



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Dumping and Subsidizing

ORDER AND REASONS

Expiry Review No. RR-2009-002

Certain Whole Potatoes

*Order and reasons issued
Friday, September 10, 2010*

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IN THE MATTER OF an expiry review, pursuant to subsection 76.03(3) of the *Special Import Measures Act*, of the order made by the Canadian International Trade Tribunal on September 12, 2005, in Expiry Review No. RR-2004-006, continuing, with amendment, its order made on September 13, 2000, in Review No. RR-99-005, continuing, without amendment, its order made on September 14, 1995, in Review No. RR-94-007, concerning:

THE DUMPING OF WHOLE POTATOES, EXCLUDING SEED POTATOES, EXCLUDING IMPORTS DURING THE PERIOD FROM MAY 1 TO JULY 31, INCLUSIVE, OF EACH CALENDAR YEAR, AND EXCLUDING RED POTATOES, YELLOW POTATOES AND THE EXOTIC POTATO VARIETIES, REGARDLESS OF PACKAGING, AND WHITE AND RUSSET POTATOES IMPORTED IN 50-LB. CARTONS IN THE FOLLOWING COUNT SIZES: 40, 50, 60, 70 AND 80, IMPORTED FROM THE UNITED STATES OF AMERICA, FOR USE OR CONSUMPTION IN THE PROVINCE OF BRITISH COLUMBIA

ORDER

On December 30, 2009, the Canadian International Trade Tribunal gave notice that, pursuant to subsection 76.03(3) of the *Special Import Measures Act*, it would initiate an expiry review of its order made on September 12, 2005, in Expiry Review No. RR-2004-006, continuing, with amendment, its order made on September 13, 2000, in Review No. RR-99-005, continuing, without amendment, its order made on September 14, 1995, in Review No. RR-94-007, concerning whole potatoes, excluding seed potatoes, excluding imports during the period from May 1 to July 31, inclusive, of each calendar year, and excluding red potatoes, yellow potatoes and the exotic potato varieties, regardless of packaging, and white and russet potatoes imported in 50-lb. cartons in the following count sizes: 40, 50, 60, 70 and 80, imported from the United States of America, for use or consumption in the province of British Columbia.

Review No. RR-94-007 continued, with an amendment to exclude imports during the period from May 1 to July 31, inclusive, of each calendar year, its order made on September 14, 1990, in Review No. RR-89-010. The latter review continued, without amendment, (1) the finding of the Anti-dumping Tribunal made on June 4, 1984, in Inquiry No. ADT-4-84, concerning whole potatoes with netted or russeted skin, excluding seed potatoes, in non-size A, also commonly known as strippers, originating in or exported from the state of Washington, United States of America, for use or consumption in the province of British Columbia and (2) the finding of the Canadian Import Tribunal made on April 18, 1986, in Inquiry No. CIT-16-85, concerning whole potatoes, originating in or exported from the United States of America, for use or consumption in the province of British Columbia, excluding seed potatoes, and excluding whole potatoes with netted or russeted skin in non-size A, originating in or exported from the state of Washington.

Pursuant to paragraph 76.03(12)(b) of the *Special Import Measures Act*, the Canadian International Trade Tribunal hereby continues its order in respect of the aforementioned goods.

Jason W. Downey

Jason W. Downey

Presiding Member

Diane Vincent

Diane Vincent

Member

Stephen A. Leach

Stephen A. Leach

Member

Dominique Laporte

Dominique Laporte

Secretary

Place of Hearing:	Vancouver, British Columbia
Dates of Hearing:	July 27 to 29, 2010
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Rebecca M. Morse**Importer/Exporter/Other**

Washington State Potato Commission

Counsel/Representative

Mark H. Calkins

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STATEMENT OF REASONS

1. This is an expiry review, under subsection 76.03(3) of the *Special Import Measures Act*,¹ of the order made by the Canadian International Trade Tribunal (the Tribunal) on September 12, 2005, in Expiry Review No. RR-2004-006, concerning whole potatoes, excluding seed potatoes, excluding imports during the period from May 1 to July 31, inclusive, of each calendar year, and excluding red potatoes, yellow potatoes and the exotic potato varieties, regardless of packaging, and white and russet potatoes imported in 50-lb. cartons in the following count sizes: 40, 50, 60, 70 and 80, imported from the United States of America, for use or consumption in the province of British Columbia. This is the fifth expiry review proceeding with respect to the finding of the Anti-dumping Tribunal (ADT), made on June 4, 1984, in Inquiry No. ADT-4-84, and the finding of the Canadian Import Tribunal (CIT) made on April 18, 1986, in Inquiry No. CIT-16-85, concerning certain whole potatoes.²

2. On December 30, 2009, the Tribunal initiated an expiry review to determine, pursuant to subsection 76.03(10) of *SIMA*, whether the expiry of the order was likely to result in injury or retardation and sent a notice of expiry review to known interested parties.³ The Tribunal also sent letters requesting the Canadian growers, importers, foreign growers and exporters to complete expiry review questionnaires. The Tribunal requested that, if the Canada Border Services Agency (CBSA) found a likelihood of continued or resumed dumping, domestic growers, importers, foreign growers and exporters update their responses to questionnaires submitted to the CBSA to include data for the period from January to March 2010 and that domestic growers complete Part E of the expiry review questionnaire for growers.

3. On December 31, 2009, the CBSA initiated an expiry review investigation to determine whether the expiry of the order would likely result in the continuation or resumption of dumping.

4. On April 29, 2010, the CBSA determined that, pursuant to subsection 76.03(7)(a) of *SIMA*, the expiry of the order would likely result in the continuation or resumption of dumping.

5. The Tribunal held a hearing, with public and *in camera* testimony, in Vancouver, British Columbia, from July 27 to 29, 2010.

6. The BC Vegetable Marketing Commission (BCVMC) submitted evidence and made arguments in support of a continuation of the order. The BCVMC was represented by counsel and presented the following witnesses at the hearing: Mr. Tom Demma, General Manager, BCVMC; Mr. Murray Driediger, President and CEO, *BCFresh*; Mr. Peter Guichon, Chairman, *BCFresh*; Mr. Blair Lodder, owner, Shadie Acres; Mr. Peter Schouten, Director/GM, Heppell's Potato Corp.; and Mr. John Walsh, owner, Echo Valley Farms.

7. The Washington State Potato Commission (WSPC) submitted evidence and made arguments in support of a rescission of the order. The WSPC was represented by counsel and presented Mr. Matt Harris, Director of Trade, WSPC, as witness at the hearing.

8. The Tribunal invited Mr. Dariel Trottier, Director of Produce, Sysco Canada, Inc.; Mr. Jim Waites, Director, Produce Merchandising, Overwaitea Food Group; and Mr. Mark Drouin, Senior Market Development Advisor, Department of Agriculture and Agri-Food, to appear as witnesses for the Tribunal at the hearing.

1. R.S.C. 1985, c. S-15 [*SIMA*].

2. The original finding, as amended as a result of the Tribunal's orders in previous expiry reviews as described in the present order, has been in place for 26 years.

3. C. Gaz. 2010.I.28.

9. The record of these proceedings consists of all relevant documents filed or accepted for filing by the Tribunal, including the following: the CBSA's protected expiry review report, statement of reasons, index of background information and related documents; the protected and public replies to the expiry review questionnaires; the public and protected pre-hearing staff reports prepared for this expiry review; documents with respect to the product exclusion process, witness statements and other exhibits; the Tribunal's findings and notice of expiry review; the transcript of the hearing; and the exhibit list along with the public and protected pre-hearing staff reports prepared for Expiry Review No. RR-2004-006. Protected exhibits were provided only to counsel who had filed a declaration and undertaking with the Tribunal in respect of confidential information.

PRODUCT

Production Description

10. The goods subject to this expiry review are defined as:

whole potatoes, excluding seed potatoes, excluding imports during the period from May 1 to July 31, inclusive, of each calendar year, and excluding red potatoes, yellow potatoes and exotic potato varieties, regardless of packaging, and white and russet potatoes imported in 50-lb. cartons in the following count sizes: 40, 50, 60, 70 and 80, imported from the United States of America, for use or consumption in the province of British Columbia.

Additional Product Information

11. Russet and white potatoes are the two types of potatoes subject to this expiry review.⁴ In British Columbia, russet and white potatoes are the predominant types grown. In crop year 2008-2009, russet and white potatoes represented 43 percent and 29 percent, respectively, of all potatoes sold.⁵ In that same year, russet and white potatoes represented 60 percent and 40 percent, respectively, of all like goods sold. Russet potatoes dominate the B.C. retail market, and they are popular, though not necessarily dominant, in other parts of Canada.⁶

12. Russet potatoes have a netted reddish-brown skin and, overall, are the most widely used type in Canada and the United States. A russet potato is long and slightly rounded and has only a few shallow eyes. Many potato varieties belong to this type, including Norkotah, Burbank, Ranger, Umatilla and Alturas. Over the last decade, the Russet Norkotah has replaced the Russet Burbank as the principal variety of russet potatoes grown in British Columbia.⁷

13. White potatoes are round or oblong tubers of varying sizes, with smooth skins ranging in colour from white to light tan and white flesh, also with only a few shallow eyes. Frito-Lay, Shepody, Cascade, Kennebec and Norchip are common white potato varieties. In recent years, white nugget potatoes have increased in popularity. The average prices of white potatoes were about 65 percent higher than those of russet potatoes during the period of review (POR).⁸

14. Potatoes can be sold to either the fresh market or the processing market.

4. Potatoes in count sizes 40, 50, 60, 70 and 80 are excluded.

5. Grower's Exhibit A-05 at para. 33, Administrative Record, Vol. 11.

6. *Ibid.* at para. 34; Grower's Exhibit A-06, tab 14, Administrative Record, Vol. 11.

7. *Transcript of Public Hearing*, Vol. 1, 27 July 2010, at 25.

8. *Pre-hearing Staff Report*, 17 June 2010, Tribunal Exhibit RR-2009-002-05C, Administrative Record, Vol. 1.1 at 145.

15. Sales to the fresh market include sales to large and small food retailers and wholesalers ultimately destined for the table market, as well as sales to the foodservice industry that primarily consist of sales to restaurants, hospitals and health care institutions.

16. Sales to the processing market include sales to french-fry manufacturers, chip manufacturers, dehydration establishments and canning plants. As a last resort, potatoes which are scarred and bruised and not otherwise suitable for the fresh market or the processing market may be culled and sold to dehydrating plants where they are turned into pastes and other forms for use in soups or other food products and mixes.⁹

17. In British Columbia, potatoes are only sold to the fresh market, as there is no processing industry in the province.

18. During the POR, the state of Washington was the source of the vast majority of the subject potato imports into British Columbia, averaging about 88 percent of total imports from the United States into the province.

19. In the state of Washington, during crop year 2009-2010, russet potatoes represented about 85 percent of all potato acres planted.¹⁰ In the same year, the Russet Burbank maintained its position as the dominant variety in the state of Washington, with 31 percent of all potato acres planted, while the Russet Norkotah was the next most common type, with 15 percent. Following in popularity were the Ranger Russet at 14 percent, the Umatilla Russet at 12 percent and the Alturas Russet at 8 percent.

20. The vast majority of potatoes grown in the state of Washington, about 87 percent in 2008-2009, are for the processing market under pre-established contracts between processors and growers. The predominant potato variety sold for processing is the Russet Burbank. The remainder, about 13 percent, is sold into the fresh market. As in British Columbia, over the past decade in the state of Washington, the Russet Norkotah has replaced the Russet Burbank as the variety preferred for the fresh market.

21. Each different potato variety has certain inherent qualities, which ultimately determine their preferred end uses. While the Russet Norkotah is almost exclusively destined for the fresh market, the Russet Burbank is sold mainly to the processing market but, as will be discussed later, it could also be sold to the fresh market, depending on market conditions.

22. In both Canada and the United States, the bulk of the potato harvest occurs from August to October, with potatoes that are not sold immediately being stored in storage sheds, where some varieties can be kept until the beginning of the following summer. In British Columbia, there are some early white nugget potatoes harvested in June and July, some of which are sold on the Alberta market.

23. Potatoes destined for the fresh market are sold in a wide variety of packages. They can be sold in individual bags weighing 5, 10, 15, 20, 50 or 100 lbs., or in bales. The two most common types of bales are a 5/10-lb. bale, which consists of 5 10-lb. bags, and a 10/5-lb. bale, which consists of 10 5-lb. bags. The bags can be made of plastic, paper, mesh or jute. Potatoes can also be sold in count-size cartons. Count-size potatoes are those of uniform size and shape that are sold mostly in 50-lb. cartons containing between 40 and 110 potatoes.¹¹ A 90 count size means that there are 90 potatoes in a carton. The higher the count size, the greater the number of potatoes in a carton and the smaller the size of each individual potato.

9. *Transcript of Public Hearing*, Vol. 1, 27 July 2010, at 97.

10. Exporter's Exhibit B-05 at 2, Administrative Record, Vol. 13.

11. Potatoes in count sizes 40, 50, 60, 70 and 80 are not covered by this order and, therefore, not subject to this expiry review.

Canadian Regulations and Standards

24. The *Fresh Fruit and Vegetable Regulations*,¹² enacted pursuant to the *Canada Agricultural Products Act*,¹³ define a Canada No. 1 grade and a Canada No. 2 grade for potatoes. Potatoes of both grades must meet certain minimum quality standards, including being properly packed and being free from various diseases and insects. However, the Canada No. 2 grade has a greater range of permissible defects than the Canada No. 1 grade, e.g. the potatoes can be more odd-shaped or can be slightly damaged or dirty. In addition, the *Regulations* establish certain minimum and maximum diameter and weight requirements for the two potato grades.

U.S. Grades and Standards

25. In the United States, there are four grades of potatoes: U.S. Extra No. 1; U.S. No. 1; U.S. Commercial; and U.S. No. 2. The requirements of the U.S. Extra No. 1 grade are the most stringent in terms of absence of defects, cleanliness and uniformity of size. The *Regulations* state that only potatoes meeting the requirements of the U.S. Extra No. 1 or U.S. No. 1 grade can be imported into Canada.¹⁴ As a result of the *Regulations*, imported U.S. potatoes generally meet the same size and quality standards as the Canada No. 1 grade.¹⁵

DOMESTIC GROWERS

26. The BCVMC is a commission established on March 21, 1980, under the *Natural Products Marketing (BC) Act*¹⁶ to regulate the marketing of certain vegetables grown in British Columbia, including potatoes.¹⁷ It administers its mandate by way of a sub-delegation of powers to various sales agencies in the province, of which the growers¹⁸ are members.

