



Ottawa, Monday, March 20, 2000

Review No.: RR-99-002

IN THE MATTER OF a review, under subsection 76(2) of the *Special Import Measures Act*, of the order made by the Canadian International Trade Tribunal on March 21, 1995, in Review No. RR-94-002, continuing, without amendment, its order made on March 16, 1990, in Review No. RR-89-003, continuing, without amendment, the findings of the Anti-dumping Tribunal in its report made on August 7, 1984, in Inquiry No. GIC-1-84, concerning:

**SUBSIDIZED CANNED HAM UNDER 1.5 kg PER CAN, ORIGINATING IN OR EXPORTED FROM DENMARK AND THE NETHERLANDS, AND CANNED PORK-BASED LUNCHEON MEAT CONTAINING MORE THAN 20 PERCENT BY WEIGHT OF PORK, IN RESPECT OF WHICH A SUBSIDY HAS BEEN PAID DIRECTLY OR INDIRECTLY BY THE EUROPEAN UNION**

**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 order made on March 21, 1995, in Review No. RR-94-002, concerning the aforementioned goods.

Pursuant to subsection 76(4) of the *Special Import Measures Act*, the Canadian International Trade Tribunal hereby continues the order, with an amendment to rescind that portion of the order respecting canned pork-based luncheon meat containing more than 20 percent by weight of pork, in respect of which a subsidy has been paid directly or indirectly by the European Union.

Patricia M. Close

Patricia M. Close  
Presiding Member

Pierre Gosselin

Pierre Gosselin  
Member

Peter F. Thalheimer

Peter F. Thalheimer  
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 order made by the Canadian International Trade Tribunal on March 21, 1995, in Review No. RR-94-002.

Place of Hearing: Ottawa, Ontario  
Dates of Hearing: January 19 and 20, 2000  
Date of Order and Reasons: March 20, 2000

Tribunal Members: Patricia M. Close, Presiding Member  
Pierre Gosselin, Member  
Peter F. Thalheimer, Member

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Naila Elfar  
for Canadian Meat Council  
Maple Leaf Consumer Foods

**(Association/Domestic Producer)**

Jesse I. Goldman  
for Midlon Foods Inc.

J.K. Shillito  
Shillito's Grocery Brokers & Importers Ltd.  
Tulip International A/S

**(Importers/Exporter)**

**Witnesses:**

Steven B. McArthur  
President  
Maple Leaf Consumer Foods

Ian Klarer  
Consumer Marketing Manager  
Maple Leaf Consumer Foods

Ram Dharamdass  
Consultant  
Maple Leaf Meats

Carol Hunt  
Vice-President  
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Ottawa, Monday, March 20, 2000

Review No.: RR-99-002

IN THE MATTER OF a review, under subsection 76(2) of the *Special Import Measures Act*, of the order made by the Canadian International Trade Tribunal on March 21, 1995, in Review No. RR-94-002, continuing, without amendment, its order made on March 16, 1990, in Review No. RR-89-003, continuing, without amendment, the findings of the Anti-dumping Tribunal in its report made on August 7, 1984, in Inquiry No. GIC-1-84, concerning:

**SUBSIDIZED CANNED HAM UNDER 1.5 kg PER CAN, ORIGINATING IN OR EXPORTED FROM DENMARK AND THE NETHERLANDS, AND CANNED PORK-BASED LUNCHEON MEAT CONTAINING MORE THAN 20 PERCENT BY WEIGHT OF PORK, IN RESPECT OF WHICH A SUBSIDY HAS BEEN PAID DIRECTLY OR INDIRECTLY BY THE EUROPEAN UNION**

TRIBUNAL: PATRICIA M. CLOSE, Presiding Member  
PIERRE GOSSELIN, Member  
PETER F. THALHEIMER, Member

**STATEMENT OF REASONS**

**BACKGROUND**

This is a review, under subsection 76(2) of the *Special Import Measures Act*,<sup>1</sup> of the order made by the Canadian International Trade Tribunal (the Tribunal) on March 21, 1995, in Review No. RR-94-002, concerning subsidized canned ham under 1.5 kg per can, originating in or exported from Denmark and the Netherlands, and canned pork-based luncheon meat (luncheon meat) containing more than 20 percent by weight of pork, in respect of which a subsidy has been paid directly or indirectly by the European Union (EU).

Pursuant to subsection 76(2) of SIMA, the Tribunal initiated a review of the order and issued a notice of review<sup>2</sup> on September 3, 1999. This notice was forwarded to all known interested parties. As part of this review, the Tribunal sent questionnaires to Canadian producers of canned ham and luncheon meat and to importers, purchasers and foreign manufacturers of the subject goods.

The record of this review consists of all relevant documents, including the notice of review, the public and confidential replies to the questionnaires, the transcript of the proceedings, the public and protected pre-hearing staff reports prepared for the 1994 review and those prepared for this review, and the Tribunal's statement of reasons in Review No. RR-94-002. All public exhibits were made available to interested parties, while protected exhibits were provided only to independent counsel who had filed a declaration and undertaking with the Tribunal.

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1. R.S.C. 1985, c. 15 [hereinafter SIMA].  
2. C. Gaz. 1999.I.2702.

