "exceptional circumstances," and that the ratio of 1.22:1 (or even the market penetration ratio of 1.3:1) in this case is not.

In my view, then, the concentration requirement is not met. This requirement is no less essential than the other three criteria of paragraph 1 of Article 4 of the Code. Accordingly, the first mandatory condition in paragraph 1 of Article 4 concerning injury to a regional industry cannot be met in this case. While my difference of view with my colleagues on this issue is sufficient to cause me to dissent from the entire finding, I would like also to make some comments on the question of material injury in this case.

I agree with my colleagues that there are clear indications in this case of material injury in the past, particularly with respect to the disastrous year of 1991. However, I question whether there is a strong likelihood of material injury from continued dumping in the future. While Revenue Canada's dumping investigation concentrated on the 1991 crop year when U.S. prices were at their lowest, the Tribunal considered evidence relating to injury over the five-year period from 1988 to 1992. To make a judgement about future injury and the advisability of putting anti-dumping duties in place for up to five years, it is necessary to consider market developments in the past five years, with particular reference to recent developments.

It is clear that B.C. lettuce production and market share have slipped significantly in the past five years. Furthermore, as measured by the B.C. Iceberg lettuce cost-of-production formula which the industry presented to the Tribunal, the industry has been in a loss position for much of the past five years. On the basis of evidence tested at the hearing and confirmed subsequently by the interested parties, per carton losses on sales were \$0.62 in 1988, \$0.09 in 1989 and \$2.01 in 1991. Profits were only \$0.01 per carton in 1990 and \$0.24 in June and July 1992, though their average for the entire 1992 crop year must have been considerably higher, given the strong increase in prices which occurred in the remainder of the year.

What is interesting is how the B.C. industry responded to the negative or at best mediocre price and profit signals it was receiving. During the crop years 1988 to 1991, the area planted in lettuce in British Columbia increased by 17 percent, compared to a 3-percent decline in the rest of Canada. According to evidence supplied by the B.C. industry, intended acreages in lettuce rose from 526 for 1990 to 594 for 1991. In the same two years, marketable production increased from approximately 300,000 cartons to approximately 390,000. Of the 1991 marketable production, the industry estimated that

it had to plough down the equivalent of 97,500 cartons. That is, the plough downs were only slightly greater than the increase in the domestic industry's marketable production. Meanwhile, shipments to British Columbia from the United States, in carton equivalents, increased by about 5 percent in 1991.

During the hearing, industry witnesses were unable to give complete explanations of why they planted so much lettuce in 1991. Most mentioned the B.C. growers' belief that continued drought in California would restrict supplies and keep prices high, though California had been in drought for several years. There was also testimony that the greatest part of B.C. growers' shift to the Salinas variety of Iceberg lettuce took place in 1991. I think it is possible that B.C. growers' plantings in 1991 were influenced by the hope that the full-scale switch to the Salinas variety would help them recover market share from U.S. producers. I think it is also possible that the B.C. industry's cost-of-production formula is on the high side, and that 1990 was quite a profitable year, not just a break-even year as shown by the formula. Indeed, the British Columbia Fruit Wholesalers Association submitted evidence based on interviews of some producers that the break-even cost for B.C. producers was approximately \$7.00 a carton, not \$7.92 as shown by the formula submitted by the B.C. industry.

Whatever the reasons for the B.C. industry's overproduction in 1991, this factor clearly aggravated the material injury which the industry suffered as a result of very low U.S. prices that year. In reaction to the U.S. dumping and its own overproduction, the B.C. industry cut back sharply lettuce acreage and production in 1992. The cutback in 1992 production, in response to the difficulties of 1991, made it impossible for the industry to take full advantage of the higher prices in 1992 and allowed U.S. lettuce sold that year, at largely undumped prices, to make sizeable gains in market share.

In turning to the question of future injury, it is well to keep in mind paragraph 6 of Article 3 of the Code, which reads as follows:

A determination of threat of injury shall be based on facts and not merely on allegation, conjecture or remote possibility. The change in circumstances which would create a situation in which the dumping would cause injury must be clearly foreseen and imminent.

In my view, "imminence" must relate to the likelihood of injurious dumping affecting B.C. lettuce producers in the next year or so, and not at any time over the five-year period which would be covered by a finding of material injury. The chance of the 1993 crop year being as difficult as the 1991 crop year is probably no more than one in five. While the first three years of the 1988-92 period were at best mediocre for the B.C. lettuce industry in terms of profits, and worse in terms of market share, the industry appeared to be adjusting to the pressures. For instance, it was attempting to regain market share and reduce the price discounts it had to give relative to the landed price of U.S. lettuce by switching to the Salinas variety of Iceberg lettuce. The fifth year, 1992, was profitable overall, despite the low production of the B.C. industry. Indeed, prices rose throughout the summer. By the time the preliminary determination of dumping went into effect at the end of July, and anti-dumping duties began to be collected, market forces had driven U.S. prices and hence B.C. prices, net of duties, to levels which were very profitable for B.C. producers.

In making short-term projections, that is in deciding what is "imminent," it is normal to put particular weight on recent events. On this basis, the pricing and profit

situation in the 1992 crop year might suggest little reason to predict a reversal in the fortunes of the B.C. lettuce industry next year. In addition, the B.C. industry has been successful, through switching to the Salinas variety, in narrowing the price discount it must offer against the landed price of U.S. lettuce. A narrowing of the discount was noticeable even in 1991. Furthermore, the B.C. industry, with the lesson of 1991 in mind, is unlikely to overplant as it did that year. However, it must be recognized that agricultural markets are notoriously volatile. Even if B.C. producers are careful, is it not possible that the high prices in 1992 will induce producers in California and other states to grow too much Iceberg lettuce and drive prices to disastrous lows?

The experience in California, in the last few years, suggests that there will not be a significant supply response to the firm prices of 1992. From 1989 to 1991, lettuce acreage in California declined by 9 percent. From 1988 to 1991, total lettuce production in California increased by only 1.5 percent. Whether the high prices of 1992 will bring on more production in the United States depends on a lot of unknown factors such as the availability of land, the attractiveness of other crops and the weather. Press clippings on California production, supplied to the Tribunal by the B.C. industry, suggest that California lettuce producers, despite the recent collapse of the California Iceberg Lettuce Commission, have not given up efforts to pursue orderly marketing activities. An institutional example of this is the revitalization of the Central California Iceberg Lettuce Cooperative, which groups half of the state's Iceberg lettuce growers.

It is quite possible, in the absence of a finding of material injury, in the course of the next five years, that the B.C. Iceberg lettuce industry could be hit again by very low U.S. prices. However, I do not consider that the purpose of the anti-dumping legislation is to put a price floor under Canadian producers to protect them from intermittent dumping. Dumping in this industry, when it occurs, is the result of market forces driving prices down below the cost of production in the exporting country. Cost-of-production formulas for agricultural commodities are notoriously high and industries concerned, such as the California lettuce industry, operate and may even expand without always selling at prices exceeding those given by a full cost-of-production formula. Dumping arising from sales at prices below full cost of production in a competitive market such as lettuce is inadvertent and not part of any long-range plan to eliminate production in the importing country. Furthermore, such dumping, when it occurs, may not be of such magnitude as to cause material injury to production in Canada. For these reasons, great caution should apply to decisions on the likelihood of material injury in agricultural commodity cases of this sort.

John C. Coleman

John C. Coleman

Member