27. In the case of potatoes, these agencies are BCFresh (formerly Lower Mainland Vegetable Distributors Inc.), the Interior Vegetable Marketing Agency Ltd., the Island Vegetable Co-operative Association, Vancouver Island Produce and Fraserland Organics Inc.¹⁹

28. The agencies provide growers with provincial sales outlets for their product and derive virtually all of their revenue from marketing potato and vegetable crops. Potato sales represent over 63 percent of this revenue.²⁰ BCFresh is the largest agency, accounting for the majority of all sales of potatoes grown in British Columbia.²¹

12. C.R.C., c. 285 [*Regulations*].

13. R.S.C. 1985 (4th Supp.), c. 20.

14. Exceptionally, when there is insufficient supply of domestic product, an exemption can be granted by the Minister of Agriculture and Agri-Food to import into Canada bulk potatoes for processing that do not meet the U.S. Extra No. 1 or U.S. No. 1 grade requirements.

15. The Tribunal's witness from the Department of Agriculture and Agri-Food indicated that Canada No. 1 and U.S. No. 1 grades are essentially identical. *Transcript of Public Hearing*, Vol. 2, 28 July 2010, at 135-36.

16. R.S.B.C. 1996, c. 330.

17. Grower's Exhibit A-03 at para. 2, Administrative Record, Vol. 11.

18. In 2010, in British Columbia, there were 53 registered conventional potato growers that cultivated 3,225 acres of potatoes. *Addendum to the Pre-hearing Staff Report*, 22 July 2010, Tribunal Exhibit RR-2009-002-05B, Administrative Record, Vol. 1.1 at 137; Tribunal Exhibit RR-2009-002-15.04F, Administrative Record, Vol. 3B at 31.

19. Tribunal Exhibit RR-2009-002-23.01, Administrative Record, Vol. 7 at 5.

20. Tribunal Exhibit RR-2009-002-03A, Administrative Record, Vol. 1 at para. 25.

21. *Protected Pre-hearing Staff Report*, 17 June 2010, Tribunal Exhibit RR-2009-002-06 (protected), Administrative Record, Vol. 2.1 at 14, 67.

29. The BCVMC administers a delivery allocation system for the growing of domestic potatoes to ensure an orderly flow of product into the market. Under this system, for table potatoes that enter the retail or wholesale market, the crop year²² is divided into four periods: period A is from July 1 to July 31; period B is from August 1 to September 30; period C is from October 1 to January 31; and period D is from February 1 to June 30.

30. There is a separate delivery allocation system in place for the foodservice market, where the crop year is divided into three periods for the marketing of table potatoes: period 1 is from August 1 to September 30; period 2 is from October 1 to April 30; and period 3 is from May 1 to July 31.

31. Each grower's delivery allocation is based on a five-year average of the grower's shipments of potatoes during a particular period. While a grower can harvest more than its delivery allocation, the excess will only be sold by the grower's sales agency after all other growers that sell through that agency have fulfilled their delivery allocation. This system is not to be confused with what is commonly known as production quotas.²³

WSPC

32. The WSPC is, like the BCVMC, a grower-funded organization. However, the WSPC's mandate is substantially different, as it does not sell potatoes on behalf of growers nor does it set delivery allocations or minimum pricing. Rather, it engages in other activities relating to research and data collection, legislative and regulatory affairs, public and industry education, and trade and market access.²⁴ As such, the WSPC does not have any specific mandate with respect to controlling or limiting acreage planted, production or the marketing and pricing of potatoes grown in the state.²⁵

MARKETING AND DISTRIBUTION

33. As previously noted, the marketing and distribution of potatoes in British Columbia are delegated by the BCVMC to the sales agencies identified above. They sell potatoes to all major retail chains, foodservice companies and licensed wholesalers that, in turn, distribute directly to other retail chains, independent retail outlets and foodservice accounts.

34. The channels of distribution did not change significantly during the POR except that customer consolidation continues to be an ongoing trend within the industry.²⁶ The agencies work closely with the BCVMC to determine domestic selling prices that are competitive with those of imports from the United States.²⁷

IMPORTERS AND EXPORTERS

35. Expiry review questionnaires were sent to 130 potential importers. Three importers responded to the CBSA portion of the questionnaire. Two of these importers provided the Tribunal with the updated data requested for the period from January to March 2010.

22. The crop year for potatoes in British Columbia is from July 1 to June 30.

23. *Transcript of Public Hearing*, Vol. 1, 27 July 2010, at 68.

24. Exporter's Exhibit B-07 at para. 3, Administrative Record, Vol. 13.

25. *Transcript of Public Hearing*, Vol. 2, 28 July 2010, at 60-61.

26. Tribunal Exhibit RR-2009-002-15.05, Administrative Record, Vol. 3B at 64.

27. *Pre-hearing Staff Report*, 17 June 2010, Tribunal Exhibit RR-2009-002-05, Administrative Record, Vol. 1.1 at 33.

36. Following the initial limited response to questionnaires, the Tribunal sent additional questionnaires to 18 importers. Seventeen of these importers responded. Three of these 17 companies indicated that they did not import the subject potatoes, while 4 others confirmed that their imports from the United States were not sold in the B.C. market during the POR. The remaining 10 importers provided the requested information.

37. Expiry review questionnaires were sent to 200 potential foreign growers. The WSPC and one other exporter replied to the CBSA portion of the questionnaire.

SUMMARY OF PREVIOUS FINDINGS AND ORDERS

38. On June 4, 1984, in Inquiry No. ADT-4-84, the ADT found that the dumping in British Columbia of whole potatoes with netted or russeted skin, in non-size A, excluding seed potatoes, originating in or exported from the state of Washington, had caused, was causing and was likely to cause material injury to the production of like goods in the province.

39. On April 18, 1986, in Inquiry No. CIT-16-85, the CIT found that the dumping in Canada of whole potatoes from the United States, for use or consumption in British Columbia, excluding seed potatoes and excluding those potatoes already covered by the finding in Inquiry No. ADT-4-84, had caused, was causing and was likely to cause material injury to the production in Canada of like goods.

40. On September 14, 1990, in Review No. RR-89-010, the Tribunal continued, without amendment, the findings made in Inquiry Nos. ADT-4-84 and CIT-16-85.

41. On September 14, 1995, in Review No. RR-94-007, the Tribunal continued its order made in Review No. RR-89-010, with an amendment to exclude imports during the period from May 1 to July 31, inclusive, of each calendar year.

42. On September 13, 2000, in Review No. RR-99-005, the Tribunal continued, without amendment, its order made in Review No. RR-94-007.

Expiry Review No. RR-2004-006

43. This was the fourth review of the two injury findings originally put in place in 1984 and 1986.²⁸

44. In 2005, the BCVMC and the WSPC were represented by counsel and made submissions.

45. During the said review, the Tribunal was asked to evaluate the continuing existence of a regional market.

46. In this regard, the Tribunal was of the opinion that B.C. growers continued to sell all or almost all of their harvest in British Columbia and that the B.C. market was not supplied to any substantial degree by growers located elsewhere in Canada.

47. The evidence showed that imports of the subject potatoes continued to be concentrated in the B.C. market. In the Tribunal's opinion, should the order be rescinded, the concentration of imports would likely increase, if not in the near term, then in the medium term.

28. In Review No. RR-89-010, the findings made in Inquiry Nos. ADT-4-84 and CIT-16-85 were reviewed together.

48. The Tribunal also noted that the consumption of potatoes in the United States was on the decline during the period under review at that time. During that time, the United States saw increases in production volumes. Notably for the state of Washington, these trends had created a systemic oversupply and, consequently, lower potato prices.

49. The Tribunal estimated that, if the order had been rescinded, potato growers in British Columbia would have experienced a loss in net income of approximately \$1.2 million in crop year 2005-2006, which represented nearly half of the industry's profits. In addition, the Tribunal was of the view that the magnitude of injury in crop year 2006-2007 would likely have been even greater.

50. The Tribunal found that the magnitude of this injury would adversely affect the financial health of the industry, notwithstanding the high proportion and strong profitability of sales of red and yellow potatoes.

51. The Tribunal noted that B.C. growers needed to continue to grow the entire range of potatoes demanded by their customers. If white and russet potato production became unprofitable due to the resumed dumping, it would in turn undermine the overall profitability of potato production. This, in the Tribunal's view, would result in injury to "all or almost all" of the B.C. growers' production.

52. The Tribunal granted product exclusions for red, yellow and exotic varieties of potatoes, as well as for white and russet potatoes imported in 50-lb. cartons in the following count sizes: 40, 50, 60, 70 and 80. The Tribunal found that these types of potatoes had been exported at prices that were generally above normal value.

PRELIMINARY MATTERS

53. Prior to and during the hearing, a number of issues arose that required the Tribunal to issue rulings. This section will summarize the issues and the rulings made by the Tribunal at the time and provide further explanation for such rulings.

Materials Filed by the WSPC and Expiry Review Schedule

54. On July 8, 2010, the WSPC filed its case brief in opposition to the continuation of the Tribunal's order. The brief, which was signed by the Director of Trade for WSPC, Mr. Matthew R. Harris, did not include supporting witness statements.

55. On July 9, 2010, the BCVMC noted that the WSPC's did not file supporting witness statements and requested that the Tribunal direct the WSPC to file witness statements identifying the names of the witnesses and the evidence that each witness intended to adduce. The BCVMC also requested that, if the Tribunal were to allow the WSPC to file supporting witness statements, it also set a new date for any reply submissions.

56. On July 12, 2010, the Tribunal advised the WSPC that Mr. Harris had to file a witness statement if he intended to adduce evidence during the hearing. The Tribunal further advised the WSPC that it had to request leave of the Tribunal to file a witness statement because it had missed the deadline of July 8, 2010.

57. On July 14, 2010, after having considered the WSPC's request that Mr. Harris appear as a lay witness at the hearing and the BCVMC's reply submission further to this request, the Tribunal granted Mr. Harris leave to appear as a lay witness on the condition that a witness statement be filed no later than

July 15, 2010. The Tribunal considered that, in order to provide the WSPC with a fair and meaningful opportunity to participate in this expiry review, it was appropriate to allow it to file evidence. Indeed, natural justice and procedural fairness considerations dictate that parties in proceedings before the Tribunal should have the right to present evidence.

58. The Tribunal was also of the view that it was appropriate, in the circumstances, to amend the schedule of the expiry review in order to ensure that the BCVMC was afforded a fair and meaningful opportunity to respond to the evidence to be adduced by the WSPC. Accordingly, on July 14, 2010, the Tribunal informed the parties of its decision to grant an extension of time to the BCVMC, i.e. until July 20, 2010, to file its reply submissions.

59. On July 15, 2010, the WSPC filed a witness statement for Mr. Harris, along with supporting evidence.²⁹ Included in the documents filed with the Tribunal by the WSPC on July 15, 2010, was a report prepared by Dr. Joseph F. Guenther, dated June 16, 2005, entitled *Profitability of Producing Fresh Potatoes in Washington State Report*.³⁰ Another report prepared by the same author, dated June 21, 2008, had already been filed by the WSPC with its case brief on July 8, 2010.³¹

60. In its July 20, 2010, reply brief, the BCVMC submitted that neither of these reports was admissible in evidence in this expiry review as their author, Dr. Guenther, would not be presented as a witness in these proceedings.

61. On July 21, 2010, the Tribunal informed parties that it would not accept Dr. Guenther's reports as expert evidence. However, the reports would remain on the record as supporting evidence and given the weight that they deserve.

62. The Tribunal determined that the reports could not be accepted as expert evidence, since the WSPC had not indicated any intention to call Dr. Guenther as an expert witness at the hearing or otherwise qualify him as an expert pursuant to the *Canadian International Trade Tribunal Rules*.³² Furthermore, Dr. Guenther's reports were filed with the Tribunal less than 20 days before the hearing, contrary to subrule 22(1) of the *Rules*.

63. Although Dr. Guenther's reports form part of the record and are admissible as non-expert evidence in support of Mr. Harris's testimony, the Tribunal accords little weight to these reports because the WSPC did not make Dr. Guenther available for cross-examination at the hearing, thereby depriving the BCVMC of the opportunity to test this evidence.

Request to Qualify Dr. R. Allan Mussell as an Expert Witness

64. Included as an attachment to the BCVMC's reply brief filed with the Tribunal on July 20, 2010, was a witness statement for Dr. R. Allan Mussell and a copy of Dr. Mussell's curriculum vitae.³³ The BCVMC stated in its reply brief that, if the Tribunal ruled that Dr. Guenther's reports were admissible, it would rely on Dr. Mussell's evidence to refute certain points addressed in Dr. Guenther's reports.

29. Exporter's Exhibits B-07 to B-11, Administrative Record, Vol. 13.

30. Exporter's Exhibit B-11, Administrative Record, Vol. 13.

31. See *Washington State Fresh Potato Profitability, US/Canadian Currency Exchange & Fresh Potato Trade Analysis*, Exporter's Exhibit B-02, Administrative Record, Vol. 13.

32. S.O.R./91-499 [*Rules*].

33. Grower's Exhibit A-18 at 3-10, Administrative Record, Vol. 11.

65. The Tribunal informed parties on July 21, 2010, that Dr. Mussell could not be qualified as an expert witness in view of the requirements of rule 22 of the *Rules*, which reads as follows:

22. (1) A party who intends to call an expert as a witness at a hearing shall, not less than 20 days before the hearing, file with the Secretary and serve on the other parties a report, signed by the expert, setting out the expert's name, address, qualifications and area of expertise and a detailed outline of the expert's testimony.

(2) A party on whom a copy of a report has been served and who wishes to rebut with expert evidence any matter set out in the report shall, not less than 10 days before the hearing, file with the Secretary a statement setting out the evidence to be introduced in rebuttal and serve a copy of the statement on the other parties.

66. These provisions make it clear that a party that intends to call an expert at a hearing must file a report signed by the proposed expert not less than 20 days before the hearing. Subrule 22(2) of the *Rules* also requires that a meaningful opportunity be afforded to the opposing party to rebut expert evidence by providing it with the right to file its own expert report well before the hearing.

67. However, the Tribunal informed the parties that it accepted Dr. Mussell's witness statement on the basis that he would appear at the hearing as a lay witness and be available for cross-examination by the WSPC.