Public and in camera hearings were held in Ottawa, Ontario, on January 19 and 20, 2000.

The Canadian Meat Council and a domestic producer, Maple Leaf Consumer Foods (Maple Leaf), were represented by counsel at the hearing. Evidence was presented and arguments were made in support of a continuation of the order.

One importer, Midlon Foods Inc. (Midlon), was represented by counsel at the hearing. Evidence was submitted and arguments were made in support of a rescission of the order.

The Tribunal also heard evidence from a witness from Loblaw Companies Limited (Loblaw) who appeared at the hearing at the Tribunal's request.

## PRODUCTS

The 1984 inquiry and the two subsequent reviews, as well as the present review, cover the goods described as follows:

- subsidized canned ham under 1.5 kg per can, originating in or exported from Denmark and the Netherlands; and
- canned pork-based luncheon meat containing more than 20 percent by weight of pork, in respect of which a subsidy has been paid directly or indirectly by the EU.

Canned ham is made from the hind leg of a pig. It is a pre-cooked, shelf-stable convenience item. Historically, ham in can sizes under 1.5 kg (about 3.3 lbs.) has been sold to the retail trade primarily in three sizes: 425 g (15 oz.), 454 g (1 lb.) and 680 g (1.5 lbs.). Ham in can sizes of 1.5 kg and over is sold to the food service industry and is not subject to this review. Currently, the domestic industry produces canned ham in two can sizes under 1.5 kg, namely 454 g and 680 g.

Luncheon meat is usually sold in oblong 340-g (12-oz.) cans to retail stores.<sup>3</sup> Demand is seasonal in nature, with the lowest volumes sold between the months of June and September. Luncheon meat is produced from pork trimmings and other raw materials that are selected according to a formula. Frozen meat is tempered through a microwave tunnel, ground together with fresh meat and transferred to a meat blender. Spices, binders and curing agents are added, and the ingredients are mixed under vacuum. The raw emulsion is poured into cans. The filled cans are seamed, inspected, pressure-cooked and prepared for shipping. The industry ships luncheon meat in cases of 12 and 24 cans.

## DOMESTIC INDUSTRY

At the time of the inquiry, in 1984, there were several significant domestic producers of canned ham and luncheon meat, including Canada Packers Inc. (Canada Packers), Gainers Inc. (Gainers), Burns Meats Ltd. and Montalban Enterprises Ltd. During the period between the 1984 findings and the current review, there were major changes in the composition of the domestic industry resulting from firms leaving the industry, mergers and plant closures. By 1995, there were only two major producers left, namely, Gainers and Maple Leaf which had been created by an earlier merger between Canada Packers and Maple Leaf Mills. In 1997, the industry was reduced to one major producer, as Maple Leaf acquired Gainers' canned

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3. Imports from Denmark are available in 200-g (7-oz.) cans. Tribunal Exhibit RR-99-002-20.5, Administrative Record, Vol. 5.1 at 64.

meat business. Maple Leaf subsequently closed certain Gainers facilities and consolidated the production of Maple Leaf and former Gainers brands in the Maple Leaf canning plant in Mississauga, Ontario. As a result of the foregoing changes, Maple Leaf is currently the only producer of canned ham in Canada.

Insofar as canned luncheon meat is concerned, there is currently one other small producer besides Maple Leaf, namely, International Home Foods (Canada) Inc. (International) located in Markham, Ontario. International entered the business in March 1998 by acquiring the luncheon meat operations of T.J. Lipton, A Division of UL Canada Inc., which had formerly been a niche supplier of luncheon meat in Western Canada. International has a plant in Niagara Falls, Ontario, where it produces luncheon meat packed in 360-g round cans, rather than in the conventional 340-g oblong cans, for a single customer located in British Columbia. International's share of domestic production is less than 10 percent.

Given that Maple Leaf represents 100 percent of the domestic production of canned ham and over 90 percent of the domestic production of luncheon meat, the Tribunal considers it to constitute the domestic industry for the purpose of this review.<sup>4</sup>

#### **SUMMARY OF REVIEW NO. RR-94-002**

The 1994 review was the second review of the 1984 findings. In that review, the Tribunal observed that, when the effects of the export subsidies were eliminated by the imposition of countervailing duties in 1984, the volume of the subject imports quickly declined to relatively insignificant levels, where they remained for 10 years. The Tribunal concluded that, if the advantage offered by the subsidies were reinstated, by the rescission of the findings and the elimination of the countervailing duties, there would be a significant risk that subsidized imports from the subject sources would become available in the domestic market at low prices and in substantial volumes.

In coming to this conclusion, first, the Tribunal noted that the relevant subsidy program, which provides export refund payments to EU exporters of pigmeat products, including the subject goods, was still in place and would continue to be in place in the foreseeable future. Second, the Tribunal found that, although the EU had committed to reducing export subsidies on agricultural products pursuant to the World Trade Organization (WTO) *Agreement on Agriculture*,<sup>5</sup> the starting points for the reductions in the pigmeat sector were high. The Tribunal also noted that, because the WTO reduction commitments apply to the pigmeat sector in total, not to specific products within the sector, the subsidies for certain products within the sector, such as the subject canned ham and canned luncheon meat, could be increased and others decreased, provided the reduction commitments for the sector, as a whole, were met.

