



Ottawa, Monday, February 7, 1994

Review No.: RR-93-002

IN THE MATTER OF a review, under subsection 76(2) of the *Special Import Measures Act*, of the finding of material injury made by the Canadian International Trade Tribunal on February 3, 1989, in Inquiry No. CIT-3-88, concerning:

**FRESH, WHOLE, DELICIOUS, RED DELICIOUS AND GOLDEN
DELICIOUS APPLES, ORIGINATING IN OR EXPORTED
FROM THE UNITED STATES OF AMERICA, EXCLUDING
DELICIOUS, RED DELICIOUS AND GOLDEN DELICIOUS APPLES
IMPORTED IN NON-STANDARD CONTAINERS FOR PROCESSING**

ORDER

The Canadian International Trade Tribunal, under the provisions of subsection 76(2) of the *Special Import Measures Act*, has conducted a review of its finding of material injury made on February 3, 1989, in Inquiry No. CIT-3-88.

Under subsection 76(4) of the *Special Import Measures Act*, the Canadian International Trade Tribunal hereby rescinds the above-mentioned finding.

Arthur B. Trudeau

Arthur B. Trudeau
Presiding Member

Charles A. Gracey

Charles A. Gracey
Member

Lise Bergeron

Lise Bergeron
Member

Michel P. Granger

Michel P. Granger
Secretary



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Special Import Measures Act - Whether to rescind or continue, with or without amendment, the finding of material injury made by the Canadian International Trade Tribunal on February 3, 1989, in Inquiry No. CIT-3-88.

Place of Hearing: Vancouver, British Columbia

Dates of Hearing: December 2 and 3, 1993

Date of Order and Reasons: February 7, 1994

Tribunal Members: Arthur B. Trudeau, Presiding Member
Charles A. Gracey, Member
Lise Bergeron, Member

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for Canadian Horticultural Council

(Organization representing domestic growers)

Darrel H. Pearson
for Northwest Horticultural Council

**(Organization representing Washington
growers/exporters)**

Witnesses:

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Consultant
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Stephen Thomson
General Manager
British Columbia Fruit Growers'
Association

David Hobson
President
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Penny Gambell
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TRIBUNAL: ARTHUR B. TRUDEAU, Presiding Member
 CHARLES A. GRACEY, Member
 LISE BERGERON, Member

STATEMENT OF REASONS

BACKGROUND

This is a review, under subsection 76(2) of the *Special Import Measures Act*¹ (SIMA) of the finding of material injury made by the Canadian International Trade Tribunal (the Tribunal) on February 3, 1989, in Inquiry No. CIT-3-88, concerning fresh, whole, Delicious, Red Delicious and Golden Delicious apples (hereinafter referred to as "delicious apples²"), originating in or exported from the United States of America, excluding Delicious, Red Delicious and Golden Delicious apples imported in non-standard containers for processing. In Expiry No. LE-93-003 dated June 2, 1993, the Tribunal gave notice that the finding was scheduled to expire on February 2, 1994. The Tribunal asked that interested parties requesting or opposing the initiation of a review of the finding file written submissions addressing relevant factors relating to: (1) the likelihood of the resumption of dumping if the finding were allowed to expire; (2) the likely volumes and prices of dumped imports if dumping were to resume; (3) the domestic industry's performance since the finding; (4) the likelihood of material injury to the domestic industry if the finding were allowed to expire; (5) other developments affecting, or likely to affect, the performance of the domestic industry; and (6) any other changes in circumstances, domestically or internationally, including changes in the supply and demand for delicious apples, as well as changes in the level and sources of imports into Canada.

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1. R.S.C. 1985, c. S-15.
 2. The term "delicious apples" will be used to refer to the total of Delicious, Red Delicious and Golden Delicious apples.

On September 10, 1993, on the basis of available information, including representations received from interested parties, the Tribunal decided, under subsection 76(3) of SIMA, to initiate a review of the finding. A notice of review was forwarded to all known interested parties and published in Part I of the September 18, 1993, edition of the Canada Gazette.

As part of this review, the Tribunal sent questionnaires to five grower organizations. From the replies to these questionnaires and other sources, the Tribunal's research staff prepared public and protected pre-hearing staff reports.

The record of this review consists of all relevant documents, including the finding, the notice of review, replies to the questionnaires, the staff reports prepared for the review, and all evidence and testimony given during public and *in camera* hearings held in Vancouver, British Columbia, on December 2 and 3, 1993. All public exhibits were made available to interested parties. Protected exhibits were provided only to independent counsel who had given undertakings respecting the non-disclosure of confidential information.

The Canadian Horticultural Council (CHC), an organization representing domestic growers, was represented by counsel at the hearing, submitted evidence and made argument in support of continuing the finding. The Northwest Horticultural Council (NHC), an organization representing growers/exporters in the state of Washington, was represented by counsel at the hearing, submitted evidence and made argument in support of rescinding the finding.

The Tribunal also invited the Produce Merchandising Manager of Canada Safeway Limited in Vancouver, British Columbia, to answer questions put to him by members of the Tribunal and by counsel for each party.

SUMMARY OF THE FEBRUARY 3, 1989, FINDING

Counsel for the CHC, the complainant and sole representative of Canadian apple growers at the time of the initial hearing in January 1989, alleged that the dumping of delicious apples had caused and was causing material injury to Canadian growers in the form of price suppression and reduced grower returns. The reduction in growers' incomes had adversely affected productivity, operating debt, employment, land value and the proportion of fresh apples sold on the market. Moreover, with the reduction in growers' incomes, agricultural support programs of the federal and provincial governments assumed a greater share of the financial burden.