68. Despite the Tribunal's ruling with regard to Dr. Mussel, at the hearing, the BCVMC attempted to call Dr. Mussell as an expert witness. The WSPC objected, and the Tribunal had to reiterate its previous ruling that Dr. Mussell's witness statement was filed late and that, therefore, the Tribunal could not allow him to testify as an expert witness.

Objection to the Contents of the Aid to Argument Filed by the BCVMC

69. During the argument portion of the hearing, the WSPC made a "standing objection" to the contents of the aid to argument filed by the BCVMC.³⁴ The WSPC submitted that the aid to argument may include new evidence and referred in particular to various graphs and charts that the BCVMC prepared on the basis of information allegedly already on the record.

70. Although the WSPC did not request that the aid to argument be removed from the record, it argued that it gave an unfair advantage to the BCVMC because it contained evidence that should have been presented through witnesses and subjected to cross-examination.

71. In response, the BCVMC submitted that all the data contained in its aid to argument were based on information that was already on the record and that no new evidence was being introduced through this document.

72. After considering the parties' submissions, the Tribunal allowed the aid to argument to be placed on the record, but cautioned that it would not accept any new evidence under the guise of argument and would only give this document the weight that it deserved.

73. After reviewing the aid to argument in detail, the Tribunal found that, while it does not appear to introduce new evidence, it does not contain calculations that were not presented during the evidence portion of the hearing. In any event, rather than rely on this document in its deliberations, the Tribunal conducted its own analysis of the evidence before it.

34. *Public Aid to Argument*, Administrative Record, Vol. 17.

Request for Exclusion Adjustment

74. In its case brief, the BCVMC requested that the Tribunal reconsider the exclusion for russet potatoes imported in 50-lb. cartons in the 40, 50, 60, 70 and 80 count sizes granted in its order issued on September 12, 2005, in Expiry Review No. RR-2004-006.

75. The BCVMC submitted that, contrary to the circumstances that led the Tribunal to exclude potatoes in the above-noted count sizes in Expiry Review No. RR-2004-006, there is now evidence of dumping of count-size russet potatoes from the United States, especially in crop year 2009-2010.

76. Upon review of the BCVMC's request and submissions, the Tribunal informed parties, on July 14, 2010, that it had determined that it does not have jurisdiction to revoke the exclusions that were granted for the specified items in Expiry Review No. RR-2004-006. The following are the Tribunal's reasons for its determination.

77. In the Tribunal's opinion, it is clear that the BCVMC's request is tantamount to a request to expand the scope of the goods subject to its order in Expiry Review No. RR-2004-006. However, as the Tribunal stated in *Certain Carbon Steel Plate and Alloy Steel Plate*,³⁵ goods that have been previously excluded cannot subsequently be covered by an expiry review. The Tribunal stated as follows:

It is clear, based on the words "order or finding described in any of sections 3 to 6" in the English version of subsection 76(2) of SIMA [now subsection 76.03(3)] and the words "*une ordonnance ou des conclusions rendues en vertu des articles 3 à 6*" in the French version of subsection 76(2), that a review is limited to an order or finding described in sections 3 to 6. . . .

...

Section 3 of SIMA refers to duties being levied, collected and paid on dumped and subsidized goods in respect of which the Tribunal has made an order or finding of injury, retardation or threat of injury. Thus, the wording of section 3 specifically refers to goods in respect of which the Tribunal has made an injury finding and not to all goods subject to the order or finding generally. It is this distinction which lies at the heart of the issue before the Tribunal. With respect to the specific exclusions before the Tribunal in this motion, it cannot be said that the Tribunal has made an injury finding in respect of the goods covered by these exclusions. It follows that these goods are, therefore, not described in section 3 and, thus, they cannot be subject to review under subsection 76(2).

...

The Tribunal is of the view that, in a review, it has the power to rescind or continue an order or finding against some or all of the goods subject to the order or finding, *but it does not have the power to increase or expand the scope of its review beyond the goods covered by the order or finding being reviewed*. With respect to exclusions, this means that, if the Tribunal continues an order or finding, it may leave an exclusion as it is or may exclude additional goods. If domestic producers subsequently become concerned about imports of goods that are subject to an exclusion, they may consider filing a new complaint in respect of such goods with the Department of National Revenue. For the above reasons, the Tribunal concludes that it does not have the power, in this review, to consider including, in any order that it may make continuing the finding in Inquiry No. NQ-92-007, subject plate exceeding 3.125 inches in thickness or PVQ plate, which were excluded from the Tribunal's injury finding.³⁶

[Emphasis added]

35. Procedural order (12 December 1997), RR-97-006 (CITT) [*Carbon Steel Plate*].

36. *Carbon Steel Plate* at 7-9. The Tribunal notes that, although there have been amendments to *SIMA* since the time of its decision in *Carbon Steel Plate*, these amendments do not affect the rationale which underpins that decision.

78. The Tribunal recently re-affirmed the principles set out in *Carbon Steel Plate* and concluded that it lacked jurisdiction to reconsider previously granted exclusions in *Certain Fasteners*.³⁷

79. In light of the foregoing, the Tribunal finds that it does not have jurisdiction to consider the BCVMC's request that it revoke the exclusion granted in 2005 for certain count-size russet potatoes.

Request for Exclusion Filed by the WSPC on July 8, 2010

80. In its case brief, which was filed with the Tribunal on July 8, 2010, the WSPC requested that round white potatoes be excluded from the Tribunal's order, on the basis that there was no dumping of such products during the POR.³⁸

81. In this regard, the Tribunal notes that its notice of expiry review in this case, which was issued on December 30, 2009, made it clear that any request to exclude goods from the order had to be filed by interested parties no later than noon, on June 24, 2010.

82. As the request for a product exclusion made by the WSPC was filed beyond that deadline, the Tribunal informed parties, on July 12, 2010, of its decision not to accept this request. Accordingly, the Tribunal did not give any consideration to this late request for product exclusion in the present expiry review.

ANALYSIS

83. On April 29, 2010, the CBSA determined that, pursuant to paragraph 76.03(7)(a) of *SIMA*, the expiry of the order was likely to result in the continuation or resumption of dumping of the subject goods. Consequently, the Tribunal is required, pursuant to subsection 76.03(10), to determine whether the expiry of the order is likely to result in injury or retardation, as the case may be, to the domestic industry.³⁹

84. More specifically, the Tribunal is required, pursuant to subsection 76.03(12) of *SIMA*, to make an order either rescinding the order issued in 2005, if it determines that the expiry of that order is unlikely to result in injury, or continuing that order, with or without amendment, if it determines that expiry of that order is likely to result in injury.

85. Before proceeding with its analysis concerning the likelihood of injury, the Tribunal will first determine (1) what domestically produced goods are "like goods" in relation to the subject goods, and (2) what constitutes the "domestic industry" for the purposes of its analysis.

Like Goods

86. Subsection 2(1) of *SIMA* defines "like goods" in relation to any other goods as follows: "... (a) goods that are identical in all respects to the other goods, or (b) in the absence of any [such] goods ... goods the uses and other characteristics of which closely resemble those of the other goods". In

37. (6 January 2010), RR-2009-001 (CITT) at 7-9.

38. Exporter's Exhibit B-01 at 15, 29, 30, Administrative Record, Vol. 13.

39. Subsection 2(1) of *SIMA* defines "injury" as "... material injury to a domestic industry" and "retardation" as "... material retardation of the *establishment* of a domestic industry" [emphasis added]. Given that there is currently an established domestic industry, the issue of whether the expiry of the order is likely to result in retardation does not arise in this expiry review.

considering the issue of like goods, the Tribunal typically looks at a number of factors, including the physical characteristics of the goods, their market characteristics and whether the domestic goods fulfill the same customer needs as the subject goods.

87. In its statement of reasons in Expiry Review No. RR-2004-006, the Tribunal stated the following:

60. The Tribunal notes that the issue of “like goods” was not a contentious issue during these expiry review proceedings. It also notes that U.S. potatoes and B.C. potatoes are substitutable to a very high degree, having the same physical characteristics and uses, and are similarly farmed. Therefore, in light of the foregoing, the Tribunal finds B.C. potatoes to be like goods [in relation] to the subject goods for the purposes of its injury analysis.

88. Similarly, the issue of “like goods” was not contentious in this expiry review. Thus, the record contained no evidence or argument that warrants departing from the conclusion on like goods reached in Expiry Review No. RR-2004-006.

89. In fact, the evidence on the record indicates that U.S. potatoes and B.C. potatoes remain highly substitutable products that have similar, if not identical, physical and market characteristics, and uses.⁴⁰ Accordingly, the Tribunal concludes that potatoes grown in British Columbia, defined in the same manner as the subject goods, constitute like goods in relation to the subject goods.

Domestic Industry/Regional Market

90. The domestic industry is defined in subsection 2(1) of *SIMA* as the “. . . domestic producers as a whole of the like goods or those domestic producers whose collective production of the like goods constitutes a major proportion of the total domestic production of the like goods” However, subsection 2(1.1) of *SIMA* provides that domestic producers in a “regional market” within the territory of Canada may be considered to be a separate domestic industry. In this expiry review, the Tribunal must consider whether British Columbia continues to constitute a “regional market” for potatoes.

91. With respect to the establishment of a “regional market”, subsection 2(1.1) of *SIMA* provides as follows:

(1.1) In exceptional circumstances, the territory of Canada may, for the production of any goods, be divided into two or more regional markets and the domestic producers of like goods in any of those markets may be considered to be a separate domestic industry where

(a) the producers in the market sell all or almost all of their production of like goods in the market; and

(b) the demand in the market is not to any substantial degree supplied by producers of like goods located elsewhere in Canada.

92. With respect to the first condition, the Tribunal notes that, in previous decisions, it has interpreted the phrase “all or almost all” to represent at least 80 percent.⁴¹

93. In this regard, the Tribunal also notes that, over the POR, sales of B.C. potatoes in the B.C. market represented between 84 and 89 percent of production,⁴² the first condition being therefore satisfied.

40. *Transcript of Public Hearing*, Vol. 2, 28 July 2010, at 136.

41. *Certain Whole Potatoes* (12 September 2005), RR-2004-006 (CITT) at 10.

42. Tribunal Exhibit RR-2009-002-05, Administrative Record, Vol. 1.1 at 32.

94. The Tribunal also notes that, on the basis of the data collected from its questionnaires and Statistics Canada, total shipments of potatoes from other provinces as a percentage of the B.C. market were consistently below 1 percent over the POR, the second condition being therefore satisfied.⁴³

95. Since the conditions in paragraphs 2(1.1)(a) and (b) of *SIMA* are met, the Tribunal finds that a regional market exists and that the growers in that market constitute a separate domestic industry.⁴⁴

96. Subsection 42(5) of *SIMA* provides as follows:

... the Tribunal shall not find that the dumping or subsidizing of those goods has caused injury or retardation or is threatening to cause injury unless

(a) there is a concentration of those goods into the regional market; and

(b) the dumping or subsidizing of those goods has caused injury or retardation or is threatening to cause injury to the producers of all or almost all of the production of like goods in the regional market.

97. With respect to the criteria relating to a concentration of dumped imports, the evidence indicates that, during the POR, between 40 and 60 percent of the total imports into Canada from the United States were destined for the B.C. market,⁴⁵ approximately 88 percent of which came from the state of Washington.⁴⁶

98. During that period, imports from the United States accounted for 43 to 52 percent of the B.C. potato market.⁴⁷ These percentages indicate that the concentration of imports from the United States into the B.C. market has increased since Expiry Review No. RR-2004-006.⁴⁸ Furthermore, the Tribunal notes that this issue was neither raised nor contested by the WSPC.

99. The question of whether the dumping of those goods is likely to cause injury to the growers of all or almost all of the production of like goods in the regional market is dealt with below in the discussion on the likelihood of injury.

43. Tribunal Exhibit RR-2009-002-05A, Administrative Record, Vol. 1.1 at 127.

44. The Tribunal notes that, in its brief, the WSPC submitted that the Tribunal should not conclude that there is a regional market on the basis of normal commercial circumstances, but rather an artificially isolated regional market supported by the existing Tribunal order (see Exporter's Exhibit B-01 at 28-29, Administrative Record, Vol. 13). However, subsection 2(1.1) of *SIMA* does not provide for the consideration of such questions or alleged circumstances in determining whether a regional market exists. Accordingly, this argument does not affect the conclusion that, on the basis of the evidence on the record, the two conditions set out in subsection 2(1.1) have been met in this expiry review.

45. Tribunal Exhibit RR-2009-002-05, Administrative Record, Vol. 1.1 at 32.

46. Tribunal Exhibit RR-2009-002-06 (protected), Administrative Record, Vol. 2.1 at 22.

47. Tribunal Exhibit RR-2009-002-05, Administrative Record, Vol. 1.1 at 25.

48. In Expiry Review No. RR-2004-006, the Tribunal concluded that the criteria relating to a concentration of dumped imports were met on the basis of evidence that showed that between 24 and 33 percent of the total imports into Canada from the United States were destined for the B.C. market, approximately 80 percent of which came from the state of Washington. The Tribunal also found that imports from the United States accounted for between 39 and 43 percent of the B.C. potato market. *Certain Whole Potatoes* at 11.

Likelihood of Injury

100. Subsection 37.2(2) of *SIMA* enumerates a number of factors that the Tribunal may consider in addressing the question of likelihood of injury. The Tribunal has considered each of these factors and finds that the relevant factors in this case can be analyzed under the following general headings: changes in market conditions; likely volumes of dumped goods; likely prices of dumped imports; likely impact of dumped imports on the domestic industry; and other factors.

101. In making its assessment of the likelihood of injury, the Tribunal has consistently taken the view that its focus must be on circumstances that can reasonably be expected to exist in the near to medium term, which is generally within 24 months of the expiry of the finding or order.⁴⁹

102. As elaborated under the section entitled “Likely Impact of Dumped Goods on Like Goods”, the Tribunal finds that the time frame, 12 to 24 months, is appropriate for the circumstances of this case. As such, it has focused the forward-looking part of its analysis on crop years 2010-2011 and 2011-2012 and on the potential effects that removal of the order would have on the full cycles of planting, including harvesting, marketing and storage, over this time period.

Changes in Market Conditions

103. Before proceeding with its analysis of likelihood of injury, the Tribunal will first consider whether, under paragraph 37.2(2)(j) of the *Special Import Measures Regulations*,⁵⁰ there have been important changes to U.S. and domestic market conditions since the last expiry review.

104. In any expiry review, there are always variations in market conditions from year to year, due to market forces and the inherent nature of commerce. These will be described in the following sections of the present reasons.