Turning to the amount of the subsidies, the subsidy rates in effect in October 1994 were comparable, in Canadian-dollar terms, to the rates prevailing at the time of the 1984 findings. In terms of Canadian selling prices, the Tribunal found that, although the subsidies represented a lower percentage of the average

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4. Subsection 2(1) of SIMA defines, in part, domestic industry 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”.

5. Annex 1A to the *Agreement Establishing the World Trade Organization*, 15 April 1994 (entered into force 1 January 1995) in *The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts* (Geneva: GATT Secretariat, 1994) 39 [hereinafter *Agreement on Agriculture*].

wholesale prices of canned ham and canned luncheon meat than at the time of the 1989 review,<sup>6</sup> they were still at levels which would make subsidized European products attractive in the domestic market and cause Canadian buyers to switch from domestic to import sources.

The Tribunal found no evidence to indicate that European production, productive capacities or export capacities for the subject goods declined after the 1989 review. The Tribunal also noted that the EU's Export Refund Program was designed to provide subsidies at a rate sufficient to move product into export markets, taking into consideration changes in market variables.

Regarding the likelihood of material injury, the Tribunal was of the view that the availability of uncountervailed, subsidized canned ham or canned luncheon meat would be materially injurious to the production in Canada of like goods. The Tribunal found that the markets for canned ham and canned luncheon meat had declined steadily over the previous 15 years, as consumer tastes changed in favour of fresh and prepared meat and non-meat substitute products. This led to highly competitive conditions for canned ham and canned luncheon meat and to prices that were under constant downward pressure, even in the absence of substantial imports. In these circumstances, the availability of subsidized imports would have caused losses in the domestic industry's market share, as well as price erosion and suppression, especially in the price-sensitive economy segment of the markets.

The evidence in the 1994 review illustrated that large grocery retailers and mass merchandisers, which accounted for the vast majority of industry sales, tended to carry product from only one supplier. The Tribunal concluded that, given the price sensitivity of these important buyers and their inclination to single-source, there was a real risk that the domestic industry could find itself shut out of certain large volume accounts in favour of subsidized imported brands.

The Tribunal also took into consideration that the industry's financial performance had been uneven and found the domestic industry to be financially vulnerable to the volume and price effects that were likely to ensue from a resurgence of subsidized imports if the findings were rescinded.

## **POSITION OF PARTIES**

### **Domestic Industry**

Maple Leaf submitted that, if the order were rescinded, imports of subsidized canned ham and luncheon meat would recommence in substantial volumes without significant delay. Maple Leaf estimated that, if the countervailing duties were no longer imposed, the immediate price impact would be approximately 15 percent. It noted that the average prices of canned ham and luncheon meat imports from Denmark and the Netherlands have decreased in the United States in the past three years.

Maple Leaf submitted that the domestic industry now is very similar to the industry at the time of the last review and that a rescission of the order would lead to material injury for the basic reasons that the Tribunal identified in the last review. As an example of what could happen if the order were rescinded, Maple Leaf noted that, over the period of the present review, it has suffered a substantial loss of market share in the market for canned picnic, a product which was subsidized but on which no countervailing duties have

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6. The subsidies represented 10 percent and 13 percent of the average wholesale prices of canned ham and luncheon meat, respectively, in 1994. Tribunal Exhibit RR-99-002-1, Administrative Record, Vol. 1 at 18.

been imposed. Maple Leaf also mentioned that there were no barriers to direct imports, by retailers, of canned ham and luncheon meat from the EU, if the order were rescinded.

### **Importer<sup>7</sup>**

Midlon acknowledged that there is an EU export subsidy in place on canned ham and luncheon meat. However, it submitted that a rescission of the order would not result in material injury to the domestic industry. Midlon submitted that Maple Leaf is in a better position than it has been at any time since the initial findings. The Canadian meat processing market has consolidated, rationalized and made itself far more efficient and cost competitive. Midlon also mentioned that Maple Leaf has benefited from lower raw material costs in recent years.

Midlon recalled the testimony of the witness from Loblaw who stated that imported canned meat is widely perceived as an inferior product and that 80 percent of consumers seek national brands. Midlon stated that importers, such as itself, cannot provide the marketing and other support offered by the Canadian producer for its brands. Security of supply and level of service also provide advantages for the domestic product. Midlon emphasized the fact that shelf space is limited for canned ham and luncheon meat and that importers have to offer both low price and higher margins to mass merchants and retailers. Such considerations make it unlikely that relatively unknown EU brands would flood the market. For Midlon, the conditions in the Canadian market for canned ham and luncheon meat today are different from those present at the time of the last review.

With respect to the situation in the U.S. market, Midlon submitted that it cannot be concluded from the experience in that market that a rescission of the order would result in a flooding of the Canadian market. As regards the August 1999 surtax imposed by the Canadian government on canned luncheon meat and canned picnic,<sup>8</sup> Midlon argued that there is no likelihood that it will be repealed in the foreseeable future.

Finally, Midlon indicated that, as a responsible importer, if conditions allowed it to import, it would only import a reasonable amount of the subject goods. In this context, it requested, if the order were continued, an exclusion to import 450,000 kg of canned ham and the same amount of canned luncheon meat in the years 2000, 2001 and 2002.