Counsel for the CHC stated that, because of a surge in U.S. production of delicious apples, particularly in the state of Washington in 1987-88, which exceeded North American and offshore demand for delicious apples, North American prices declined below costs of production. As a consequence, packers in the state of Washington had no alternative but to export delicious apples to any available market, including Canada, at prices which the Deputy Minister of National Revenue for Customs and Excise (the Deputy Minister) found to be lower than normal values. The increase in production of delicious apples was attributed to the extensive planting, largely in the state of Washington, during the late 1970s and early 1980s. According to counsel for the CHC, the increase in acreage devoted to delicious apples was motivated by tax incentives and government irrigation projects.

Counsel for the NHC submitted that there were several factors independent of supply and demand determinants that affected the price points for delicious apples. These factors included international trade in delicious apples, world supply, local quality, availability and substitutability of other fruits. Although it was conceded that the 1987-88 apple crop in the state of Washington was large, the poor quality of the harvested apples drove prices down. Counsel told the Tribunal that the domestic industry's decade-long losses were caused by factors other than dumping. Counsel concluded that the 1987-88 crop year, which was characterized by a combination of an above-trend production level and low quality, should not be used as a basis for making a determination of material injury.

The Tribunal noted that the domestic market for fresh apples over a period of five years (1983 to 1988) fluctuated between 5.5 and 6.8 million cartons. Canadian production supplied about 70 percent of the market, except for 1986-87 when Canadian growers experienced a small crop, and their market share fell to 60 percent. Imports from the United States captured the balance of the market. Moreover, production in the state of Washington was so large that it could supply the entire Canadian market. When Canadian prices rose above the landed prices of apples from the state of Washington, buyers increased their imports. Because of the continuing availability of apples from the state of Washington at very competitive prices, B.C. Tree Fruits Limited (BCTFL) and the Ontario Apple Marketing Commission took into consideration the landed prices in Canada of apples from the state of Washington before setting their own domestic prices.

In the Tribunal's view, the gains in market share by U.S. imports were largely achieved because of the dumped prices at which delicious apples were entering the Canadian market. The Tribunal was satisfied that growers in British Columbia had suffered and were suffering material injury in the form of price suppression, which culminated in a severe decline in net revenue.

With respect to the future, the Tribunal found that apple growers in the state of Washington were producing and would continue to produce apples in excess of U.S. demand. The evidence respecting growers' efforts to expand storage facilities and increase demand in the domestic and export markets did not convince the Tribunal that those efforts would offset the excess production that had had a depressing effect on prices in the United States and Canada. As a consequence, the Tribunal concluded that, unless anti-dumping duties were imposed to restrict the impact of overproduction and dumping, Canadian growers would continue to suffer material injury caused by these imports.

PRODUCT

The goods under review are fresh, whole, Delicious, Red Delicious and Golden Delicious apples, originating in or exported from the United States of America, excluding Delicious, Red Delicious and Golden Delicious apples imported in non-standard containers for processing.

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

plantings of the Red Delicious strains. In addition, new varieties such as Gala, Jonagold and Fuji have been introduced by growers in British Columbia in the past five years.

The most important aspect of planting an orchard of delicious apples is the selection of the appropriate cultivar or scion variety and rootstock. In Canada, seedling rootstocks were used extensively in the past, producing large or standard trees that could reach 6 m in height and 10 m in width. These trees matured slowly, bearing fruit in 10 to 12 years. Since the mid-1980s, Canadian apple growers have gradually begun to replace large apple trees with smaller trees grown from clonal rootstocks. These smaller trees are referred to as "dwarf trees."

Dwarf trees begin to bear apples in commercial quantities in about five to six years after planting and reach a height which enables apples to be picked without the use of a ladder. Because of their shorter branches, dwarf trees lend themselves to denser planting than large trees. Although dwarf trees do not yield as many apples as large trees, a hectare of dwarf trees should yield the same volume of apples as a hectare of large trees. Moreover, because of the higher-density planting, the resulting low and continuous tree surface in dwarf tree orchards facilitates spraying, pruning and picking, all of which permit apple growers to improve efficiency and to increase the proportion of high-quality apples.

It is very important to harvest apples at the correct stage of maturity to optimize flavour, aroma and other desirable characteristics and to maximize the fruit's storage life. In conventional apple orchards, hand-picking from ladders is the most widely used and desirable harvesting method, as great care must be taken to avoid bruising the apples. Mechanical harvesting, wherein a clamp grasps the tree trunk and shakes the apples off the tree, sometimes replaces hand-picking; however, because apples harvested by this method suffer extensive bruising, they are normally processed into juice and applesauce.

After harvesting, apples are transported to packing houses to be graded and packed. Some apples may be sprayed with a thin coating of edible wax to improve their appearance and extend their storage life. If apples are to be kept for a length of time, they are put in storage bins and cooled quickly. The most common storage methods used to keep apples at their best for long periods of time are cold or regular storage and controlled atmosphere storage. A third method, known as low-oxygen storage, is a modified version of the controlled atmosphere storage method. It involves the further reduction of oxygen levels to approximately 1 percent.