105. However, broadly speaking, the Tribunal finds that, over the POR, there have not been any major changes to the structure of the North American potato industry, or the B.C. potato industry or market, or to the potato industry in Washington, Idaho, Oregon and California (the western states), which are the primary suppliers to British Columbia.

106. The Canadian and U.S. potato markets continue to be highly integrated with substantial trade in potatoes flowing both ways across the border.⁵¹ This is particularly expressed through the recent technical arrangement concerning trade in potatoes,⁵² which is deemed to enhance and facilitate trade between the two countries.

49. *Preformed Fibreglass Pipe Insulation* (17 November 2003), RR-2002-005 (CITT) at 11; *Prepared Baby Foods* (28 April 2003), RR-2002-002 (CITT) at 8; *Solder Joint Pressure Pipe Fittings* (16 October 1998), RR-97-008 (CITT) at 10.

50. S.O.R./84-927 [*SIM Regulations*].

51. *Transcript of Public Hearing*, Vol. 1, 27 July 2010, at 64-65; *Transcript of Public Hearing*, Vol. 2, 28 July 2010, at 18.

52. *Technical Arrangement Between the Government of Canada and the Government of the United States of America Concerning Trade in Potatoes*, 23 and 25 October 2007. Exporter's Exhibit B-10 at 2, Administrative Record, Vol. 13.

107. Five years ago, the North American potato market faced challenges with regard to oversupply, declining demand and stability of potato prices at levels that were profitable for growers. These challenges appear to continue to be present today.

108. The Tribunal also notes that B.C. potato production continues to be insufficient to meet regional market demand; consequently, the B.C. market continues to be heavily dependent on imports from the United States, particularly from the state of Washington, to meet the demand for potatoes.

109. As such, given its relatively small size, the B.C. market continues, as was the case in previous expiry reviews, to be highly subject to the influence of conditions prevailing, especially those in the state of Washington, and decisions taken across the border.

Likely Volumes of Dumped Goods

110. In assessing the likely volumes of dumped goods, the Tribunal first looked at the size and supply characteristics of the B.C. market.

111. The Tribunal examined the data collected and determined that, while there are some fluctuations from year to year, overall consumption of whole potatoes in British Columbia amounts, on average, to about 1 million hundredweight (cwt) per year.

112. Considering more specific data over the POR, the Tribunal notes that the B.C. market for whole potatoes, which stood at just above the 1-million-cwt mark in 2006-2007, declined somewhat in both 2007-2008 and 2008-2009 to just under 1 million cwt, and rebounded to the 2006-2007 level in 2009-2010.⁵³

113. During the same period, B.C. growers produced, on average, about 0.6 million cwt of whole potatoes, with just over 0.5 million destined for B.C. consumption and the balance going to the rest of Canada and for export to the United States.⁵⁴

114. These data reveal that B.C. growers captured, on average, about 50 percent of the B.C. market, which is in line with the historical trend over the last 26 years during which the injury finding has been in place.⁵⁵

115. However, 2008-2009 was an anomalous year when compared with this historical trend, when the market share of B.C. growers rose to 56 percent.⁵⁶ According to the evidence, this increase in market share was not a result of increased sales volumes by B.C. growers, but rather a reduction in sales of potato imports from the United States and a corresponding decline in overall market sales.⁵⁷ A witness testified that the decrease in potato imports from the United States in 2008-2009 was related to grower decisions in the

53. *Pre-hearing Staff Report*, 17 June 2010, Tribunal Exhibit RR-2009-002-05, Administrative Record, Vol. 1.1 at 25.

54. *Ibid.* at 21, 25; *Protected Pre-hearing Staff Report*, 17 June 2010, Tribunal Exhibit RR-2009-002-06 (protected), Administrative Record, Vol. 2.1 at 28.

55. *Pre-hearing Staff Report*, 17 June 2010, Tribunal Exhibit RR-2009-002-05, Administrative Record, Vol. 1.1 at 25; *Addendum to the Pre-hearing Staff Report*, Tribunal Exhibit RR-2009-002-05B, Administrative Record, Vol. 1.1 at 137.

56. *Pre-hearing Staff Report*, 17 June 2010, Tribunal Exhibit RR-2009-002-05, Administrative Record, Vol. 1.1 at 25.

57. *Transcript of Public Hearing*, Vol. 1, 27 July 2010, at 64-65.

western states to grow crops that could be transformed into bio-fuels, which were then eligible for government incentives under U.S. energy policy.⁵⁸ In the following year, 2009-2010, the proportion of the B.C. market shared by both domestic and U.S. growers again fell into line according to the historical 50-50 pattern, as U.S. shipments and overall market sales volumes rebounded.⁵⁹

116. According to the evidence, during the POR, B.C. growers effectively sold all their fall whole potato harvest by year end, with little or no stock carryovers.⁶⁰ Their limited ability to supply the demand of the B.C. market means that, from one year to the next, domestic inventories eventually run out before the new seasonal crop is ready.

117. As to the ability of domestic growers to increase their market presence, the Tribunal heard testimony that this could, to a certain extent, be possible. For example, the witness from *BCFresh* suggested that, in the future, B.C. growers could potentially increase their market share by a maximum of 10 percentage points.⁶¹ This increase, however, seems highly dependent on the occurrence of favourable conditions ranging from yield to marketing.

118. Such evidence underlines the fact that the B.C. market remains highly dependent on U.S. potato supplies to meet its needs, even with the order in place for the last five years. The fact that B.C. growers face limitations on storage and have limited potato supplies during certain times of the year, such as May to July, contributes to this dependence.⁶²

119. As noted earlier, the B.C. potato market is exclusively a fresh potato market composed of sales for table consumption and to the foodservice industry.⁶³ There is no potato processing industry in the province.⁶⁴

120. Of all the potatoes grown by B.C. growers, the evidence available to the Tribunal indicates that like goods comprise about 70 percent of total B.C. potato production.⁶⁵

121. The russet potato is the predominant type grown and sold in British Columbia, comprising more than half of B.C. growers' sales of like goods.⁶⁶ Russet potatoes are also the predominant type grown in the western states and are, by far, the principal type exported to British Columbia.⁶⁷

58. *Ibid.* at 64-66.

59. *Pre-hearing Staff Report*, 17 June 2010, Tribunal Exhibit RR-2009-002-05, Administrative Record, Vol. 1.1 at 25.

60. *Protected Pre-hearing Staff Report*, 17 June 2010, Tribunal Exhibit RR-2009-002-06 (protected), Administrative Record, Vol. 2.1 at 46.

61. *Transcript of Public Hearing*, Vol. 1, 27 July 2010, at 116.

62. *Protected Pre-hearing Staff Report*, 17 June 2010, Tribunal Exhibit RR-2009-002-06 (protected), Administrative Record, Vol. 2.1 at 46; Grower's Exhibit A-02 at para. 90, Administrative Record, Vol. 11.

63. There are no dehydration plants in British Columbia where culled or spoiled potatoes can be sent for processing. *Pre-hearing Staff Report*, 17 June 2010, Tribunal Exhibit RR-2009-002-05, Administrative Record, Vol. 1.1 at 30.

64. As noted, there are no dehydration plants or other types of facilities where potatoes can be processed into products such as chips or frozen french fries.

65. Grower's Exhibit A-05 at para. 33, Administrative Record, Vol. 11.

66. This includes russet potatoes in count sizes 40 to 80. Grower's Exhibit A-05 at para. 33, Administrative Record, Vol. 11.

67. Exporter's Exhibit B-05 at 2, Administrative Record, Vol. 13; Grower's Exhibit A-05, tab 15, Administrative Record, Vol. 11.

122. All told, the data available to the Tribunal indicate that sales of russet potatoes generally comprised over 65 percent of total market sales of whole potatoes in British Columbia during the POR.⁶⁸ Given this number, it is evident that russet potato supply-demand balances have significant effects on the B.C. potato market.

123. With the foregoing in mind, the Tribunal will next examine supply-demand conditions in the United States. The Tribunal will concentrate its analysis on the fall potato crop, as it constitutes, by far, the largest U.S. potato harvest and has the most influence on the B.C. market and B.C. growers whose principal production is harvested at the same time.⁶⁹ The many varieties of russet potatoes, as well as most varieties of white potatoes, are part of the fall harvest.⁷⁰

124. Data on record show that the total U.S. fall potato crop acreage was, on average, 1 million acres during the POR. In 2007, it reached a high of 1.01 million acres and, in 2008, a low of 0.93 million acres.⁷¹ From 2006 to 2009, the acreage planted fell by just under 6 percent. Evidence submitted by witnesses indicates that the area planted in 2010 has been further reduced by some 41,000 acres from 2009.⁷²

125. While overall U.S. acreage planted decreased, as noted, by 6 percent during the POR, U.S. potato yields have been trending upward. More specifically, U.S. yields increased by about 5 percent over this same period.⁷³ In terms of overall production, these yield increases have tended to offset the reduction in production that might otherwise have occurred from the decrease in acres planted. As a result, U.S. potato production effectively declined from 2006 to 2009, but only by 1 percent.⁷⁴

126. With a general decline in potato consumption in the United States (as discussed later), more potatoes have become available for export markets. In this context, the Tribunal notes that the United States has recently become a net exporter of potatoes,⁷⁵ with Canada being its largest export market, and British Columbia, the destination of choice for the majority of its fresh potato exports.⁷⁶

127. Between 2006 and 2009, 64 percent of all U.S. fresh potato exports were shipped to Canada.⁷⁷ From January to March 2010 alone, a period of record high inventory levels,⁷⁸ U.S. exports to Canada increased by 41 percent, reflecting a general situation of U.S. overproduction relative to domestic consumption.⁷⁹

68. Grower's Exhibit A-05 at paras. 33, 34, Administrative Record, Vol. 11; Exporter's Exhibit B-06 at 2, Administrative Record, Vol. 13.

69. *Pre-hearing Staff Report*, 17 June 2010, Tribunal Exhibit RR-2009-002-05, Administrative Record, Vol. 1.1 at 48; *Public Aid to Argument* at para. 64, Administrative Record, Vol. 17.

70. *Transcript of Public Hearing*, Vol. 1, 27 July 2010, at 102-104; Grower's Exhibit A-05 at paras. 33-35, Administrative Record, Vol. 11; Exporter's Exhibit B-05 at 2 Administrative Record, Vol. 13.

71. *Pre-hearing Staff Report*, 17 June 2010, Tribunal Exhibit RR-2009-002-05, Administrative Record, Vol. 1.1 at 48.

72. Exporter's Exhibit B-07 at 3, Administrative Record, Vol. 13.

73. *Pre-hearing Staff Report*, 17 June 2010, Tribunal Exhibit RR-2009-002-05, Administrative Record, Vol. 1.1 at 49.

74. *Ibid.*

75. Tribunal Exhibit RR-2009-002-15.04B, Administrative Record, Vol. 3A at 367. In terms of fresh potatoes alone, the United States, as a whole, imports more than it exports. Tribunal Exhibit RR-2009-002-21.05, Administrative Record, Vol. 5.1 at 183.

76. Tribunal Exhibit RR-2009-002-21.05, Administrative Record, Vol. 5.1 at 78; *Pre-hearing Staff Report*, 17 June 2010, Tribunal Exhibit RR-2009-002-05, Administrative Record, Vol. 1.1 at 22.

77. Grower's Exhibit A-05 at para. 29, Administrative Record, Vol. 11; Grower's Exhibit A-05, tab 12, Administrative Record, Vol. 11.

78. Grower's Exhibit A-05, tab 8, Administrative Record, Vol. 11.

79. *Ibid.* at para. 29; Growers' Exhibit A-05, tab 10, Administrative Record, Vol. 11; *Protected Pre-hearing Staff Report*, 17 June 2010, Tribunal Exhibit RR-2009-002-06 (protected), Administrative Record, Vol. 2.1 at 22.

128. As well, the Tribunal notes that the U.S. Government has recently begun an initiative called the “National Export Initiative”, with the goal of increasing U.S. exports, including agricultural exports, in the next five years.⁸⁰ As part of this initiative, at the beginning of 2010, the United States Department of Agriculture (USDA) announced that the U.S. potato industry⁸¹ was expected to receive US\$5.1 million to assist in expanding export sales of fresh potato products, among others, to key export markets. No particular export markets are specified in the announcement.⁸² However, Canada, and especially British Columbia, as a key export destination for U.S. potatoes, is a market that is clearly eligible for this assistance.⁸³

129. Considering the above-noted trends and the most recent U.S. Government export initiative, the Tribunal finds that there is a continued presence and interest in the Canadian potato market and, in particular, the B.C. potato market. The Tribunal also notes that U.S. potato exporters have extensive and well-established distribution networks in British Columbia, which they can use to quickly ramp up their shipments.⁸⁴

130. The Tribunal will focus next on the fall crop⁸⁵ in the western states. According to available data, the western states accounted for over 60 percent of total U.S. potato production during the POR. Specifically, the production for each state represented, on average, respectively, 22 percent, 32 percent, 5 percent and 1 percent of total U.S. fall production from 2006 to 2009.⁸⁶

131. In 2009, yields of all potatoes in the state of Washington were the highest in the United States, at 610 cwt/acre, followed by those in Oregon and California. Yields in Idaho were close to the U.S. average, which stands at about 400 cwt/acre.⁸⁷ The evidence also indicates that the volume of production of all potatoes of these four states for the 2009 fall crop was approximately 245 million cwt, which is approximately 260 times greater than the volume of production in British Columbia.⁸⁸

132. For the state of Washington, the data indicate that, between 2006 and 2009, the number of acres planted for all potatoes grown decreased from 156,000 to 145,000 acres.⁸⁹ However, yields in the state of

80. Grower’s Exhibit A-05 at para. 27, Administrative Record, Vol. 11; Grower’s Exhibit A-05, tab 10, Administrative Record, Vol. 11.

81. Represented by the United States Potato Board.

82. The witness for the WSPC testified that Canada was not specifically targeted. *Transcript of Public Hearing*, Vol. 2, 28 July 2010, at 40-41.

83. Grower’s Exhibit A-05 at para. 28, Administrative Record, Vol. 11; Grower’s Exhibit A-05, tab 11, Administrative Record, Vol. 11.

84. *Transcript of Public Hearing*, Vol. 1, 27 July 2010, at 124; Grower’s Exhibit A-03 at para. 17, Administrative Record, Vol. 11.

85. All potatoes grown for the fall crop.

86. *Pre-hearing Staff Report*, 17 June 2010, Tribunal Exhibit RR-2009-002-05, Administrative Record, Vol. 1.1 at 49.