### **EU**

The Tribunal notes that, even though the EU did not file a notice of appearance in this review, the European Commission did provide comments on the review. It submitted that any recurrence of injury cannot be shown to be likely, in view of the long absence of the subject goods in the Canadian market. The European Commission also submitted that Article 13 of the *WTO Agreement on Agriculture* provides that signatories such as Canada should exercise due restraint in initiating countervailing duty investigations. In the European Commission's view, the principle of due restraint should be applied in this review and, accordingly, the order should be rescinded.

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7. Although several importers responded to the Tribunal's questionnaire, only Midlon, which was formerly a significant importer of the subject goods, appeared at the hearing, and submitted evidence and made arguments.

8. *European Union Surtax Order*, S.O.R./99-317, Tribunal Exhibit RR-99-002-32, Administrative Record, Vol. 1 at 102-110.



## ANALYSIS

While SIMA does not prescribe the questions to be decided in determining whether to continue a finding or order under section 76, it has been a long-standing Tribunal practice to consider two questions. First, the Tribunal must determine whether, if a finding or order is rescinded, there is likely to be a continuation or resumption of dumped or subsidized imports. Second, the Tribunal must assess whether, if there is such a continuation or resumption, it is likely to cause material injury to the domestic industry.

As indicated previously, the European Commission submitted that the “due restraint” principle found in Article 13 of the *WTO Agreement on Agriculture* should be applied in this review.<sup>9</sup> The Tribunal wishes to note that this provision applies to the initiation of original investigations, not reviews, and that there is no “due restraint” clause or similar provision found in SIMA.

### Likelihood of Resumption of Subsidized Imports

The first question to be decided in this case is whether there is likely to be a continuation or resumption of subsidized canned ham or canned luncheon meat imports from the subject countries if the order is rescinded. As noted in the previous reviews, the subsidies on canned ham and luncheon meat are part of a broader EU export subsidy program on pigmeat products. The program is designed to facilitate the export of pigmeat products from the EU by providing export refunds on goods, such as the subject goods, at a rate that helps to make these goods competitive in foreign markets.

At the time of the last review, in 1994, the EU had just committed itself, under the then recently signed *WTO Agreement on Agriculture*, to reducing export subsidies on agricultural products, including pigmeat products. In this context, it was argued in 1994 by parties opposing the continuation of the order that the implementation of these WTO commitments would lead to a reduction in the subsidies on canned ham and luncheon meat. In deciding to continue the order at that time, the Tribunal expressed doubts about the extent of any future reductions in the subsidies on the subject goods. The Tribunal noted that, within the pigmeat subsidy program, EU administrators had wide discretion to allocate export refunds among the different products covered, taking into account a variety of factors, including the prices and supplies of pigmeat products in the EU, the prices and supplies of pigmeat products in world markets, the differences in hog grain feed costs in world markets and the competitive conditions in third-country markets. Thus, in the last review, the Tribunal considered that a reduction in the overall pigmeat subsidy program did not necessarily point to a reduction in the subsidies available to canned ham and luncheon meat.

Today, some five years later, the evidence shows that the Tribunal’s doubts in 1994 were warranted. More specifically, despite the EU’s implementation of its 1994 WTO pigmeat subsidy reduction commitments, the rates of subsidy on both canned ham and luncheon meat have not declined from their levels at the time of the last review. Indeed, in terms of EURO,<sup>10</sup> the subsidy rates are higher currently than they were then. Specifically, on canned ham, the subsidy went up from 0.54 EURO/kg in April 1995 to 0.62

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9. Article 13 provides, in part, that “due restraint shall be shown in initiating any countervailing duty investigations”.

10. On January 1, 1999, the EURO replaced the ECU on a one-for-one basis. Accordingly, the term EURO is used throughout this statement of reasons.

EURO/kg in September 1999, an increase of 15 percent. During the same period, the subsidy on luncheon meat went from 0.21 to 0.25 EURO/kg, a 19 percent increase.<sup>11</sup>

In evaluating the significance of the subsidies in the 1994 review, the Tribunal found that the then prevailing subsidy rates represented a substantial proportion of the average wholesale prices of canned ham and luncheon meat. On the basis of the evidence before it in this review, the Tribunal sees no reason to come to a different conclusion on the significance of the subsidies. Today, at \$0.46 a can, the subsidy rate on canned ham, as a proportion of average domestic wholesale prices, is almost twice the level that it was at the time of the last review, while on luncheon meat, at \$0.14 a can, the proportion is somewhat less than it was five years ago.<sup>12</sup> In both cases, the subsidy exceeds the percentage difference in price that some purchasers indicated would cause them to consider switching from domestic to imported product.<sup>13</sup>

During the current review period, with countervailing duties in place, relatively small volumes of the subject goods entered Canada.<sup>14</sup> Midlon has contended that, under present conditions, subsidized EU products would not be competitive in the Canadian market, even if the order were rescinded. In support of this contention, Midlon submitted a price quotation, dated December 13, 1999,<sup>15</sup> from a potential supplier of the subject goods from the Netherlands. Midlon argued that retailers seek a 30 percent profit margin on imported subject goods and that the imported goods retail at about a 20 percent discount to domestic products. According to Midlon, these factors would require a wholesale selling price to its customers that Midlon could not achieve if it imported product at the December 13, 1999, price quotation.