When held in storage warehouses, apples are cooled to 0°C in special chambers to slow down the ripening process and extend storage life. The humidity level is maintained at 93 to 95 percent to reduce moisture loss which leads to shrivelling. This type of storage provides for the availability of high-quality apples throughout the year, as long as product is available. Most grades and sizes of delicious apples from the state of Washington are now available year-round. Such is not generally the case with apples from British Columbia and Ontario.

Apples are graded under the *Canada Agricultural Products Standards Act*³ as Canada Extra Fancy, Canada Fancy and Canada Commercial. Although not all provinces

3. R.S.C. 1985, c. A-7.

require grading, most have regulations that are similar to those of the federal government, e.g. B.C. Extra Fancy, etc. In the United States, fresh apples are graded as U.S. Extra Fancy and U.S. Fancy. Each state may also apply its own grading standards to its own apples, e.g. Washington Extra Fancy, etc. B.C. Extra Fancy and Washington Extra Fancy are generally recognized as higher grades than Canada Extra Fancy and U.S. Extra Fancy. The grading standards in both countries are based on uniformity of size and shape, minimum and maximum diameters, colour, maturity, freedom from disease, injury and other defects and damage, and cleanliness. Apples are also pressure tested for firmness to establish internal quality.

Generally, graded apples have a minimum diameter of 5.7 cm. This measurement can be established with callipers or with automated ring or weight sizers. Since size determines the number of apples that can be layered into a carton or crate, wholesalers order cartons of apples by count size, e.g. 113, meaning that there are 113 apples per 42-lb. carton. Large apples in the 56 to 88 count sizes are usually sold in specialty shops, while the 100 to 133 count sizes are the usual retail range and are sold by the kilogram or in 1.36- and 2.27-kg bags.

DOMESTIC INDUSTRY

In Canada, delicious apples are grown mainly in British Columbia and Ontario. These two provinces account for about 95 percent of domestic production. British Columbia accounts for about 65 percent of the total, and Ontario for about 30 percent. Delicious apples also represent about 45 percent of all apples grown in British Columbia, but only 20 percent of total apple production in Ontario. In British Columbia, Red Delicious apples make up about 75 percent of the annual crop of delicious apples, and Golden Delicious apples about 25 percent of the total. In Ontario, Red Delicious apples account for 90 percent of the total crop of delicious apples.

B.C. growers that belong to the British Columbia Fruit Growers' Association (BCFGA) export about 50 percent of their crops of fresh delicious apples and ship about 35 percent to other provinces. Ontario growers, on the other hand, sell a large proportion of their crops, which consist mostly of Canada Fancy Red Delicious apples, within the province. In both provinces, the volume of delicious apples that goes into processing fluctuates significantly from year to year.

In British Columbia, the BCFGGA, an umbrella organization which represents 85 percent of growers, operates under the authority of the B.C. Tree Fruit Marketing Board. It owns the BCTFL, which is responsible for marketing worldwide, and sets prices in consultation with the packing organizations which handle about 80 percent of the production of delicious apples. Prices of local apples within the province are determined by grade and size primarily on the basis of the price of Washington apples landed in Vancouver.

In Ontario, the Ontario Apple Marketing Commission has the authority to licence growers, promote product and establish minimum prices at which graded and packed apples from Ontario may be sold to wholesalers and retailers. Prices are determined on a periodic basis by way of Price Determination Orders which take into account a number of factors, including the price of imports.

While there are similarities in orchard and packing operations in British Columbia and Ontario, there are also many regional differences, as there are between the state of Washington and the states of New York and Michigan. A system of mechanical irrigation is necessary in British Columbia, while many eastern orchards depend on rainfall. In British Columbia, there are only a few packing organizations which are cooperatively owned and operated, while in Ontario, there are several hundred privately owned packing organizations, some of which are also owned by growers.

ECONOMIC INDICATORS

The following table summarizes key economic indicators for the Canadian industry.

ECONOMIC INDICATORS						
(000 lbs)						
	1987-88	1988-89	1989-90	1990-91	1991-92	1992-93
Canadian Industry						
Total Production (all varieties)	1,115,000	1,104,000	1,183,000	1,190,000	1,127,000	1,149,000
Total Production of Delicious Apples	325,873	287,073	280,287	275,965	229,251	228,855
Ratio of Delicious Apples to Total Production (%)	29	26	24	23	20	20
Fresh Delicious Apples	202,219	186,214	178,804	194,700	188,188	158,893
Processing Apples	123,654	100,859	101,483	81,265	41,063	69,962
Ratio of Fresh Delicious Apples to Total Production of Delicious Apples (%)	62	65	64	71	82	69
Imports						
United States	85,340	55,117	71,455	76,994	74,476	61,935
Other Countries	-	1,587	687	77	90	6
Total Imports	85,340	56,704	72,142	77,071	74,566	61,941
Total Market	231,893	199,604	196,677	219,848	211,782	168,386
Market Share						
Domestic Growers (%)	63	72	64	65	65	63
U.S. Imports (%)	37	28	36	35	35	37
Note: The crop year is from July to June.						

Canadian production of all varieties of fresh and processing apples remained fairly stable during the period under review at between 1,104 million lbs in 1988-89 and 1,190 million lbs in 1990-91.