87. Tribunal Exhibit RR-2009-002-05, Administrative Record, Vol. 1.1 at 49.

88. Includes all potatoes. Submissions of the BCVMC, 2 December 2009, at para. 44, in Expiry No. LE-2009-002; Grower’s Exhibit A-01 at para. 30, Administrative Record, Vol. 11; *Pre-hearing Staff Report*, 17 June 2010, Tribunal Exhibit RR-2009-002-05, Administrative Record, Vol. 1.1 at 21, 49.

89. *Pre-hearing Staff Report*, 17 June 2010, Tribunal Exhibit RR-2009-002-05, Administrative Record, Vol. 1.1 at 48. In the state of Washington, in crop year 2008-2009, russet potatoes represented about 85 percent of all potato acres planted. The Burbank has maintained its position as the dominant variety in the state of Washington with 31 percent of all potato acres planted; the Norkotah has maintained 15 percent of all potato acres planted. Next in the rankings were the Ranger, at 14 percent, the Umatilla, at 12 percent, and the Alturas, at 8 percent. Exporter’s Exhibit B-05 at 2, Administrative Record, Vol. 13.

Washington, which are double those of British Columbia, increased from 580 to 610 cwt/acre from 2006 to 2009.⁹⁰

133. As a result of the acreage decrease and yield increase, total production in the state of Washington, which averaged about 93 million cwt from 2006 to 2009, decreased by only about 1.5 million cwt, which represents less than 2 percent over the POR.⁹¹

134. The Tribunal notes that, despite the gradual decrease in production in the state of Washington, average total production in the state (for the fresh and processed sectors of the market) still represents approximately 85 times the annual average volume of whole potatoes that were consumed in the entire B.C. market during the POR.⁹² Further considered, the state of Washington's potato production is approximately 150 times the size of British Columbia's total production of like goods.

135. The available data show that, in 2008-2009, about 87 percent of potato production in the state of Washington was used in the processing sector and that the balance, about 13 percent, was consumed in the fresh market.⁹³ More specifically, in the state of Washington that year, the processing industry used just over 73 million cwt of potatoes, while just over 10 million cwt of fresh potatoes were sold to domestic U.S. and export markets.⁹⁴ Of the fresh market sales, approximately 0.5 million cwt, or about 5 percent, were sold to British Columbia.⁹⁵

136. As noted in the section entitled "Domestic Industry/Regional Market", the state of Washington supplied, on average, about 88 percent of all B.C. annual imports over the POR, ranging from a high of 93 percent in 2006-2007 to a low of 83 percent in 2009-2010.⁹⁶ Following the reduced crop in the state of Washington in 2008-2009, B.C. imports from the state of Washington increased by 37 percent in 2009-2010 as compared to the previous year.

137. The Tribunal considered the arguments presented by the WSPC that land and water limitations have put a squeeze on existing production and a cap on any expansion of production capacity.⁹⁷ However, even if there are limits to expansion of production, the fact remains that current levels of production in the state of Washington are huge relative to B.C. production and sales. In 2008-2009, with total fresh potato sales of about 10 million cwt, the state of Washington's fresh sales alone were 9 times the size of the B.C. market and 18 times the size of B.C. growers' sales of like goods from domestic production.⁹⁸

90. Yields in the state of Washington are apparently reported on a "gross" basis, while B.C. yields are reported on a "market" basis. *Transcript of Public Hearing*, Vol. 1, 27 July 2010, at 56; *Transcript of Public Argument*, Vol. 1, 29 July 2010, at 26-27; *Pre-hearing Staff Report*, 17 June 2010; Tribunal Exhibit RR-2009-002-06A (protected), Administrative Record, Vol. 2.1 at 127.1; Tribunal Exhibit RR-2009-002-05, Administrative Record, Vol. 1.1 at 49.

91. *Pre-hearing Staff Report*, 17 June 2010, Tribunal Exhibit RR-2009-002-05, Administrative Record, Vol. 1.1 at 49.

92. *Ibid.* at 25, 49.

93. Exporter's Exhibit B-08 at 2-3, Administrative Record, Vol. 13.

94. Exporter's Exhibit B-07 at para. 4, Administrative Record, Vol. 13; Exporter's Exhibit B-09 at 2, Administrative Record, Vol. 13.

95. Exporter's Exhibit B-07 at para. 4, Administrative Record, Vol. 13; *Pre-hearing Staff Report*, 17 June 2010, Tribunal Exhibit RR-2009-002-05, Administrative Record, Vol. 1.1 at 22.

96. *Pre-hearing Staff Report*, 17 June 2010, Tribunal Exhibit RR-2009-002-05, Administrative Record, Vol. 1.1 at 22.

97. Exporter's Exhibit B-01 at para. 50, Administrative Record, Vol. 13.

98. Exporter's Exhibit B-07 at para. 4, Administrative Record, Vol. 13; *Pre-hearing Staff Report*, 17 June 2010, Tribunal Exhibit RR-2009-002-05, Administrative Record, Vol. 1.1 at 25.

138. It is abundantly clear from these numbers that only small changes in conditions in the state of Washington's production or supply dynamics can have disproportionately large effects in the B.C. market. This is further evidenced by the ease with which the state of Washington's fresh exports to British Columbia rebounded in 2009-2010 and the extent of this rebound, as noted earlier, after the reduced crop in 2008-2009.

139. Both the documentary evidence filed with the Tribunal and the evidence of witnesses at the hearing indicated that overproduction and oversupply were constants in both the United States as a whole and the state of Washington in particular over the POR and that these issues remain the two most important challenges facing the U.S. potato industry today.⁹⁹ Authoritative potato industry publications, such as the *North American Potato Marketing News*, report regularly to this effect.¹⁰⁰ It is also the principal underlying reason for the creation of the United Potato Growers of America (UPGA), a farmers' cooperative, in 2004-2005.¹⁰¹

140. The Tribunal notes that, over the past five years, the UPGA has recommended curtailed planting. However, as compliance is voluntary, the net effect of this measure has failed to impact production to the extent required to bring supply and demand in balance.¹⁰² For example, for crop year 2010-2011, the UPGA recommended that, to balance actual and forecast demand, U.S. growers should plant only 70 to 75 percent of their 2004 acreage. Although the final figures are not yet available for the current crop season, preliminary indications in trade publications are that actual cutbacks are well below the recommended percentage.¹⁰³

141. The evidence shows that, while production has declined somewhat in recent years, demand has also declined by a significantly greater amount. Specifically, evidence submitted by the witness from BCFresh shows that per capita consumption in the United States has decreased by 6 percent for processing potatoes and by 11 percent for fresh potatoes since 2001.¹⁰⁴ These facts were not disputed by the witness from the WSPC.

142. On the contrary, the witness from the WSPC affirmed that North American demand had been on a general downward trend for many years.¹⁰⁵ According to the evidence, there are many factors that contribute to this decline, the most important being changing consumer preferences, the shift from home-prepared foods to fast foods,¹⁰⁶ an emphasis on low carbohydrate diets and, more recently, the economic recession.¹⁰⁷

99. Grower's Exhibit A-15 at para. 4, Administrative Record, Vol. 11; Grower's Exhibit A-05 at para. 39, Administrative Record, Vol. 11; *Transcript of Public Hearing*, Vol. 2, 28 July 2010, at 74-75, 126, 132-33.

100. Grower's Exhibit A-05, tabs 5, 6, 9, Administrative Record, Vol. 11; Grower's Exhibit A-05, tab 6, Administrative Record, Vol. 11; Grower's Exhibit A-05, tab 9, Administrative Record, Vol. 11.

101. In 2004-2005, the UPGA was formed in an attempt to manage potato supply and achieve more stable pricing and income for growers. The association can make recommendations but has no enforcement power, and grower membership is voluntary. *Transcript of Public Hearing*, Vol. 2, 28 July 2010, at 49.

102. Exporter's Exhibit B-02 at 16-19, Administrative Record, Vol. 13; Exporter's Exhibit B-07 at para. 9, Administrative Record, Vol. 13; Grower's Exhibit A-01 at paras. 25-29, Administrative Record, Vol. 11; *Pre-hearing Staff Report*, 17 June 2010, Tribunal Exhibit RR-2009-002-05, Administrative Record, Vol. 1.1 at 48-49; Tribunal Exhibit RR-2009-002-15.04B, Administrative Record, Vol. 3A at 153-54.

103. Submissions of the BCVMC, 2 December 2009, tab 6, in Expiry No. LE-2009-002; Grower's Exhibit A-01 at paras. 25-29, Administrative Record, Vol. 11; Exporter's Exhibit B-07 at para. 9, Administrative Record, Vol. 13; Grower's Exhibit A-05 at paras. 19, 20, Administrative Record, Vol. 11.

104. Grower's Exhibit A-05 at para. 49, Administrative Record, Vol. 11.

105. *Transcript of Public Hearing*, Vol. 2, 28 July 2010, at 79.

106. This shift diverts fresh consumption to consumption of processed foods, such as french fries.

107. Grower's Exhibit A-01 at para. 32, Administrative Record, Vol. 11; Grower's Exhibit A-05 at para. 48, Administrative Record, Vol. 11.

143. As a result, despite the fact that production fell slightly over the POR, the gap between supply and demand actually grew. An examination of inventory levels supports this conclusion.

144. In particular, the evidence indicates that, on June 1, 2010, total U.S. inventories soared to 51.3 million cwt, their highest level during the POR. These inventories exceeded those in 2009 by 6.0 million cwt and were equal to about 13 percent of total U.S. production in 2009-2010.¹⁰⁸

145. The evidence also shows that, on June 1 of each year during the POR, Idaho and the state of Washington accounted for about 46 percent and 20 percent, respectively, of all U.S. potato inventories.

146. As of June 1, 2010, inventories for these two states were reported to be 9.5 percent and 53 percent, respectively, higher than at the same time last year.¹⁰⁹ To put this in perspective, the 53 percent incremental increase in the state of Washington's inventories alone is, on average, 7 times the average size of total B.C. growers' sales of whole potatoes and 4 times the size of the B.C. market as a whole.¹¹⁰ These inventory numbers are highlighted by a trade publication as the reason for which Idaho and the state of Washington will have a major influence on setting the stage for the start of the 2010-2011 marketing season.¹¹¹

147. In considering the oversupply situation, in addition to the above factors, it is necessary to examine the issue of "flex" or "open" potatoes. While variations exist as to the usage of these two terms, on the basis of testimony at the hearing, they generally designate Russet Burbank potatoes which were originally grown for use by the processing market, but somehow, either through processing contract attrition or through overabundant yield, spill over into the fresh sector of the market.¹¹²

148. As discussed previously, the state of Washington grows large volumes of Russet Burbank potatoes, mostly under contract, for the processing industry. According to the evidence, the acreage involving "flex" potatoes in Idaho alone may be as high as 10,000 acres for crop year 2010-2011.¹¹³ Therefore, the extent to which such potatoes can be diverted to the B.C. fresh market could increase the threat to B.C. production if the Tribunal's order is rescinded.

149. The BCVMC submitted that this threat is real because some growers deliberately grow excess Russet Burbank potatoes to ensure that they will be able to meet their processor contract volumes. Specifically, growers plant an undefined extra amount as a cushion against crop events that could downwardly affect final yield to allow themselves to meet the tonnage that is required by contract at the end of the growing season.

150. The Tribunal considers that this threat is credible, especially given the fact that U.S. processors have just recently switched back to a tonnage-based purchasing model as opposed to the previous acreage-based purchasing model.¹¹⁴ In addition, the evidence shows that U.S. processors have cut back on producer contract volumes because of the recent recession, thus releasing acreage devoted to Russet Burbank potatoes and production to other uses.¹¹⁵

108. Grower's Exhibit A-05, tab 5, Administrative Record, Vol. 11.

109. *Ibid.*

110. *Pre-hearing Staff Report*, 17 June 2010, Tribunal Exhibit RR-2009-002-05, Administrative Record, Vol. 1.1 at 21, 25.

111. Grower's Exhibit A-05 at paras. 22-26, Administrative Record, Vol. 11; Grower's Exhibit A-05, tabs 5, 9, Administrative Record, Vol. 11.

112. *Transcript of Public Hearing*, Vol. 1, 27 July 2010, at 24, 34-35; *Transcript of Public Hearing*, Vol. 2, 28 July 2010, at 41-42; Grower's Exhibit A-05, tab 3, Administrative Record, Vol. 11.

113. Grower's Exhibit A-05, tab 3, Administrative Record, Vol. 11.

114. *Transcript of Public Hearing*, Vol. 2, 28 July 2010, at 7.

115. *Ibid.* at 28.

151. The WSPC argued that, because of differences in appearance, composition and storage characteristics, Russet Burbank potatoes are no longer considered suitable for the fresh market.¹¹⁶ Moreover, when growers have excess production of Russet Burbank potatoes, they look for the most economic way to recoup their costs. According to the witness from the WSPC, generally, in the state of Washington, the best economic option is to sell excess Russet Burbank potatoes for dehydration or cow feed rather than into the fresh market.¹¹⁷

152. The Tribunal finds that, although there are preferences for one potato variety over another, the different russet varieties are certainly substitutable.

153. In the past, Russet Burbank potatoes were extensively used in the fresh market both in the state of Washington and in British Columbia.¹¹⁸ In fact, the Russet Burbank is still today the foundation of the fresh market in Idaho.¹¹⁹ Moreover, one of the witnesses for the B.C. growers testified that certain foodservice buyers preferred Russet Burbank potatoes because of their ease of peeling and other characteristics.¹²⁰ Another witness confirmed that certain buyers preferred either the Russet Norkotah or the Russet Burbank because of characteristics specific to each variety.¹²¹

154. On the basis of the evidence, the Tribunal finds that Russet Burbank potatoes are likely present in the B.C. fresh market. Therefore, the Tribunal finds that “flex” or surplus Russet Burbank potatoes, which were originally grown for the processing market, can have an effect on the B.C. fresh market. That being said, the Tribunal’s analysis of likelihood of injury is more heavily weighted on the size, disposition and conditions affecting sales in the state of Washington and total production for the fresh market.

155. Having regard to the foregoing, the Tribunal finds that the U.S. potato market, the markets in the western states and, in particular, the market in the state of Washington, have been and remain substantially oversupplied. Moreover, as discussed previously, there is nothing to indicate that present supply-demand balances are likely to change substantially, if at all, for crop year 2010-2011 or crop year 2011-2012.