The Tribunal notes that the above analysis by Midlon is quite similar to one that it advanced in the last review. Again, the Tribunal is not swayed by this proposition. First, a single price quotation, with no quantities specified, that may have been obtained for purposes of the present review, is unlikely to be representative of import prices generally. Second, the assumptions that Midlon has made about retailer margins and price points oversimplify the market. The evidence shows that there is a wide range of profit margins that retailers may apply to their canned ham and luncheon meat sales, depending on, among other things, store banner, store format and distribution channel. The retail profit margin cited by Midlon is at the high end of the range, with certain retailers operating at far lower margins.<sup>16</sup> When these lower margins are taken into account, EU products become much more competitive, even at the December 13, 1999, price quotation. Third, that quotation was derived from a Canadian dollar and EURO exchange rate that reflected a weak Canadian dollar. Even by the time of the hearing, the Canadian dollar had appreciated against the EURO, making EU imports more competitive.<sup>17</sup>

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11. The September 1999 subsidy rate on canned ham is about 24 percent higher than it was in 1984, when it stood at 0.50 EURO/kg, while the 1984 rate on luncheon meat, at 0.26 ECU/kg, is almost the same as the September 1999 rate of 0.25 EURO/kg. Tribunal Exhibit RR-99-002-5, Administrative Record, Vol. 1A at 16-17.
  12. Tribunal Exhibit RR-99-002-6 (protected), Administrative Record, Vol. 2 at 20.
  13. Tribunal Exhibits RR-99-002-23.5, -23.6 and -23.9, Administrative Record, Vol. 5.2 at 114, 129 and 171.
  14. Indeed, all of the EU canned ham imported to Canada since 1996 is a specialty product that is sold as part of a gift or Christmas package in a can size not made in Canada. Tribunal Exhibit RR-99-002-17.9, Administrative Record, Vol. 5 at 54; and *Transcript of Public Hearing*, 19 January 2000, at 68.
  15. Importer's Exhibit C-2.1 (protected), Administrative Record, Vol. 14.
  16. *Transcript of Public Hearing*, 19 January 2000, at 137-38.
  17. In the one-month period between the December 13, 1999, quotation and the hearing in the present case, the Canadian dollar strengthened by 1.5 percent against the EURO. Source: Bank of Canada.

Turning to European production capability, the Tribunal notes that there is nothing to indicate that there has been a noticeable decline in European production or export capacity of the subject goods. The EU continues to have extensive capacity to ship large volumes of the subject goods to foreign markets, as evidenced by the large volume of EU exports to the United States. Indeed, EU export volumes to the United States alone are larger than the entire combined Canadian market for canned ham and luncheon meat.<sup>18</sup> Even more striking is the capacity reported by Tulip International A/S,<sup>19</sup> the only EU producer to respond to the Tribunal's foreign manufacturer questionnaire. According to this information, the canned ham and luncheon meat capacity of this one company is many times the size of the Canadian market, and its current spare capacity is about the size of the Canadian market for the subject goods.<sup>20</sup>

In sum, given the significance of the existing subsidies on canned ham and luncheon meat, the clear interest of importers such as Midlon to bring in the subject goods and the ample EU capacity available for export markets, including Canada, the Tribunal is satisfied that there would be a resumption of subsidized canned ham and luncheon meat imports from the EU if the order were rescinded.

Further, the Tribunal notes that, in August 1999, the Canadian government imposed a 100 percent surtax on EU canned picnic and luncheon meat but not on canned ham, in retaliation for the EU's failure to comply with certain WTO rulings relating to Canadian beef shipments to the EU. The surtax has effectively shut down imports of canned picnic and luncheon meat from the EU. It would appear that this situation will continue as long as the surtax is in place. In its analysis of the likelihood of a resumption of subsidized luncheon meat imports, the Tribunal has placed little weight on the surtax, given that it may be removed at any time by the Canadian government, if circumstances warrant.

### **Likelihood of Material Injury**

Having decided that subsidized imports of canned ham and luncheon meat from the EU are likely to continue or resume if the order is rescinded, the Tribunal must now address the second question of whether such a continuation or resumption is likely to cause material injury to the domestic industry. Since canned ham and luncheon meat are distinct products that occupy different segments of the canned meat market, the Tribunal will examine the question of injury for each product separately.

#### Canned Ham

According to the evidence, over the past 15 years, the canned ham industry in Canada has consolidated and rationalized, going from several producers in 1984 to only one producer today, namely, Maple Leaf. The last round of consolidation took place in 1997, when Maple Leaf acquired Gainers. Following this acquisition, Maple Leaf shut down older production facilities, reduced capacity and took a number of other measures to enhance efficiency and reduce costs. The data collected for this review show