Total production of delicious apples, during the post-finding period, declined steadily from 326 million lbs in 1987-88 to 229 million lbs in 1992-93, a net reduction of 30 percent. In proportion to total Canadian apple production, the ratio of delicious apple production dropped by about one third, from 29 percent in 1987-88 to 20 percent in 1992-93.

Between 1987-88 and 1992-93, domestic and export shipments of fresh, whole, delicious apples fluctuated irregularly between a high of 202 million lbs in 1987-88 and a low of 159 million lbs in 1992-93. In proportion to total delicious apple production, shipments of fresh delicious apples ranged between 62 percent in 1987-88 and 82 percent in 1991-92, then fell 13 percentage points to 69 percent in 1992-93.

During the period under review, the domestic market for delicious apples, which reached over 200 million lbs in 1987-88, 1990-91 and 1991-92, dropped to its lowest level of 168 million lbs in 1992-93. Over this period, the domestic growers' share of the market hovered around 65 percent. Growers in British Columbia have supplied the major proportion of total domestic production of delicious apples for domestic consumption.

The market share captured by U.S. imports (mainly from the state of Washington) declined from 37 percent in 1987-88 to 28 percent in 1988-89, then averaged about 36 percent during the subsequent four years.

Since 1988-89, Canadian export sales of fresh delicious apples have steadily increased in aggregate terms and as a ratio of domestic production. Over 85 percent of these sales were made by the BCTFL, with the balance originating in Ontario.

The industry's income statement shows a significant improvement in profitability during the post-1987 period, although during the first three crop years of this period, the improvement can be traced partially to support payments made by both federal and provincial governments.

The enforcement data provided by the Department of National Revenue (Revenue Canada) show that the amount of anti-dumping duties that was collected by Revenue Canada on imports of delicious apples during the post-finding period is negligible.

U.S. DELICIOUS APPLE INDUSTRY

The following table summarizes key economic indicators for the U.S. and state of Washington industries.

ECONOMIC INDICATORS						
(carlots)						
	1987-88	1988-89	1989-90	1990-91	1991-92	1992-93
U.S. Industry						
Total Production (all varieties)	255,764	217,334	237,210	230,876	231,635	255,227
Total Production of Delicious Apples	156,510	124,660	141,250	137,800	131,935	147,750
Ratio of Delicious Apples to Total Production (%)	61	57	60	60	57	58
State of Washington Industry						
Total Production (all varieties)	106,974	84,507	111,646	108,344	95,988	107,443
Total Shipments of Fresh Apples (all varieties)	68,064	63,635	78,446	73,544	71,201	74,153
Ratio of Fresh Apples to Total Production (%)	64	75	70	68	74	69
Shipments of Fresh Delicious Apples	62,678	57,587	71,237	64,925	64,028	62,081
Shipments of Other Varieties	5,386	6,048	7,209	8,619	7,173	12,072
Ratio of Fresh Delicious Apple Shipments to Total Fresh Apple Shipments (%)	92	90	91	88	90	84
Total Exports (all varieties)	12,336	8,181	14,427	14,349	19,457	17,126
Ratio of Exports to Total Fresh Apple Shipments (%)	18	13	18	20	27	23
F.O.B. Price of Total Fresh Apple Shipments (US\$/42 lbs)	9.64	12.22	10.25	14.20	16.32	13.41
F.O.B. Price of Red Delicious Apple Shipments (US\$/42 lbs)	9.32	11.46	9.50	14.14	15.65	12.86
F.O.B. Price of Golden Delicious Apple Shipments (US\$/42 lbs)	9.82	13.11	11.42	14.66	17.30	13.38
Notes: A carlot is equivalent to 1,000 42-lb. cartons or 21 t. The crop year is from August to July.						

Delicious apples are the predominant apples grown in the United States. Based on 1992 data, they account for close to 60 percent of total U.S. apple production. The western region, dominated by the state of Washington, is by far the major growing area, with some 75 percent of total U.S. apple production.

The state of Washington is able to produce consistently high-quality fresh delicious apples because of its climate. Over 70 percent of the production of fresh apples consists of Extra Fancy grades. During the post-finding period, Red Delicious apple production was, on average, about three times larger than Golden Delicious apple production. Over the same period, exports to Canada consisted mainly of the Extra Fancy grades. The state of Washington produces twice as many apples for fresh use as for processing, while the reverse is true for the state of Michigan, the third-largest apple-producing state. In the state of New York, the second-largest and only other major producing state of delicious apples, production is almost evenly divided between fresh and processing apples. More importantly, for purposes of this review, the state of

Washington is the only significant exporting state to Canada. It ships to all regions of the country year-round. Imports into Canada from the states of Michigan and New York are sporadic and negligible.

The preceding table summarizes data relating to production, shipments, prices and exports for the state of Washington. While production fluctuates from year to year, prices vary according to the size of the crop and the quality of the fruit. Total exports have been on an upward trend and reached a record high of 27 percent of shipments of fresh apples in 1991-92 before declining in 1992-93. Exports to Canada have accounted for less than 5 percent of shipments of fresh delicious apples and are declining relative to total exports.

POSITION OF PARTIES

Canadian Horticultural Council

Counsel for the CHC submitted that the two questions that the Tribunal must address are whether it is likely that the dumping of delicious apples will resume in Canada if the finding is rescinded and, if so, whether such dumping is likely to cause material injury to the production in Canada of like goods. Counsel argued that the burden to prove that the circumstances had changed so as to warrant the rescission of the finding rested on the NHC, which, they contended, has failed to provide any evidence to support its position.