156. The Tribunal finds that potato imports from the United States could readily and rapidly flow into British Columbia, given the oversupply situation, the magnitude of available potato supplies from U.S. growing regions that neighbour British Columbia, especially the state of Washington, the propensity to export to British Columbia and the eventual likely reduction of British Columbia’s production of like goods, if the order is rescinded.

Likely Prices of Dumped Goods and Effects on Prices of Like Goods

157. In assessing the effects that the likely prices of dumped goods would have on prices of like goods, the Tribunal will examine whether the dumped potatoes are likely to significantly undercut, depress or suppress the prices of like potatoes.¹²²

116. *Ibid.* at 7-9.

117. *Ibid.* at 65-66.

118. *Transcript of Public Hearing*, Vol. 1, 27 July 2010, at 25.

119. *Ibid.* at 25, 46-47; *Transcript of Public Hearing*, Vol. 2, 28 July 2010, at 47.

120. *Transcript of Public Hearing*, Vol. 1, 27 July 2010, at 25.

121. *Transcript of Public Hearing*, Vol. 2, 28 July 2010, at 8-9.

122. Paragraph 37.2(2)(b) of the *SIM Regulations*.

158. According to the Tribunal's witness from Agriculture and Agri-Food Canada, both Canada as a whole and the much smaller B.C. regional market are "price takers" when it comes to potatoes. In effect, this means that supply and demand conditions in the United States determine prices in the Canadian market.¹²³ More particularly, Canadian and B.C. prices cannot get out of line with the landed prices of U.S. potatoes in Canada without the risk of losing sales. This reality, which is not new, has not been challenged in this expiry review or previous expiry reviews.

159. In particular, the evidence indicates that the BCVMC sets minimum prices for B.C. fresh potatoes once a week,¹²⁴ in consultation with the B.C. potato sales agencies. In this process, the landed cost, in Vancouver, of potatoes exported from the United States, in particular, from the part of the Columbia Basin that lies within the state of Washington, is established for each size of package, factoring in the export price, transportation costs and exchange rates. On the basis of this information, the BCVMC's weekly minimum prices are then set at, or above, the landed prices of the corresponding lowest-priced imports from the United States.¹²⁵

160. With the Tribunal order in place, the normal values effectively set a "floor" for the price of potatoes in British Columbia.¹²⁶ These normal values, as determined by the CBSA, reflect the costs of growing potatoes in the United States.¹²⁷ When the U.S. export price¹²⁸ is lower than the normal value for a particular potato product, the normal value, rather than the export price, is used by the BCVMC as the starting point for determining the price of B.C. potatoes.¹²⁹

161. During the POR, the prices of U.S. exports were generally above the normal values, resulting in very low duties being paid with regard to the total import volumes. These normal values were revised on September 25, 2009, and increased by approximately 50 percent.¹³⁰ Subsequent to this revision, the prices of U.S. exports have been consistently below the revised normal values. Consequently, since September 2009, the normal values established by the CBSA for the different sizes of package have become the starting point for the BCVMC in establishing its weekly minimum prices.¹³¹

123. *Transcript of Public Hearing*, Vol. 1, 27 July 2010, at 6, 98-99, 201-202; *Transcript of Public Hearing*, Vol. 2, 28 July 2010, at 134-35; *Transcript of In Camera Hearing*, Vol. 1, 27 July 2010, at 6.

124. More frequently if warranted.

125. Grower's Exhibit A-03 at paras. 19-24, Administrative Record, Vol. 11; Grower's Exhibit A-05 at paras. 40-44, Administrative Record, Vol. 11.

126. *Pre-hearing Staff Report*, 17 June 2010, Tribunal Exhibit RR-2009-002-05, Administrative Record, Vol. 1.1 at 33.

127. Tribunal Exhibit RR-2009-002-03A, Administrative Record, Vol. 1 at 163.

128. Export prices are determined by means of a ministerial specification, pursuant to section 29 of *SIMA*. As per the ministerial specification, export prices are determined weekly on the basis of the preponderant selling prices, referred to as "mostly" prices, as reported in the *National Potato and Onion Report* (Market News) published by the Federal-State Market News Service, USDA. In the absence of preponderant selling prices, export prices are specified as the straight average of the price range quoted in the Market News. Tribunal Exhibit RR-2009-002-03A, Administrative Record, Vol. 1 at 163.

129. *Pre-hearing Staff Report*, 17 June 2010, Tribunal Exhibit RR-2009-002-05, Administrative Record, Vol. 1.1 at 33; Grower's Exhibit A-05 at para. 41, Administrative Record, Vol. 11.

130. For the common package sizes. The rates of increase were even higher for other package sizes. *Pre-hearing Staff Report*, 17 June 2010, Tribunal Exhibit RR-2009-002-05, Administrative Record, Vol. 1.1 at 17.

131. As discussed later, during crop year 2009-2010, the BCVMC gradually phased in the price increases that could be realized by B.C. growers as a result of the higher normal values.

162. Anti-dumping duties are only levied and collected by the CBSA when export prices are below normal values. Prior to the September 2009 revision of normal values, a small amount of anti-dumping duties were levied and collected on imports from the United States during the POR, since export prices were, as noted, usually above normal values.¹³² In contrast, since September 2009, substantial amounts of anti-dumping duties have been collected on imports from the United States, as export prices have been below normal values.

163. To further illustrate how B.C. prices were determined, in the witness statement of the President and CEO of BCFresh, the largest B.C. sales agency, a number of specific pricing examples were provided for the most common equivalent potatoes and package sizes.¹³³ The examples represented actual price calculations that were done at different times during the POR, including both before and after September 2009.

164. The Tribunal has reviewed these examples and the pricing data for common potato types and package sizes presented in the *Pre-hearing Staff Report*.¹³⁴ The results of this analysis show that, prior to the revision of the normal values in September 2009, the average annual BCVMC minimum prices of russet potatoes sold in 5/10-lb. bales and 10/5-lb. bales, the most common package sizes in the B.C. market, generally tracked the corresponding adjusted preponderant selling prices in the state of Washington, or “mostly prices”.¹³⁵ For example, in 2008-2009, average “mostly prices” in the state of Washington for 5/10-lb. bales of russets, landed in Canadian dollars in British Columbia, adjusted for markups, were \$24.23 per hundredweight, and the average B.C. prices for the same package size were \$22.64 per hundredweight.

165. Subsequent to the revision of normal values, these B.C. selling prices were significantly higher than the corresponding adjusted “mostly prices”, but were in line with the revised adjusted normal values.¹³⁶ For example, in 2009-2010, average “mostly prices” in the state of Washington for 5/10-lb. bales of russets, landed in Canadian dollars in British Columbia, adjusted for markups, were \$12.44 per hundredweight, significantly lower than the average B.C. price for the same package size, at \$19.74 per hundredweight. This latter B.C. price, however, tracked more closely with the applicable revised adjusted normal value for the subject potatoes, at \$21.07 per hundredweight. Generally, over the POR, the B.C. prices adjusted closely to the landed prices of potatoes from the state of Washington, taking into consideration the normal values that are in place.

132. *Protected Pre-hearing Staff Report*, 17 June 2010, Tribunal Exhibit RR-2009-002-06, Administrative Record, Vol. 2.1 at 18.

133. 5/10-lb. bales and 10/5-lb. bales; Grower’s Exhibit A-05 at para. 41, Administrative Record, Vol. 11.

134. *Pre-hearing Staff Report*, 17 June 2010, Tribunal Exhibit RR-2009-002-05, Administrative Record, Vol. 1.1 at 35, 87-90; revisions to the *Pre-hearing Staff Report*, 23 June 2010, Tribunal Exhibit RR-2009-002-05C, Administrative Record, Vol. 1.1 at 145; *Protected Pre-hearing Staff Report*, 17 June 2010, Tribunal Exhibit RR-2009-002-06 (protected), Administrative Record, Vol. 2.1 at 83-86. In its analysis, the Tribunal has relied, to the extent possible, on pricing data that allow comparisons to be made of the same or similar potato types and package sizes, such as the information contained in Tables 18 and 19 and Schedules 25 to 32 of the *Pre-hearing Staff Report*, as well as on evidence provided in submissions and testimonies. Information such as the average pricing data contained in Table 12 of the *Pre-hearing Staff Report*, which combines all potato varieties and all package sizes, is subject to distortions caused by product and packaging mix. For example, white potatoes are significantly more expensive than russet potatoes, and count-size potatoes in cartons are much higher priced than bagged potatoes.

135. Adjusted to include markups of importers and wholesalers.

136. *Pre-hearing Staff Report*, 17 June 2010, Tribunal Exhibit RR-2009-002-05, Administrative Record, Vol. 1.1 at 17. These normal values are adjusted to include markups of importers and wholesalers.

166. This examination clearly confirms the pivotal role of the prices in the state of Washington in determining B.C. prices, as well as the operation of the normal value regime in establishing a base, or “floor” price, which protects British Columbia against adverse price trends emanating from the United States, when these prices fall below normal values.¹³⁷

167. While the evidence establishes a high degree of correlation between the prices in British Columbia and those in the state of Washington, the Tribunal also heard evidence that there are various factors that can also affect pricing at different times and under different market circumstances. For example, during certain “shoulder” periods,¹³⁸ i.e. at the beginning and end of the marketing season, B.C. growers might obtain somewhat higher prices, such as in July and August before their fall crop is fully harvested and towards the end of the crop year in March and April, when the inventories of B.C. crops are depleting.

168. In addition, marketing strategy can play a role in pricing. For example, after the approximately 50 percent upward revision of normal values in September 2009, the BCVMC and its agencies decided to phase in price increases over a period of months, rather than raise prices to the maximum extent all at once.¹³⁹

169. Another factor that could affect prices is the degree to which purchases in the fresh market are conducted on the basis of pre-established contracts that fix volumes and prices. Production by growers to fulfil contract requirements is common in the United States, especially in food processing, but not that common in the fresh market.

170. The Tribunal heard evidence that contracts have occasionally been used in British Columbia, in both the retail and foodservice sectors.¹⁴⁰ The Tribunal’s witness from Sysco, one of the largest foodservice wholesalers in North America, indicated that it was his desire to increase the use of contracts in British Columbia. In his view, this would help to stabilize volumes, prices and costs for buyers and sellers.¹⁴¹ Nonetheless, the Tribunal notes that contract growing is not yet a widespread practice in British Columbia and, hence, has had little, if any, effect on prices.

171. The Tribunal’s witness from Sysco, as well as the Tribunal’s witness from Overwaitea, a large regional grocery retailer, testified that they are willing to pay more in order to purchase products of better quality. In terms of importance to their purchasing decisions, they generally ranked price after quality, availability and service.¹⁴² Moreover, the witness from Overwaitea testified that, as a B.C. company, Overwaitea is committed to buying quality B.C. potatoes until they are depleted. In particular, the company annually launches a “Buy B.C.” campaign during the peak harvest season to promote locally grown potatoes.¹⁴³

137. *Transcript of Public Hearing*, Vol. 2, 28 July 2010, at 214-16.

138. Grower’s Exhibit A-05 at para. 38, Administrative Record, Vol. 11.

139. *Protected Pre-hearing Staff Report*, 17 June 2010, Tribunal Exhibit RR-2009-002-06 (protected), Administrative Record, Vol. 2.1 at 86.

140. *Transcript of Public Hearing*, Vol. 1, 27 July 2010, at 157-58, 195-96; *Transcript of In Camera Hearing*, Vol. 2, 28 July 2010, at 9-12; *Transcript of Public Hearing*, Vol. 2, 28 July 2010, at 113-15.

141. *Transcript of Public Hearing*, Vol. 1, 27 July 2010, at 136-38.

142. *Ibid.* at 130-35; *Transcript of Public Hearing*, Vol. 2, 28 July 2010, at 97-98.

143. *Transcript of Public Hearing*, Vol. 2, 28 July 2010, at 90-91. The witness from Sysco also testified that, in order to help the local economy and protect the environment, he is considering developing more direct contacts with local potato growers. *Transcript of Public Hearing*, Vol. 1, 27 July 2010, at 139-40, 158-60.

172. However, these witnesses, as well as the Tribunal's witness from Agriculture and Agri-Food Canada, all affirmed that similarly graded potatoes from the United States and British Columbia are essentially interchangeable.¹⁴⁴

173. Although the witnesses from Overwaitea and Sysco testified that quality was the primary determining factor in their purchasing decisions, they acknowledged that they need to be conscious of the price differentials between B.C. products and U.S. products in making purchasing decisions; otherwise, their companies risk losing customers to their competitors.¹⁴⁵ The witnesses from BCFresh stated that the reality was that potatoes are a price-sensitive commodity and that purchasers may choose to walk away from a deal if the price is pennies too high for a given package size.¹⁴⁶ According to the witness from Overwaitea, potatoes were a low-profit business that was very competitive.¹⁴⁷

174. The Tribunal witnesses also testified that competition is particularly intense during recessionary times. The advent of "big-box" stores into the grocery business with their "low-price" strategies had also intensified competition, according to the witness from Overwaitea.¹⁴⁸ He noted further that Overwaitea and its competitors frequently used potatoes as a loss leader in order to attract customers into their stores.¹⁴⁹ Rebate schemes between sales agencies and their customers are also commonly used to adjust prices to competitive levels, according to the Tribunal's witnesses.¹⁵⁰

175. It is clear from the above evidence that there are many factors that can influence potato pricing in British Columbia. However, overall, as has been found in all the previous expiry reviews of this case, in the absence of normal values, B.C. grower prices should not, for any length of time, get out of line with the landed prices in British Columbia of potatoes from the United States, and the state of Washington in particular, if they wish to maintain their sales and market share.

176. The result of B.C. growers trying to de-link their prices from prices in the state of Washington is well illustrated by what actually happened when this was tried for a time in crop year 2007-2008. At the time, there was a short crop in British Columbia, and growers wanted to get more value out of their reduced production than they could get based on the prevailing prices in the state of Washington at that time.¹⁵¹ As a result, the BCVMC decided to de-link B.C. prices from U.S. prices.

177. In particular, the BCVMC launched a "buy local" loyalty campaign whereby B.C. potatoes were priced higher than those of competing sources in the state of Washington.¹⁵² According to the BCVMC, during the trial period, B.C. growers lost 40 percent of their expected sales for that harvest period. In the face of this ill-fated attempt, B.C. prices were precipitously lowered to again track prices in the state of

144. *Transcript of Public Hearing*, Vol. 1, 27 July 2010, at 128, 133; *Transcript of Public Hearing*, Vol. 2, 28 July 2010, at 94, 129-30.