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18. In 1998, imports of EU subsidized canned ham and luncheon meat into the United States each amounted to 3.2 million kg and were each about 2.4 million kg in the first half of 1999. EU subsidies on these products are not countervailed in the United States. Tribunal Exhibit RR-99-002-5, Administrative Record, Vol. 1A at 71-72; and Tribunal Exhibit RR-99-002-6 (protected), Administrative Record, Vol. 2 at 26 and 28.
  19. In 1997-98, DANISH CROWN acquired all of the institutional interests of Tulip International A/S. Tribunal Exhibit RR-99-002-26.4, Administrative Record, Vol. 5.3 at 71; and Tribunal Exhibit RR-99-002-26.4, Administrative Record, Vol. 5.3 at 38.
  20. Tribunal Exhibit RR-99-002-27.4 (protected), Administrative Record, Vol. 6.3 at 7-8; and Tribunal Exhibit RR-99-002-6 (protected), Administrative Record, Vol. 2 at 26 and 28.

that, since 1996, Maple Leaf's sales of canned ham have been quite profitable, especially since the acquisition of Gainers.<sup>21</sup>

While this might argue for decreased vulnerability of the domestic industry to subsidized imports, the rationalization and consolidation of the industry and the emergence of Maple Leaf as the sole domestic supplier must be understood in terms of the evolution of the canned ham market over the past two decades. The market for canned ham has been on a long-term, steady downward trend. This downward trend reflects, among other things, changing consumer preferences and the increasing availability of substitute products, such as fresh meats and canned fish.<sup>22</sup> Moreover, the volume declines have been accompanied by substantial declines in the wholesale and retail prices of canned ham, when adjusted for inflation. In fact, even in nominal terms,<sup>23</sup> the data show that canned ham wholesale prices have been higher at various times in the past than they are today.<sup>24</sup> Given these stagnant prices and volumes, industry profitability has been driven by restructuring, cost reductions and increased efficiency.

Viewed from a cost standpoint, the current subsidy provides EU producers with an advantage that is in excess of 20 percent of domestic canned ham production costs.<sup>25</sup> Although the Tribunal has no pricing data on canned ham imports,<sup>26</sup> an advantage of this magnitude would seem to allow Danish and Dutch producers considerable scope to underprice Canadian production.

The Tribunal notes that Maple Leaf's vulnerability to subsidized EU canned ham appears to be greater in certain market segments and distribution channels than in others. It is less vulnerable in the traditional grocery store channel. In this connection, the Tribunal heard testimony by a witness from Loblaw that national brands such as Maple Leaf comprise about 80 percent of the canned meat market.<sup>27</sup> The Maple Leaf name possesses considerable "brand equity" and is readily recognized by consumers who expect to find it in large-format traditional grocery stores. In short, according to this witness, brands such as Maple Leaf are demanded by consumers and, hence, they must be stocked on the shelves of grocers such as Loblaw.<sup>28</sup>

That having been said, the evidence shows that even Loblaw would consider offering imported canned ham to its customers if imports were available at 20 percent or more below domestic prices.<sup>29</sup> Moreover, within the Loblaw group, there are stores such as those operating under the No Frills banner that compete within a more price-sensitive segment of the grocery market. According to the witness from Loblaw, this type of discount grocery store would be open to stocking cheaper imported products, especially if a Wal-Mart or a Food Basics offered competing imported products at low prices.<sup>30</sup> The witness also stated

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21. Tribunal Exhibit RR-99-002-6 (protected), Administrative Record, Vol. 2 at 43-44 and 47-48.

22. Manufacturer's Exhibit B-3 at para. 2 and 3, Administrative Record, Vol. 11; and *Transcript of Public Hearing*, 19 January 2000, at 21 and 67-68.

23. "Nominal" in this context means not adjusting wholesale prices for inflation.

24. Tribunal Exhibit RR-99-002-6 (protected), Administrative Record, Vol. 2 at 63.

25. Tribunal Exhibit RR-99-002-6 (protected), Administrative Record, Vol. 2 at 18 and 45.

26. As noted earlier, since 1996, the only canned ham imports were specialty products for which no pricing data were supplied. The only other information on canned ham prices is Midlon's December 13, 1999, price quotation.

27. *Transcript of Public Hearing*, 19 January 2000, at 133.

28. *Transcript of Public Hearing*, 19 January 2000, at 128-31, 136, 143 and 147.

29. Tribunal Exhibit RR-99-002-23.11, Administrative Record, Vol. 5.2 at 195; and *Transcript of Public Hearing*, 19 January 2000, at 127-29.

30. *Transcript of Public Hearing*, 19 January 2000, at 130.

that in-store brands could be sourced anywhere in the world, including Europe, since they are sold under the well-established Loblaw brands and, therefore, the identity of the producer is unimportant.<sup>31</sup>

The witness from Loblaw further testified that, for non-traditional grocery retailers such as Wal-Mart, Zellers and London Drugs, brand equity was less of a factor than in the traditional grocery channels. He explained that consumers did not necessarily expect to find national brands at non-traditional grocery retailers and could well buy unknown EU brands at such outlets which compete aggressively on price against each other, as well as against traditional grocery stores, in order to draw customers.<sup>32</sup>

It is clear to the Tribunal from the foregoing that Maple Leaf's canned ham business is vulnerable to subsidized imports in the price-sensitive segments of the canned ham market. In the traditional grocery retail channel, this vulnerability is most apparent in the discount stores and on in-store brand products. However, Maple Leaf's vulnerability appears greatest in the non-traditional grocery distribution channel where about 50 percent of Maple Leaf's sales to its largest accounts are made.<sup>33</sup> The evidence shows that this channel operates on much smaller margins than the traditional grocery channels<sup>34</sup> and that non-traditional grocery retailers would switch from domestic to imported product at price spreads of 5 percent or less,<sup>35</sup> much smaller than the level reported by traditional grocery retailers such as Loblaw.