With respect to the likelihood of dumping or propensity to dump, counsel for the CHC suggested that the Tribunal should examine the production and price levels in the state of Washington, as well as factors relating to the Canadian market, such as how Canadian prices are determined and how supply and demand affect the marketplace. Counsel maintained that the state of Washington has an enormous capacity to produce delicious apples. Shipments of fresh delicious apples from the state of Washington over the past six years have met or exceeded the 1987-88 crop, which led to the dumping complaint. The evidence shows that Red Delicious apples will remain the dominant variety in the state of Washington, with average crops being even larger in the next five years than in 1990-91. Counsel added that the production of Golden Delicious apples will also significantly increase in the mid-1990s. Counsel argued, in this regard, that overproduction of perishable crops, such as apples, causes price depression. There is ample evidence, counsel said, that U.S. prices have fallen below normal values in three of the last six years, during which the state of Washington produced high levels of delicious apples. Counsel relied on a U.S. study, stating that grower returns will remain under pressure throughout the 1990s, especially in years of above-average yields. According to that study, above-average yields occur in at least three out of ten years. However, counsel suggested that recent average yields were high enough to depress U.S. prices.

As surplus low-priced apples are unlikely to be consumed domestically, counsel for the CHC suggested that U.S. growers will have to sell their perishable products at prices below costs of production, likely in Canada. The Canadian market is traditionally and geographically a close market with one of the world's highest apple consumption rates per capita. Counsel further argued that, to maximize returns to its growers, the industry in the state of Washington will try to displace competing apples in all markets and that, with an above-average yield, the only effective way to displace competitors and

increase consumption is by reducing prices. Moreover, a surplus in the state of Washington will be compounded by reduced prices for all apples in other states, such as New York and Michigan. This will result in the three states trying to sell delicious apples in a different market, such as Canada, at these lower prices. Furthermore, as the state of Washington is the price setter, Canadian growers will be unable to sell their fresh products on the market unless they compete with the prices at which U.S. delicious apples are sold in Canada, which they cannot do without the protection of anti-dumping duties. Counsel added that apples are perishable products and that reduced storage life can induce growers in the state of Washington to sell at prices that will only permit them to recover their costs of packing and marketing. However, as packing and marketing only account for a portion of total costs of producing delicious apples, counsel suggested that prices will likely be below costs of production.

Thus, if the finding is rescinded, counsel for the CHC submitted that delicious apples will be dumped and that this will cause material injury. Counsel argued that material injury is a cumulative process beginning with depressed grower returns. In order to sell their crops and keep their market share, Canadian growers will have to match the prices of the dumped delicious apples. If high-quality delicious apples from the state of Washington are sold at a price that is appreciably lower than the price of equivalent B.C. apples, there is evidence that large Canadian buyers will purchase those apples. Counsel maintained, in this regard, that the reason that almost no anti-dumping duties were paid was because only high-quality delicious apples were exported to Canada in the last five years at above normal values. In fact, counsel maintained that, if the finding is rescinded, the NHC concedes that lower-grade delicious apples from the state of Washington could be exported to Canada at prices that are below current normal values.

Counsel for the CHC concluded that, without the protection of anti-dumping duties, material injury will soon appear in the form of price suppression and reduced market share, which in turn will result in orchard decline, reduced production and acreage, diversion of fresh apples to the processing industry, underutilization of equipment and facilities, and decreased employment in orchards and in the apple industry in general. The foregoing will lead to the capitalization of operating debt and, eventually, to the elimination of the commercial apple industry. Counsel referred to the situation in British Columbia where growers would not have been able to survive the last five years without the benchmark set by the normal values, as it allowed them to receive a modest profit. For these reasons, counsel urged the Tribunal to continue the finding.

Northwest Horticultural Council

Counsel for the NHC first rejected the CHC's argument with respect to the burden of proof. Counsel submitted that, because subsection 76(5) of SIMA provides that the Tribunal's injury finding is deemed to have been rescinded as of the expiration of five years, in the absence of a review, the burden of proof, then, rests on the party seeking continuation of the finding.

Counsel for the NHC maintained, with respect to the first issue, i.e. the propensity to dump, that there is no evidence of a propensity to dump on the part of growers in the state of Washington. Counsel relied on the anti-dumping enforcement

data provided by Revenue Canada which, he said, show that the amount of anti-dumping duties assessed as a percentage of the value of delicious apples imported was minuscule. Counsel argued that, during the five-year period after the finding, exporters were able to maintain their market share, notwithstanding the anti-dumping measures. On the question of pricing, counsel insisted that apple growers in the state of Washington had never used discriminatory pricing practices to gain market share in Canada and that comparable grades of apples are sold at the same price for the U.S. market and for export to Canada.