145. *Transcript of Public Hearing*, Vol. 1, 27 July 2010, at 134-35; *Transcript of Public Hearing*, Vol. 2, 28 July 2010, at 98-99, 106-107; *Transcript of In Camera Hearing*, Vol. 2, 28 July 2010, at 2-3.

146. *Transcript of In Camera Hearing*, Vol. 1, 27 July 2010, at 12-13.

147. *Transcript of In Camera Hearing*, Vol. 2, 28 July 2010, at 2-3.

148. *Transcript of Public Hearing*, Vol. 2, 28 July 2010, at 93-94, 112.

149. *Ibid.* at 109-110.

150. *Transcript of Public Hearing*, Vol. 1, 27 July 2010, at 28-29, 160-61; *Transcript of Public Hearing*, Vol. 2, 28 July 2010, at 108-109; *Transcript of In Camera Hearing*, Vol. 1, 27 July 2010, at 12-14; *Transcript of Public Hearing*, Vol. 2, 28 July 2010, at 1-3.

151. At the time of this pricing initiative by the BCVMC, export prices in the state of Washington were above normal values. Therefore, as explained earlier, these prices, rather than normal values, were the starting point for B.C. prices.

152. Grower's Exhibit A-06 (protected) at paras. 36-37, Administrative Record, Vol. 12. *Transcript of Public Hearing*, Vol. 1, 27 July 2010, at 26-27.

Washington. However, as a result of the failed pricing strategy, a large volume of unsold potatoes were held in storage for longer than the usual period of time. In turn, this resulted in higher than normal percentages of off-grade potatoes being sold to dehydrating plants for little value at the end of the season.¹⁵³ According to the BCVMC, the outcome of this experiment was a disaster for B.C. growers.

178. The Tribunal notes that the severity of the damage caused by this attempt to de-link prices is reflected in the data collected in the Tribunal's questionnaires. In 2007-2008, the crop year encompassing the de-linked pricing attempt, the industry experienced a total year-over-year sales decline of about 15 percent compared to 2006-2007. Moreover, the majority of growers reported financial losses in this period, while the industry, as a whole, operated only at near break-even levels, as net income, as a percentage of revenue, fell several percentage points from the previous year.¹⁵⁴

179. In sum, the Tribunal finds that prices in the state of Washington and B.C. prices are intertwined and that B.C. growers are essentially price takers.

180. The Tribunal has closely examined prices in the state of Washington over the POR. In particular, the Tribunal noted that prices in the state of Washington declined over the first two years of the POR, rebounded in 2008-2009 because of the reduced potato crop in the western states that year¹⁵⁵ and plummeted in 2010-2011. As a result, by April 2010, prices in the state of Washington for both the 5/10-lb. bale and the 20-lb. paper/poly bag reached US\$7.00 per hundredweight,¹⁵⁶ which represented the lowest price levels reported for these common package sizes throughout the entire POR. In fact, at US\$7.00 per hundredweight, the prices of these russet packages were some 50 percent lower than in April of both 2007 and 2008, and about 30 percent lower than in April 2009.¹⁵⁷

181. The Tribunal notes reports in industry publications that present depressed prices in the fresh market in the United States and Washington would not generate profits and are generally well below costs of production for growers.¹⁵⁸ When these prices are adjusted to landed prices in British Columbia,¹⁵⁹ they are, for 2009-2010, some 40 to 45 percent below the August-to-April average B.C. price, and about 45 percent below weekly average B.C. prices from February to April 2010, for the common package sizes.¹⁶⁰

153. Due to the declining quality of potatoes that remained unsold.

154. *Pre-hearing Staff Report*, 17 June 2010, Tribunal Exhibit RR-2009-002-05, Administrative Record, Vol. 1.1 at 25, 37.

155. Grower's Exhibit A-03 at para. 29, Administrative Record, Vol. 11; *Transcript of In Camera Hearing*, Vol. 1, 27 July 2010, at 29.

156. *Pre-hearing Staff Report*, 17 June 2010, Tribunal Exhibit RR-2009-002-05, Administrative Record, Vol. 1.1 at 90.

157. These USDA prices are largely for russet potatoes and white potatoes combined, although the prices of russet potatoes, as the predominant type, would be more heavily weighted. However, since the prices of white potatoes are usually much higher than those of russet potatoes, it follows that the prices of russet potatoes alone may be even lower than indicated.

158. Grower's Exhibit A-05, tab 3, Administrative Record, Vol. 11; Grower's Exhibit A-05 at para. 18, Administrative Record, Vol. 11; *Pre-hearing Staff Report*, 17 June 2010, Tribunal Exhibit RR-2009-002-05, Administrative Record, Vol. 1.1 at 90.

159. The "mostly" prices for 5/10-lb. bales in the state of Washington, at US\$7.00 per hundredweight, were converted to landed prices in British Columbia, at between CAN\$11.00 and CAN\$11.50 per hundredweight. Similarly, the corresponding prices for 10/5-lb. bales, at US\$9.00 per hundredweight, were converted to landed prices in British Columbia, at between CAN\$13.10 and CAN\$13.60 per hundredweight.

160. *Protected Pre-hearing Staff Report*, 17 June 2010, Tribunal Exhibit RR-2009-002-06 (protected), Administrative Record, Vol. 2.1 at 86.

182. Furthermore, at the time of the hearing, in July 2010, witnesses representing B.C. growers, as well as the witness from the WSPC, confirmed that prices in the state of Washington continued to be extremely low, e.g. US\$4.50 for a 5/10-lb. bale, which would convert to a landed price of about \$13.25 per hundredweight in Canadian dollars in British Columbia.¹⁶¹ As has already been discussed under the section entitled “Likely Volumes of Dumped Goods”, these prices undoubtedly reflect, among other things, the ongoing effects of the recession, the high potato inventories in the United States, and the state of Washington in particular, and the ongoing high production levels relative to demand.

183. The Tribunal notes that there has been no evidence submitted by the WSPC to suggest that prices in the United States, and the state of Washington in particular, are likely to improve, as the 2010-2011 potato crop is harvested and sent to market. The Tribunal considers that present indications and trends all point to a continued weak pricing environment in the United States, and the state of Washington in particular, over the next 12 to 24 months, as will be further discussed in the next section. Suffice it to say at this point that, if the order is rescinded, low pricing conditions will almost certainly transfer into British Columbia and that, B.C. growers being “price takers”, prices will likely fall precipitously from their current levels and remain suppressed and depressed for a considerable period.

184. In sum, if the order is rescinded, the evidence shows that B.C. prices are likely to be suppressed and to fall quickly by at least CAN\$6.00 per hundredweight to CAN\$7.00 per hundredweight, or about 30 percent, from their current levels;¹⁶² they would then be subject to price undercutting, suppression and depression as a result of dumped whole potato imports from the United States.

Likely Impact of Dumped Goods on Like Goods

185. The Tribunal notes that, over the POR, potato growers in British Columbia invested several millions of dollars on equipment, storage facilities, buildings and land to maintain and enhance their competitiveness. Employment levels and hours worked in the industry also increased.¹⁶³

186. While revenues and expenses on whole potatoes fluctuated between 2006-2007 and 2008-2009, overall prevailing prices during this period were sufficient to cover costs, and the industry, as a whole, was able to achieve modest levels of profitability, although, in some cases, individual growers incurred losses.¹⁶⁴

187. Industry profit levels on whole potatoes were lower than on other potato types, such as the red and yellow types not covered by the order.¹⁶⁵ This reflects the fact that the russet potato, the predominant potato type grown in British Columbia, is a low-margin potato.¹⁶⁶

161. *Transcript of Public Hearing*, Vol. 1, 27 July 2010, at 20; *Transcript of Public Hearing*, Vol. 2, 28 July 2010, at 74-75.

162. On the basis of the price in the state of Washington, which was US\$4.50 for a 5/10-lb. bale at the time of the hearing, as testified by the witness from BCFresh. However, if this Washington state price were to stay at the April, 2010 level of US\$7.00 per cwt, the declines in BCVMC minimum prices would be greater, in the range of 40 to 45 percent. *Transcript of Public Hearing*, Vol. 1, 27 July 2010, at 20.

163. *Protected Pre-hearing Staff Report*, 17 June 2010, Tribunal Exhibit RR-2009-002-06 (protected), Administrative Record, Vol. 2.1 at 42, 117-19.

164. *Pre-hearing Staff Report*, 17 June 2010, Tribunal Exhibit RR-2009-002-05, Administrative Record, Vol. 1.1 at 37; *Protected Pre-hearing Staff Report*, 17 June 2010, Tribunal Exhibit RR-2009-002-06 (protected), Administrative Record, Vol. 2.1 at 103.

165. *Pre-hearing Staff Report*, 17 June 2010, Tribunal Exhibit RR-2009-002-05, Administrative Record, Vol. 1.1 at 37-38.

166. *Transcript of Public Hearing*, Vol. 1, 27 July 2010, at 102-103.

188. However, notwithstanding its limited profitability, the russet is an important part of B.C. potato grower operations, since it helps them to achieve economies of scale and lower costs across their full range of potato production.¹⁶⁷ The evidence points to the fact that russets are vital for growers because their retail, wholesale and foodservice customers prefer to deal with single suppliers that can meet all their potato requirements in one location.¹⁶⁸ Going to different suppliers for different potato varieties increases costs and is not economically viable.¹⁶⁹

189. The domestic industry has argued that the normal values were too low during the 2006-2007 to 2008-2009 period and that, in effect, they should be ignored. According to the domestic industry, the normal values at that time did not reflect the true cost of production of growers in the United States, and the state of Washington in particular. In the domestic industry's view, the revised normal values that were established by the CBSA in September 2009, which increased the previous normal values by some 50 percent, are the values that should be considered from 2006-2007 onward in evaluating the dumping and effects of imports from the United States. For its part, the WSPC argued that the low amount of duties paid supports its argument that very little dumping happened during this period and that the order is outdated and no longer required.

190. The Tribunal does not consider it appropriate to do the kind of retroactive analysis suggested by the domestic industry. The normal values that were in effect and applied by the CBSA from 2006-2007 until they were revised in September 2009 are the values that the Tribunal must acknowledge and apply to its analysis. In any event, from 2006-2007 through 2008-2009, B.C. growers were able to compete with imports from the United States and, in particular, with imports from the state of Washington under the circumstances that prevailed at the time and to make some profits without the application of anti-dumping duties.¹⁷⁰ However, this would clearly not have been the case in 2009-2010, when U.S. prices were severely reduced when compared to previous years.

191. That being said, the fundamental issue before the Tribunal in this expiry review is not what happened under circumstances prevailing in the past but rather what is likely to happen in the near future under the circumstances that are likely to prevail if the order is rescinded. In this regard, as already noted, the Tribunal considers the relevant time frame to be the 12-to-24-month period that covers the current 2010-2011 B.C. crop planted last spring and the next crop in 2011-2012.¹⁷¹

192. Although the Tribunal has historically considered periods ranging from 18 to 24 months, the agricultural nature of the present case, the fact that the hearing was held in July 2010 when a crop was already in the ground and would be entering the marketplace over the next 10 months, and the fact that prices and inventories, as of the spring of 2011 will affect planting decisions for the following crop year, all justify a 12-to-24-month window of reference.

167. *Ibid.* at 102-103, 194.

168. *Ibid.* at 50-52, 104-105, 188.

169. *Ibid.* at 179-81, 213-14.

170. One of these circumstances was the prevailing Canada-U.S. exchange rate. The weak Canadian dollar increased the prices of U.S. imports (in Canadian currency). Submissions of the BCVMC, 2 December 2009, at paras. 58-60, in Expiry No. LE-2009-002; Tribunal Exhibit RR-2009-002-15.04, Administrative Record, Vol. 3 at 247; *Pre-hearing Staff Report*, 17 June 2010, Tribunal Exhibit RR-2009-002-05, Administrative Record, Vol. 1.1 at 25, 37, 52.

171. The current crop year runs from July 1, 2010, to June 30, 2011, and the next crop year covers the period from July 1, 2011, to June 30, 2012.

193. As presented above under the section entitled “Likely Volumes of Dumped Goods and Effects on Volumes of Like Goods”, the current situation in the U.S. potato market is poor and the outlook for growers in 2010-2011 is not promising.

194. Briefly restated, accumulated potato stocks from 2009-2010 are high. Acres planted and forecast production for the current crop are also high relative to demand. Consequently, prices in the United States, and the state of Washington in particular, have collapsed and are currently near their lowest levels during the POR.¹⁷² Witnesses who appeared before the Tribunal, including the witness from the WSPC, attested to this situation.¹⁷³

195. As already noted, North American potato industry publications report that current price levels are “well below” costs of production for U.S. potato growers, including growers in the state of Washington that are among the most efficient growers in North America.¹⁷⁴ On a yield basis, the evidence shows that growers in the state of Washington are substantially more productive than B.C. growers.¹⁷⁵ If growers in the state of Washington cannot cover their costs at these prices, it would certainly be expected that these prices are inadequate to generate sufficient revenues to cover the costs to B.C. growers,¹⁷⁶ whose yield levels are about half those of U.S. growers.

196. To this end, the Tribunal has considered the effects which the previously discussed 40 to 45 percent price declines would have on B.C. growers.¹⁷⁷ The results of this analysis show that, if the order is rescinded and B.C. grower prices fell to the depressed levels now prevailing in the state of Washington, the immediate consequences will be dire.

197. Specifically, without the floor price set by normal values, the Tribunal estimates that B.C. grower revenues would fall in tandem with prices, by as much as 40 to 45 percent. This would amount, on an annualized basis, to several millions of dollars in forgone revenue on like goods.¹⁷⁸ If the price of russet potatoes dragged down the prices of all potato types, as the evidence suggests is likely to happen,¹⁷⁹ the revenue losses would be even higher.¹⁸⁰

172. According to pricing information provided by the witness from BCFresh at the hearing, while the “mostly” prices in the state of Washington may have rebounded somewhat at the time of the hearing, they remain one of the lowest recorded during the POR. *Transcript of Public Hearing*, Vol. 1, 27 July 2010, at 20; *Pre-hearing Staff Report*, 17 June 2010, Tribunal Exhibit RR-2009-002-05, Administrative Record, Vol. 1.1 at 35, 87-90.

173. *Transcript of Public Hearing*, Vol. 1, 27 July 2010, at 20-22, 157; *Transcript of Public Hearing*, Vol. 2, 28 July 2010, at 74-75, 111-12, 126, 132-33; *Transcript of In Camera Hearing*, Vol. 1, 27 July 2010, at 30.