In the Tribunal's opinion, the thin margins and price competition in these non-traditional grocery distribution channels would make the availability of low-priced, subsidized canned ham especially appealing to them. Moreover, many of these merchandisers are individually so large that, if only one of them were to switch, this would have a significant effect on Maple Leaf's canned ham sales volumes and market share.<sup>36</sup> Furthermore, even if they did not switch from Maple Leaf to another supplier, the mere offer and availability of low-priced, subsidized canned ham imports could be used by these merchandisers to extract price concessions from Maple Leaf and thereby depress its revenues and margins.

The risks associated with rescinding the order with respect to canned ham also become apparent when considering the issue of canned picnic. Canned picnic is a related pork product that is made from a less desirable cut of pork and generally sells at a lower retail price point. The Tribunal notes that canned picnic from the EU is subsidized under the same pigmeat export refund program as canned ham and luncheon meat,<sup>37</sup> but, unlike the subject goods, it is not subject to countervailing duties. Over the period for which data were collected in this case, from 1996 through June 1999, EU canned picnic, imported largely by Midlon, captured the lion's share of the domestic market.<sup>38</sup> This undoubtedly was facilitated by the fact that, during this period, average EU canned picnic prices, given the subsidy, were some 20 to 30 percent lower than average domestic prices.<sup>39</sup>

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31. *Transcript of Public Hearing*, 19 January 2000, at 143-45.

32. *Transcript of Public Hearing*, 19 January 2000, at 147.

33. Tribunal Exhibit RR-99-002-6 (protected), Administrative Record, Vol. 2 at 65.

34. *Transcript of Public Hearing*, 19 January 2000, at 137-38.

35. Tribunal Exhibits RR-99-002-23.5, -23.6 and -23.9, Administrative Record, Vol. 5.2 at 114, 129 and 171.

36. Tribunal Exhibit RR-99-002-6 (protected), Administrative Record, Vol. 2 at 65.

37. Tribunal Exhibit RR-99-002-33A, Administrative Record, Vol. 1 at 120-21; and Tribunal Exhibit RR-99-002-45, Administrative Record, Vol. 1 at 208-9.

38. Tribunal Exhibit RR-99-002-6 (protected), Administrative Record, Vol. 2 at 105-6. The *European Union Surtax Order* terminated imports of canned picnic as of August 1, 1999.

39. Tribunal Exhibit RR-99-002-6 (protected), Administrative Record, Vol. 2 at 135.

It is possible that there are competitive factors at play in the canned picnic domestic market that are somewhat different from those pertaining to canned ham.<sup>40</sup> Nevertheless, in the Tribunal's estimation, the substantial market share held by low-priced, subsidized EU imports in the canned picnic market serves to illustrate how effective the EU subsidy program can be in making uncountervailed EU pigmeat products more competitive in Canada than they would otherwise be. Moreover, the Tribunal notes that the August 1999 surtax has shut down canned picnic imports. Midlon has indicated that it would like to import canned ham as a replacement for canned picnic, if the order is rescinded. While this would bring Midlon's imports into direct competition with Maple Leaf's canned ham sales, as stated earlier, the duration of the surtax is unknown.

In conclusion, given the magnitude of the EU subsidy on canned ham and the vulnerability of Maple Leaf's sales in the price-sensitive segments of the market, the Tribunal considers it likely that the strides that the industry has made to improve its performance over the past few years would be jeopardized if the order were rescinded. In fact, the industry's profitability, which is already poised to diminish because of rising pork prices,<sup>41</sup> could disappear if the subsidy were not countervailed and the industry suffered revenue and margin declines as a result.

For the foregoing reasons, the Tribunal finds it likely that the domestic industry would be materially injured by a continuation or resumption of subsidised imports which would result from a rescission of the order with respect to the importation of canned ham from Denmark and the Netherlands.

With respect to the request by Midlon for an exclusion to import 450,000 kg of canned ham in the years 2000, 2001 and 2002, the Tribunal can see no reason to grant an exclusion for such an important volume of product that competes with canned ham produced by the domestic industry.

#### Luncheon Meat

The Tribunal notes that the markets for both canned ham and luncheon meat products are in a state of long-term decline, although, over the period reviewed by the Tribunal, the luncheon meat market showed a little more strength than the canned ham market. In both cases, prices are stagnant in nominal terms and falling in real terms. Despite this, over the past three years, as a result of industry restructuring and lower costs,<sup>42</sup> the industry has achieved solid levels of profitability on both products, with luncheon meat generating particularly strong returns.<sup>43</sup>

However, turning to the subsidy programs, while the canned ham subsidy regime has remained essentially unchanged, the program pertaining to luncheon meat was modified in 1997. This modification, which arose from a review that commenced in February 1997, resulted in a distinct narrowing of the scope

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40. For example, Maple Leaf might have a greater strategic interest in the higher-value canned ham market than in the canned picnic market.