Counsel for the NHC addressed the question of whether it is likely that the selling price of delicious apples for export to Canada will be below the fully absorbed cost in the foreseeable future. Counsel first pointed out that the argument of counsel for the CHC that most of the delicious apples from the 1992 crop were offered at prices below normal values is a simplistic examination of the case which does not take into account how normal values were established. In this regard, counsel referred to the final determination of dumping which established two normal values with respect to apples stored using the regular and controlled atmosphere storage methods regardless of their variety, i.e. Red or Golden Delicious apples. Counsel also referred to the November 20, 1991, Revenue Canada review establishing two new normal values for Red and Golden Delicious apples. Counsel maintained that all these values were deficient, as they did not account for differences in grade, quality or count size. Counsel further maintained that, during the period under review, average pricing by growers in the state of Washington exceeded costs of production and marketing and selling expenses. Counsel added that there is evidence on the record that, during that period, sales were profitable. This demonstrates that, despite what counsel portrayed as "arbitrary normal values," growers in the state of Washington have no propensity to dump delicious apples in Canada. Counsel claimed that marketing achievements in the past and current initiatives to develop new markets support the contention that crops will be sold at a profit in the foreseeable future. Counsel objected to the argument that the state of Washington is overproducing and argued, in this regard, that the state has supplied increased demand in export markets which has created a balance between supply and demand. Counsel stated that 5 million lbs of new market since 1986 and expectations to develop the markets of Japan and the People's Republic of China support his contention. Moreover, there is evidence of reduction in fruit-bearing acreage of delicious apples, which demonstrates that the state of Washington has no propensity to resume dumping.

As to the state of production in Canada of Red and Golden Delicious apples if dumping were to resume, counsel for the NHC argued that the industry has failed to establish that it is vulnerable to dumping. If anything, counsel suggested that the improved profitability of the industry during the period under review was not caused by the absence of dumping, but by the capacity of the industry, for instance in British Columbia, to reduce production and to strengthen the ratio of fresh apples to processing apples. Counsel also contended that, during that period, the industry, in particular B.C. growers, benefited from higher average returns in export markets. Counsel concluded that anti-dumping duties were not the factor which has removed the industry's vulnerability.

REASONS FOR DECISION

Under subsection 76(5) of SIMA, a finding of material injury expires after five years unless reviewed and continued. The Tribunal has traditionally used two criteria in determining whether a finding should be continued. First, it must be satisfied that there is a likelihood of resumption of dumping if the finding is rescinded. Second, the Tribunal must be able to conclude that a resumption of dumping is likely to cause material injury to the production in Canada of like goods. In other words, to continue the finding, the Tribunal must be persuaded by the evidence that U.S. exporters of fresh delicious apples have a propensity to dump and that Canadian growers are vulnerable to such dumping.

The Tribunal's 1989 finding of material injury was predicated largely on a surge in production of delicious apples in the state of Washington, the dominant apple-producing state and price setter for the North American market, in the 1987-88 crop year, which exceeded demand in the United States and export markets and caused prices to fall below costs of production. The problem was compounded by a lower-quality crop and lack of adequate storage facilities.

Import statistics and the history of this case show that the states of New York and Michigan, the second- and third-largest producing states of delicious apples, are not factors in the Canadian marketplace. Moreover, a careful review of unload data for all apples provided by the industry for the years 1985-86 to 1990-91 reveals that imports from the states of New York and Michigan have been negligible throughout the period. The state of Washington is by far the most important supplier of delicious apples to all regions of Canada, while the state of California is a distant second, but with other varieties of apples. Other foreign sources of supply are not a factor in the market for delicious apples. The dominant domestic supplier of delicious apples to all regions of Canada is British Columbia. Ontario growers generally supply less than 25 percent of local demand for delicious apples. Available data show that the state of Washington is by far the major supplier of both Red and Golden Delicious apples to the Toronto area market, one of the ten largest in North America. Moreover, the evidence indicates that apples from the state of Washington are generally of higher quality and command higher prices than do Ontario apples. Also, demand for Golden Delicious apples in Eastern Canada is supplied mostly by the state of Washington, as Ontario grows only small quantities of such apples, and British Columbia's production of Golden Delicious apples is kept mostly in the B.C. market.

In addressing the question of propensity to dump, the Tribunal examined the evidence and testimony, including developments in the U.S. and Canadian markets for delicious apples since 1988-89, and forecasts for the next several years, with particular emphasis on trends in production, imports, exports, demand, market shares, prices and profitability, with the focus on the state of Washington and British Columbia, the major producing areas of delicious apples in each country.

The thrust of the industry's case is that conditions have not really changed since 1987-88, and the state of Washington is still overproducing and is likely to continue to do so in the foreseeable future. This will exert pressure on prices and grower returns. Moreover, counsel for the CHC maintained that exporters in the state of Washington have a propensity to dump and based this argument on the fact that average selling

prices in the state of Washington have frequently been below established normal values since the finding was issued. Current high inventory levels in the state of Washington will also exert pressure on prices.

Counsel for the NHC countered with the argument that growers in the state of Washington do not have a propensity to dump. They have been profitable since 1988-89. Their exports to other markets have grown dramatically. They now have ample storage facilities. They sell to Canada at the same price as they do to domestic customers. Moreover, normal values are deficient in that they are based on averages and do not take into consideration factors such as grade, quality and count size.

A review of the industry in the state of Washington reveals that conditions have changed in many respects since 1987-88. During that year, growers were selling at prices that were below costs of production because of a bumper crop and the generally poor quality of the fruit. Storage facilities also proved to be inadequate. Such is no longer the case. The evidence presented at the hearing, in the form of testimony by a major grower, and actual cost-of-production and profitability data for 14 representative orchards, indicate that growers in the state of Washington have been operating profitably since 1987-88, notwithstanding the fact that, in three of the last five years, the total apple crop in the state of Washington was larger than in 1987-88. Even in 1989-90, when there was a record crop and shipments of delicious apples were more than 10 percent above 1987-88 levels, prices remained above those prevailing in 1987-88. That is not to say that, at any given time, some sizes and grades of delicious apples were not sold at less than cost. On the basis of the evidence, however, it is reasonable to infer that, at least since 1990-91, on average, delicious apples have been sold at a profit. This conclusion is supported by the Deputy Minister's use of section 29 of SIMA to calculate normal values in 1991 on the basis of selling prices.