174. Grower’s Exhibit A-05, tab 3, Administrative Record, Vol. 11; Grower’s Exhibit A-05 at para. 18, Administrative Record, Vol. 11.

175. *Pre-hearing Staff Report*, 17 June 2010, Tribunal Exhibit RR-2009-002-05, Administrative Record, Vol. 1.1 at 49; revision to *Protected Pre-hearing Staff Report*, 19 July 2010, Tribunal Exhibit RR-2009-002-06A (protected), Administrative Record, Vol. 2.1 at 127.1.

176. Assuming no anti-dumping duties.

177. See para. 181 of this statement of reasons.

178. This is based on the sales value from B.C. production, which was about \$13 million in 2009-2010. *Pre-hearing Staff Report*, 17 June 2010, Tribunal Exhibit RR-2009-002-05, Administrative Record, Vol. 1.1 at 26.

179. This proved to be the case with red potatoes in 2009-2010. Grower’s Exhibit A-05 at para. 35, Administrative Record, Vol. 11; *Transcript of Public Hearing*, Vol. 1, 27 July 2010, at 22-23.

180. In crop year 2008-2009, sales of russet potatoes accounted for about 43 percent of all potatoes sold in British Columbia. Grower’s Exhibit A-05 at para. 33, Administrative Record, Vol. 11.

198. Moreover, the analysis confirms that, at these lower price levels, B.C. growers would not be able to cover their costs.¹⁸¹ Whereas their operations were generally profitable from 2006-2007 to 2008-2009, under the conditions that would apply to the 2010-2011 crop absent the order, the evidence shows that B.C. growers would be operating at significant negative net margins. Again, the annualized net loss for the domestic industry is estimated to be in the millions of dollars on like goods, and more if total farm income is taken into account.¹⁸²

199. The limited profits which the B.C. growers now enjoy simply could not withstand a 40 to 45 percent decrease in revenue, leading to either a major re-orientation of their farming practices towards other crops or to bankruptcies. To this effect, it is worth noting that potato farmers appear to be constrained by at least two limiting factors: (a) equipment, investments and infrastructure specialized to potato farming; and (b) provincial legislation, the *Agricultural Land Commission Act*,¹⁸³ which limits agricultural land use to agriculture.¹⁸⁴ As a result, it would be very difficult for B.C. potato farmers to re-orient their practices adequately in order to maintain current levels of profitability.

200. In short, if the order is rescinded, the Tribunal is persuaded from the evidence that the poor conditions that currently prevail in North America will effectively be imported into British Columbia. All that stands between the B.C. potato industry and the above-described dire performance consequences in 2010-2011 are the current normal values.

201. Turning to 2011-2012, the Tribunal can find nothing to indicate that the situation for next year's crop is likely to be any better than the current one. In fact, the witness for the WSPC acknowledged that the present situation is poor and adduced no evidence to indicate that any change is on the horizon.¹⁸⁵ The Tribunal believes that, in the absence of any new developments, North American potato demand is likely to continue to be weak through 2011-2012. The dampening effects of the recession on fresh and processed potato demand are likely to persist, given the expectation that the economic recovery will be slow. Consumer health trends with regard to limiting carbohydrates are also likely going to continue to depress potato demand as they have done throughout the last decade.¹⁸⁶

202. On the supply side, there is nothing to indicate that the UPGA will be any more successful in getting U.S. growers to meet its production cutback recommendations in the next two years than it has been in the past two years or, in fact, since its inception in 2004.¹⁸⁷ Moreover, there is no U.S. Government program to limit supply planned for the near future. Rather, there is a new U.S. Government program designed to encourage agricultural exports, including potato exports.¹⁸⁸ All this suggests that there is little likelihood that the current gap between supply and demand will narrow significantly in the next two years.

181. Grower's Exhibit A-08 (protected) at para. 7, Administrative Record, Vol. 12; Grower's Exhibit A-010 (protected) at para. 6, Administrative Record, Vol. 12; Grower's Exhibit A-12 (protected) at para. 6, Administrative Record, Vol. 12; Grower's Exhibit A-14 (protected) at para. 4, Administrative Record, Vol. 12.

182. Subtracting estimated revenue forgone and total expenses (sales volume multiplied by cost of production) from sales value of B.C. production in 2009-2010.

183. S.B.C 2002, c. 36.

184. Grower's Exhibit A-03 at paras. 14, 15, Administrative Record, Vol. 11.

185. *Transcript of Public Hearing*, Vol. 2, 28 July 2010, at 74-75, 79-80.

186. Grower's Exhibit A-01 at para. 32, Administrative Record, Vol. 11; Grower's Exhibit A-05 at para. 48, Administrative Record, Vol. 11.

187. Submissions of the BCVMC, 2 December 2009, tab 6, in Expiry No. LE-2009-002; *Pre-hearing Staff Report*, 17 June 2010, Tribunal Exhibit RR-2009-002-05, Administrative Record, Vol. 1.1 at 48, 49; Growers' Exhibit A-01 at paras. 25-29, Administrative Record, Vol. 11; Growers' Exhibit A-05 at paras. 19, 20, Administrative Record, Vol. 11.

188. Grower's Exhibit A-05 at paras. 27-28, Administrative Record, Vol. 11; Grower's Exhibit A-05, tabs 10, 11, Administrative Record, Vol. 11.

203. The Tribunal also notes that the Canadian dollar is much stronger against the U.S. dollar than it was for most of 2006-2007 to 2008-2009.¹⁸⁹ Most economic forecasts call for continued strength of the Canadian dollar into the foreseeable future.¹⁹⁰ While exchange rates are inherently difficult to predict, it does not appear to the Tribunal that the B.C. industry can expect favourable exchange rates to offset low U.S. potato prices either this year or in 2011-2012.¹⁹¹

204. As noted, the effects of removing the order will likely play out on the price side in 2010-2011, as B.C. growers match low prices in the state of Washington. However, in 2011-2012, the effects are likely to play out on the production side, as B.C. growers absorb the financial losses that they will undoubtedly incur over the coming months and adjust their spring planting decisions accordingly. B.C. growers submitted that they are likely to cut back on potato acreage planted and, in some cases, possibly eliminate production entirely,¹⁹² and the Tribunal has no reason to doubt the plausibility of their evidence.

205. In sum, it is clear from the foregoing that, over the next 12 to 24 months, if the order is rescinded, the B.C. potato industry is likely to experience adverse effects that could cost growers many millions of dollars in lost revenues and generate millions in net losses on operations with regard to like goods alone. Employment and hours worked are likely to decline significantly; planned investments in storage and equipment are likely to be curtailed, deferred or cancelled; investments already made may have to be written off.¹⁹³

206. Moreover, the injury caused to like goods could have a serious adverse ripple effect on total farm operations. As noted, growers would have to make difficult choices between cutting back on russet potato production, ceasing to grow whole potatoes or ceasing potato production altogether. Switching to other crops, such as soy or corn, would require significant investment and farm reorganization.¹⁹⁴ Selling land for non-agricultural uses might not be possible because of the restrictions under B.C. legislation cited earlier.¹⁹⁵ As a result, some farmers who cut back or stop planting russet or other potatoes might be left with valueless agricultural land.

189. Tribunal Exhibit RR-2009-002-15.04, Administrative Record, Vol. 3 at 247; *Pre-hearing Staff Report*, 17 June 2010, Tribunal Exhibit RR-2009-002-05, Administrative Record, Vol. 1.1 at 52.

190. Tribunal Exhibit RR-2009-002-37.01, Administrative Record, Vol. 1 at 248-49, 253; Tribunal Exhibit RR-2009-002-37.02, Administrative Record, Vol. 1 at 258; Tribunal Exhibit RR-2009-002-37.03, Administrative Record, Vol. 1 at 263-64.

191. Unlike the period between 2006-2007 and 2008-2009, when the weak Canadian dollar increased the prices of U.S. imports (in Canadian currency), thus providing a measure of protection to B.C. growers. Submissions of the BCVMC, 2 December 2009, at paras. 58-60, in Expiry No. LE-2009-002; Tribunal Exhibit RR-2009-002-15.04, Administrative Record, Vol. 3 at 247.

192. *Transcript of Public Hearing*, Vol. 2, 28 July 2010, at 210-11; Grower's Exhibit A-07 at para. 18, Administrative Record, Vol. 11; Grower's Exhibit A-11 at para. 4, Administrative Record, Vol. 11.

193. *Transcript of Public Hearing*, Vol. 1, 27 July 2010, at 186, 189, 198, 210-12; Grower's Exhibit A-07 at paras. 11-14, Administrative Record, Vol. 11; Grower's Exhibit A-09 at paras. 13-16, Administrative Record, Vol. 11; Grower's Exhibit A-11 at paras. 9-12, Administrative Record, Vol. 11; Grower's Exhibit A-13 at paras. 7-11, Administrative Record, Vol. 11.

194. *Transcript of Public Hearing*, Vol. 1, 27 July 2010, at 218; Grower's Exhibit A-07 at paras. 3, 16, Administrative Record, Vol. 11; Grower's Exhibit A-09 at para. 11, Administrative Record, Vol. 11; Grower's Exhibit A-11 at para. 16, Administrative Record, Vol. 11; Grower's Exhibit A-13 at paras. 3, 5, Administrative Record, Vol. 11.

195. Grower's Exhibit A-07 at para. 16, Administrative Record, Vol. 11; Grower's Exhibit A-09 at para. 11, Administrative Record, Vol. 11; Grower's Exhibit A-03 at para. 14, Administrative Record, Vol. 11.

207. Having regard to the foregoing, the Tribunal finds that, if the order is rescinded, the likely adverse effect on the domestic production of like goods would be material over the 12-to-24-month time horizon that the Tribunal considers relevant to its decision. Moreover, the likely effects would be widespread and pervasive, amounting to injury to all or almost all of domestic production.

Other Factors

208. Pursuant to paragraph 37.2(2)(k) of the *SIM Regulations*, the Tribunal may consider any other factors relevant in the circumstances. Accordingly, the Tribunal reviewed certain factors unrelated to dumping that could affect the domestic industry.

Agricultural Cycle

209. The WSPC argued that there exists a six-year agricultural cycle in potatoes. Within this cycle, it is claimed that there will be some bad years, some break-even years and at least one banner year. The one good year is said to make up for all other years and would allow growers to operate profitably through the cycle.¹⁹⁶ This argument is based on certain studies carried out by Dr. Guenther. However, as previously discussed, the Tribunal does not assign much weight to Dr. Guenther's studies because he was neither qualified as an expert nor did he appear as a witness at the hearing, where his testimony could be tested. The Tribunal also notes that Dr. Guenther himself casts doubt on the reliability of the 6-year cycle based on his evaluation of prices for crop year 2007-2008.¹⁹⁷

210. The Tribunal finds that the evidence does not establish the existence of a six-year potato crop cycle. Indeed, there was no evidence presented that such a cycle is generally acknowledged or accepted in the agricultural community at large. On the contrary, the Tribunal's witness from Agriculture and Agri-Food Canada testified that, while potato prices were volatile, he did not agree that there was a periodic or predictable cycle in potato prices.¹⁹⁸ In addition, it is interesting to note that one of the witnesses for the BCVMC testified that he knew of no financial institution that would lend farmers any money based on a model where the operations were profitable in only one out of six years.¹⁹⁹

211. The Tribunal has already explained that the focus of its analysis of likely injury is on events that are imminent and reasonably foreseeable, in this case over the next 12 to 24 months. This horizon has been applied in the past in potato expiry reviews and in many other expiry reviews.²⁰⁰ To go beyond this time horizon in this case (i.e. up to 6 years) would be entering the realm of conjecture and speculation, which the Tribunal is not prepared to do. Finally, whether or not a cycle exists, what is relevant to the Tribunal is that the next two years are likely to be "bad years" and that material injury is likely to ensue for B.C. growers, if the order is rescinded.

196. Exporter's Exhibit B-07 at para. 13, Administrative Record, Vol. 13.

197. Exporter's Exhibit B-02 at 14, Administrative Record, Vol. 13.

198. *Transcript of Public Hearing*, Vol. 2, 28 July 2010, at 152-55.

199. *Transcript of Public Hearing*, Vol. 1, 27 July 2010, at 112-13.

200. *Preformed Fibreglass Pipe Insulation* (17 November 2003), RR-2002-005 (CITT) at 11; *Prepared Baby Foods* (28 April 2003), RR-2002-002 (CITT) at 8; *Solder Joint Pressure Pipe Fittings* (16 October 1998), RR-97-008 (CITT) at 10.

Lack of Industry Vulnerability

212. The WSPC also argued that, after years of protection, it is time to remove the order. The WSPC pointed to the World Trade Organization requirement that unfair trade actions should only remain in place “as long as is necessary” to prevent material injury caused by dumping.²⁰¹ According to the WSPC, over the years, under the protection of anti-dumping duties, B.C. growers have benefited from windfall profits, have become “fortified” and, consequently, are currently less vulnerable to material injury.²⁰²

213. While the Tribunal agrees that protection should not be extended any longer than necessary, the evidence adduced in this case clearly supports the conclusion that protection continues to be necessary to prevent material injury from dumping.

214. Moreover, while the industry under protection was modestly profitable during the POR, the measure of material injury or likely material injury is the measure of the effects or likely effects of dumping. By this measure, if the adverse change is expected to be large, as the Tribunal has found in this case, the level of an industry’s profitability or accumulated financial reserves, before the injurious trade effects occur, are not determinative.

CONCLUSION

215. In view of the above, the Tribunal finds that the expiry of the order will likely result in injury to the growers of all or almost all of the potato production in British Columbia in the near to medium term.²⁰³ Based on the foregoing, pursuant to paragraph 76.03(12)(b) of *SIMA*, the Tribunal continues its order in respect of the subject goods.

Jason W. Downey

Jason W. Downey
Presiding Member

Diane Vincent

Diane Vincent
Member

Stephen A. Leach

Stephen A. Leach
Member

201. Exporter’s Exhibit B-01 at para. 1, Administrative Record, Vol. 13.

202. *Ibid.* at para. 70.

203. The Tribunal notes that there is no evidence on the record that suggests that the resumed or continued dumping of the subject goods would only cause injury to a subset of growers in British Columbia, i.e. evidence that would indicate that the expiry of the order would not result in injury to the growers of all or almost all of the production of like goods in British Columbia, as is required by paragraph 42(5)(b) of *SIMA*. The Tribunal further notes that the WSPC did not address this question in its submissions. Therefore, the Tribunal concludes that the conditions of paragraph 42(5)(b) are satisfied in this expiry review.