41. Manufacturer's Exhibit B-4 (protected) at para. 8, Administrative Record, Vol. 12; *Transcript of Public Hearing*, 19 January 2000, at 16; and *Transcript of In Camera Hearing*, 19 January 2000, at 3.

42. In particular, low pork raw material costs have reduced manufacturing costs.

43. Tribunal Exhibit RR-99-002-6 (protected), Administrative Record, Vol. 2 at 47-48.

of the luncheon meat subsidy provisions.<sup>44</sup> Under the revised provisions, certain luncheon meat mixes and qualities that had formerly qualified for the subsidy no longer qualified and, hence, they could be exported to Canada without being countervailed. Indeed, the evidence shows that all EU luncheon meat exports to Canada since the changes came into effect in December 1997 were unsubsidized and, therefore, not subject goods.<sup>45</sup>

In terms of the ongoing subsidy on qualifying luncheon meat products, the Tribunal notes that the subsidy levels are proportionately much less significant than those applicable to canned ham. For example, as a percentage of average domestic wholesale prices, the subsidy rate on luncheon meat is only about half as significant as on canned ham.<sup>46</sup> In terms of costs of production, the subsidy is proportionately about 40 percent lower.<sup>47</sup> Thus, although the EU subsidy program confers an advantage to EU producers on both product categories, the advantage and, hence, potential harm to the domestic industry are less pronounced on luncheon meat than on canned ham.

Another important difference between the two product categories relates to their channels of distribution. While both traditional and non-traditional grocery retailers stock and sell large amounts of canned ham, the non-traditional channels appear to sell a much smaller proportion of luncheon meat than traditional grocery retailers. More specifically, in terms of its sales to its largest customers, Maple Leaf's sales of canned ham are split roughly 50/50 between the two major distribution channels, whereas it sells about 80 percent of its luncheon meat to the traditional channels and only 20 percent to the non-traditional channels.<sup>48</sup>

As discussed earlier, sales to certain of the large traditional grocery stores are generally not as price sensitive as sales to the non-traditional channels. It follows that, with a smaller proportion of its total luncheon meat sales going through the non-traditional grocery channels, Maple Leaf is less vulnerable to injury from subsidized luncheon meat imports than it is to subsidized canned ham imports. In addition, the Tribunal notes that, while Maple Leaf canned ham is sold under 3 different brand names, luncheon meat is sold under about 10 different brand names. These luncheon meat brands occupy a wide range of price points from the high end to the low end.<sup>49</sup> At the low end, Maple Leaf is able to offer its customers luncheon meat products that are sold at retail, on a featured basis, for \$0.99. In the Tribunal's opinion, Maple Leaf's array of luncheon meat products provides it with considerable marketing and pricing flexibility that further serves to lessen its vulnerability to injury from subsidized imports.

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44. The EU undertook the review because of concerns that the quality of some of the luncheon meat which had received export refunds was not suitable to be granted a refund under the pigmeat export refund program. As a first step in this review, the EU suspended all export refunds for luncheon meat, from February 18 to December 9, 1997. During this period, the EU established two internal agricultural product nomenclatures for luncheon meat, which were described as "quality" and "normal". The quality product contains no poultry meat and is required to have a higher animal protein content by weight and protein to collagen ratio than the normal product. After establishing these new nomenclatures for luncheon meat, an export refund of 0.25 EURO/kg (\$0.40/kg) was assigned to the "quality" product on December 10, 1997, while the "normal" product was not assigned a refund level and, in effect, did not qualify for a subsidy.

45. Tribunal Exhibit RR-99-002-6 (protected), Administrative Record, Vol. 2 at 2.2 and 2.3.

46. Tribunal Exhibit RR-99-002-6 (protected), Administrative Record, Vol. 2 at 20, 44 and 48.

47. Tribunal Exhibit RR-99-002-6 (protected), Administrative Record, Vol. 2 at 20, 45 and 49.

48. Tribunal Exhibit RR-99-002-6 (protected), Administrative Record, Vol. 2 at 66.

49. Tribunal Exhibit RR-99-002-11.1, Administrative Record, Vol. 3 at 57-60.

It goes without saying that export subsidy programs distort the trading and competitive environment. This remains true for both EU canned ham and luncheon meat products. However, on the basis of the particular considerations discussed above, the Tribunal is of the view that the domestic luncheon meat industry would be less affected than the canned ham industry by subsidized EU imports if the order were rescinded. Indeed, the Tribunal has come to the conclusion that the effect on the luncheon meat industry is not likely to be material.

Again, as far as the August 1999 surtax is concerned, it is evident that, as long as it is in place, the domestic industry faces no likelihood of injury from subsidized EU luncheon meat, regardless of the outcome of this case. However, this is not a decisive consideration for the Tribunal since, as already noted, the surtax is a temporary measure which the Canadian government can remove at any time.

## CONCLUSION

For the foregoing reasons, the Tribunal hereby continues the order made in review No. RR-94-002, with an amendment to rescind that portion of the order respecting canned pork-based luncheon meat containing more than 20 percent by weight of pork, in respect of which a subsidy has been paid directly or indirectly by the EU.

Patricia M. Close  
Patricia M. Close  
Presiding Member

Pierre Gosselin  
Pierre Gosselin  
Member

Peter F. Thalheimer  
Peter F. Thalheimer  
Member