The Tribunal notes that, since 1990-91, total shipments of delicious apples from the state of Washington have been at about the same level as in 1987-88, while shipments of other varieties of apples have more than doubled. Yet, overall average prices have been well above 1987-88 levels. During the last three years, average prices of Red Delicious apples were between 38 and 68 percent higher than 1987-88 levels, while those of Golden Delicious apples were between 36 and 76 percent higher than 1987-88 levels.

The NHC has also made significant progress in export markets since 1987-88. Total apple exports, largely driven by delicious apples, were 40 percent higher in 1992-93 than in 1987-88, while shipments to Canada advanced by only 9 percent. In fact, shipments of delicious apples to Canada in 1992-93 were almost 15 percent lower than in 1987-88, notwithstanding a larger crop, and have been on a downward trend since 1990-91. Many new markets have opened up in the last five years, and efforts are continuing to gain market access in Japan, the People's Republic of China and Indochina, among others.

Counsel for the CHC relied on a particular study⁴ to demonstrate future overproduction and propensity to dump by growers in the state of Washington. This study concluded that production of delicious apples would continue to increase until 1995, at a rate of about 2 percent per year, thereby exerting a downward pressure on prices. The study also showed that production of delicious apples is projected to peak around 1995, with the price of Red Delicious apples being at significantly lower prices than in 1990.

The evidence adduced at the hearing supports the conclusion that delicious apples are almost at peak production. Bearing acreage for Red Delicious apples, that is the proportion of total acreage in production, stands at 93 percent as compared to 72 percent for other varieties. Acreage devoted to the production of Red Delicious apples is actually declining, as plantings are shifting to other varieties. The Tribunal also notes that 25 percent of existing Red Delicious apple trees were planted before 1971.

The author of the above-mentioned study did not have the recent Washington Fruit Acreage Survey⁵ at his disposal when completing his study, nor does he appear to have taken into consideration the significant growth in actual and potential exports, which could have an impact on prices. The latest survey also showed a significant shift away from the Red Delicious apple variety to higher-priced varieties. The Tribunal is of the view that the rapid growth of new and higher-priced varieties, the levelling off of production of Red Delicious apples and increasing exports are factors likely to result in a better balance between demand and supply and likely to alleviate the pressure on prices.

The Tribunal has examined current inventory levels in the state of Washington and is satisfied, from the evidence, that they should not exert undue pressure on prices, as was suggested by counsel for the CHC. As at December 1, 1993, inventory levels of Red Delicious apples were significantly higher than those at the same time the previous year, but inventories of Golden Delicious apples were lower. This resulted largely from a harvest which was two weeks later than in the previous year. The Tribunal also notes, from the evidence, that the indicated crop for the current year in the state of Washington, for both Red and Golden Delicious apples, is somewhat lower than for the previous year.

Lack of adequate storage facilities to handle increasing volumes of apples in the state of Washington was an issue at the time of the 1989 finding. Based on the evidence, this no longer appears to be the case. Apples from the state of Washington, in most grades and sizes, are now generally available year-round from regular or controlled atmosphere storage facilities.

Counsel for the CHC made an issue of the fact that overall average selling prices in the state of Washington were frequently below the normal values established by Revenue Canada during the period under review. Such appears to be the case, at least for 1989 and for part of 1992, for apples in controlled atmosphere storage. However, during most of the remaining period under review, average selling prices of delicious apples were at prices equivalent to or above normal values. Moreover, enforcement data

4. The Washington Apple Industry to the Year 2000, by A. Desmond O'Rourke, IMPACT Center, Information Series # 58, February 1993 (Tribunal Exhibit A-43).

5. Washington Agricultural Statistics Service, November 29, 1993 (Tribunal exhibit B-16).

received from Revenue Canada indicate that very little dumping has occurred since the finding was issued. This implies that exports to Canada were priced at or above normal values.

Under the review provisions of SIMA, the Tribunal has no jurisdiction to review the Deputy Minister's determination of normal values. However, the issue which the Tribunal has to address in a review is whether dumping is likely to resume, not whether normal values should remain in place. The Tribunal notes that section 2 of SIMA defines the word "dumped," in relation to any goods, to mean that the normal value exceeds the export price and that SIMA provides for different methods of establishing normal values. Moreover, normal values are revised from time to time.

In the Tribunal's view, normal values, and by extension the manner in which they are established, are but one of the factors that it must consider to determine if dumping is likely to resume. These factors, in addition to the ones mentioned earlier, are, *inter alia*, enforcement data, the relative competitive position of the domestic product versus imports and the behaviour of exporters of delicious apples during the post-finding period.

