



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Dumping and Subsidizing

ORDER AND REASONS

Expiry Review No. RR-2014-004

Certain Whole Potatoes

*Order issued
Wednesday, September 9, 2015*

*Reasons issued
Thursday, September 24, 2015*

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IN THE MATTER OF an expiry review, pursuant to subsection 76.03(3) of the *Special Import Measures Act*, of its order made on September 10, 2010, in Expiry Review No. RR-2009-002, concerning:

**THE DUMPING OF CERTAIN WHOLE POTATOES IMPORTED FROM THE
UNITED STATES OF AMERICA, FOR USE OR CONSUMPTION IN THE
PROVINCE OF BRITISH COLUMBIA**

ORDER

The Canadian International Trade Tribunal, pursuant to subsection 76.03(3) of the *Special Import Measures Act*, has conducted an expiry review of its order made on September 10, 2010, in Expiry Review No. RR-2009-002, continuing, without amendment, its order made on September 12, 2005, in Expiry Review No. RR-2004-006, continuing, with amendment, its order made on September 13, 2000, in Review No. RR-99-005, continuing, without amendment, its order made on September 14, 1995, in Review No. RR-94-007, concerning the dumping of whole potatoes, excluding seed potatoes, excluding imports during the period from May 1 to July 31, inclusive, of each calendar year, and excluding red potatoes, yellow potatoes and the exotic potato varieties, regardless of packaging, and white and russet potatoes imported in 50-lb. cartons in the following count sizes: 40, 50, 60, 70 and 80, imported from the United States of America, for use or consumption in the province of British Columbia. Review No. RR-94-007 continued, with an amendment to exclude imports during the period from May 1 to July 31, inclusive, of each calendar year, its order made on September 14, 1990, in Review No. RR-89-010. The latter review continued, without amendment, (1) the finding of the Anti-dumping Tribunal made on June 4, 1984, in Inquiry No. ADT-4-84, concerning whole potatoes with netted or russeted skin, excluding seed potatoes, in non-size A, also commonly known as strippers, originating in or exported from the state of Washington, United States of America, for use or consumption in the province of British Columbia and (2) the finding of the Canadian Import Tribunal made on April 18, 1986, in Inquiry No. CIT-16-85, concerning whole potatoes, originating in or exported from the United States of America, for use or consumption in the province of British Columbia, excluding seed potatoes, and excluding whole potatoes with netted or russeted skin in non-size A, originating in or exported from the state of Washington.

Pursuant to paragraph 76.03(12)(b) of the *Special Import Measures Act*, the Canadian International Trade Tribunal hereby continues its order in respect of the aforementioned goods, excluding whole potatoes certified as organic by a recognized certification agency.

Ann Penner

Ann Penner
Presiding Member

Stephen A. Leach

Stephen A. Leach
Member

Jason W. Downey

Jason W. Downey
Member

The statement of reasons will be issued within 15 days.

Place of Hearing: Vancouver, British Columbia
Dates of Hearing: July 20 to 22, 2015

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Stephen A. Leach, Member
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Felix Farms Ltd.
Fraserland Organics Inc.
Heppell's Potato Corp.
Island Vegetable Co-operative Association
Lazo & Tyee Farm Ltd.
Lodder Potato Farms Ltd.
Lundstrum Farms
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STATEMENT OF REASONS

INTRODUCTION

1. This is an expiry review, pursuant to subsection 76.03(3) of the *Special Import Measures Act*¹ of an order made by the Canadian International Trade Tribunal (the Tribunal) on September 10, 2010, in Expiry Review No. RR-2009-002, continuing, without amendment, its order made on September 12, 2005, in Expiry Review No. RR-2004-006, continuing, with amendment, its order made on September 13, 2000, in Review No. RR-99-005, continuing, without amendment, its order made on September 14, 1995, in Review No. RR-94-007, concerning the dumping of whole potatoes, excluding seed potatoes, excluding imports during the period from May 1 to July 31, inclusive, of each calendar year, and excluding red potatoes, yellow potatoes and the exotic potato varieties, regardless of packaging, and white and russet potatoes imported in 50-lb. cartons in the following count sizes: 40, 50, 60, 70 and 80, imported from the United States of America, for use or consumption in the province of British Columbia (the subject goods).
2. On December 30, 2014, the Tribunal initiated this expiry review. It notified the President of the Canada Border Services Agency (CBSA) and sent letters to the known domestic growers' association, agencies and select growers, importers, foreign growers and exporters requesting that they complete expiry review questionnaires. The Tribunal's period of review (POR) is from August 1, 2011, to March 31, 2015.
3. On December 31, 2014, the CBSA initiated its investigation to determine whether the expiry of the order was likely to result in the continuation or resumption of dumping. On April 29, 2015, the CBSA determined, pursuant to paragraph 76.03(7)(a) of *SIMA*, that the expiry of the order was likely to result in the continuation or resumption of dumping of the subject goods.
4. Following the CBSA's determination, on April 30, 2015, the Tribunal initiated its part of the expiry review.