In weighing these factors, the Tribunal observes that the last normal values were established on November 20, 1991, by ministerial specifications under section 29 of SIMA on the basis of publicly available information. Those normal values reflect the weighted average selling prices for delicious apples for the 1990-91 crop year. The Tribunal notes that 1990-91 prices were the second highest on record to date, according to information on file. The Tribunal also observes that those normal values do not reflect differences in grade, quality and count size, which factors have a bearing on prices. The evidence presented to the Tribunal indicates that growers in the state of Washington tend to export to Canada their higher-grade apples which command higher prices. Moreover, the bulk of these sales are made to the Ontario and Quebec markets, where B.C. apples also command significantly higher prices than in the B.C. market where proportionably more of the lower-grade local apples are consumed.

A Tribunal witness, appearing on behalf of a major food chain in British Columbia, testified that his marketing program was focussed on the domestic product, which is promoted by the industry in British Columbia, and that purchases from the state of Washington or elsewhere were for size and quality reasons. He indicated that quality was more of a factor than price in buying decisions at the retail and consumer levels and that he could not recall any buying decisions based on normal values. He questioned whether a price differential of \$0.05 to \$0.10/lb. would make a distinguishable difference at the retail level and cause a switch in source of supply.

The industry is concerned that, if the finding were rescinded, there would be an increase in imports of lower-value, lower-quality delicious apples, thus putting pressure on local prices. There is little evidence to support this proposition. It is recognized, from the evidence, that U.S. exports of delicious apples, mainly from the state of Washington, during the period under review, consisted almost exclusively of higher-quality and higher-priced apples. According to the enforcement data, those apples invariably entered Canada at prices that exceeded normal values and, therefore, did not attract anti-dumping duties. The evidence is persuasive that these are grades and qualities of apples which the Canadian retail market requires to meet consumer preferences. The Tribunal does not expect consumer preferences to change with the removal of normal values. The Tribunal accepts, nonetheless, that for certain lower-quality and lower-grade apples sold on the B.C. market, normal values may have played a role in setting a floor price. However, for the

bulk of the domestic industry's sales, i.e. those in Ontario and Quebec, there is no evidence that normal values have played a significant price-setting role. The Tribunal cannot continue the finding on mere speculation that low-priced apples might be imported into Canada. Should the industry's concern in this respect actually materialize, appropriate relief could then be sought.

An analysis of the events of the past three to five years leads the Tribunal to the conclusion that growers in the state of Washington are likely to remain profitable in the foreseeable future and that they are not likely to export delicious apples to Canada at dumped prices. This conclusion, of course, takes into account that, in any one year, because of the vagaries of nature, there could well be a harvest which causes prices to fall to a level close to, or even below, costs of production for part of the year. That this should occur for a whole crop, however, has not been seen in recent years. For all the foregoing reasons, the Tribunal concludes that dumping is not likely to resume in the foreseeable future.

Having found that dumping is not likely to resume, the Tribunal is also of the view, based on the evidence, that the domestic industry is still vulnerable, but factors other than dumping from the United States play an important role in the financial condition of the industry. The evidence clearly indicates that, in the case of British Columbia, there is a direct correlation between the size and quality of the crop of delicious apples, the volume that goes into processing, and prices of fresh apples on the market and grower returns. From 1988-89 to 1990-91, crops were large, the volume of apples that went into processing was high, fresh apple prices were low and grower returns were negative because of negative returns on processing apples. In 1991-92 and 1992-93, B.C. crops were at least 20 percent lower than in any of the three previous years, and the proportion of apples that went into processing was much lower. Prices of fresh apples on the market were much higher, and growers made a profit, notwithstanding some increases in unit costs of production. The Tribunal notes that, in attempting to improve their returns, B.C. growers have, for some years, been moving to high-density plantings and other varieties of apples which currently command higher prices in the marketplace. However, in contrast with their counterparts in the state of Washington, B.C. growers have to contend with higher costs of production, due in part to the much smaller size of their orchards.

Ontario, the only other major apple-producing area, provided little evidence of vulnerability or any other competitive problems caused by delicious apples imported from the United States. Firstly, Ontario growers enjoy somewhat of an advantage, vis-à-vis growers in the state of Washington, in the form of transportation costs. Secondly, they supply mostly Fancy grade delicious apples, while imports are concentrated in the higher grades. Also, in Ontario, growers are more exposed to the vagaries of nature, which affects quality and results in substantial fluctuations in the annual volume of available fresh apples, but not in total production of delicious apples which has remained steady over the period under review. Prices and grower returns in Ontario have, nonetheless, been much steadier than in British Columbia.

Despite the presence of anti-dumping measures during the past five years, the domestic industry has not improved its market share. Domestic production of delicious apples has been on a steady downward trend, while exports have remained fairly steady since 1989-90, thereby representing a growing proportion of production.

Imported delicious apples, almost entirely from the state of Washington, have maintained a relatively constant share of the Canadian market during the past five years. Moreover, they have been concentrated mainly in Ontario and Quebec, in high-grade apples which command high prices, and have been imported at undumped prices.

The Tribunal recognizes that the normal values have set a floor price for certain grades of delicious apples. In that sense, as the finding is rescinded, a certain category of delicious apples may be offered in British Columbia at prices below the normal values. The Tribunal is not convinced, however, that the extent of the price differential, assuming there would be dumping, would be such as to cause material injury to the production in Canada of like goods.

Accordingly, the Tribunal hereby rescinds the finding.

Arthur B. Trudeau

Arthur B. Trudeau
Presiding Member

Charles A. Gracey

Charles A. Gracey
Member

Lise Bergeron

Lise Bergeron
Member