PROCEDURAL BACKGROUND

Production Order and Subpoenas Issued to Various Parties

5. The Tribunal relies on information collected during the questionnaire process to properly conduct its investigation in a manner that is thorough, transparent and fair to all interested parties. This is especially true for information from companies that play an important role in the particular market under investigation.
6. As noted above, questionnaires were sent to a wide range of companies to gather relevant information during the Tribunal's POR. One such questionnaire was sent to Loblaws Inc. (Loblaws), given its large role as an importer and retailer of the subject goods.
7. Between April 30 and June 8, 2015, the Administrative Tribunals Support Service of Canada staff made repeated attempts, by electronic mail and telephone, to obtain a response from Loblaws. However, Loblaws did not respond to these attempts. Consequently, the Tribunal issued a production order on June 10, 2015.

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

8. While Loblaws provided a limited response on June 25, 2015, a full response was not provided until July 14, 2015, only six days prior to the beginning of the public hearing and after the issuance of both the Investigation Report and Revised Investigation Report.

9. In a related matter, in preparation for the hearing, the Tribunal issued subpoenas to Mr. Frank Spagnuolo of Loblaws on July 7, 2015, and to Mr. Jim Waites of Overwaitea Food Group (Overwaitea) on July 9, 2015, requiring each to testify at the hearing in Vancouver, British Columbia, on Tuesday, July 21, 2015, at 9:30 a.m. Loblaws was also instructed, once again, to provide its questionnaire response as part of its appearance in response to the subpoena. Prompt confirmation of their attendance was not received from either witness.

10. On July 15, 2015, the Tribunal informed Loblaws and Overwaitea that it would consider contempt proceedings against their respective companies if witnesses did not attend the hearing as requested and, in the case of Loblaws, if it did not provide the requested information. The Tribunal told all parties that it would hold a pre-hearing conference on July 17, 2015, to deal with these and related issues. The Tribunal strongly urged Messrs. Spagnuolo and Waites to inform their own counsel of the pre-hearing conference.

11. All parties, witnesses and counsel for Loblaws and Overwaitea participated in the pre-hearing conference. The representative from Loblaws, Mr. David McCausland, apologized for the delays in providing the information requested by the Tribunal and confirmed that he would appear as a witness. The representatives from Overwaitea explained the reason for not replying to the subpoena and committed that Mr. Waites would appear as a witness. Counsel for the Washington State Potato Commission (WSPC) raised concerns about not being able to review the protected Revised Investigation Report until the first day of the hearing but was satisfied with the Tribunal's assurance that, if required, counsel could have additional time to question witnesses during the hearing. No concerns were raised by counsel for the British Columbia Vegetable Marketing Commission (BCVMC). The Tribunal placed the transcript of the pre-hearing conference on the public record.

WSPC's Objections to the BCVMC's Aid to Argument

12. Before the beginning of oral argument, the BCVMC sought to introduce an aid to argument. The WSPC objected to placing the aid to argument on the record because it was not notified, by the Tribunal or the BCVMC, that aid to arguments would be filed. The WSPC expressed concern that the aid to argument could contain matters for which it had not prepared responses. In reply to the WSPC's objection, the BCVMC submitted that a similar aid to argument was accepted on the record in the last expiry review.² The BCVMC added that its oral argument was the same as its aid to argument, though its counsel would not necessarily read it word for word.

13. Consistent with its practice when aids to argument are presented at the beginning of oral argument, the Tribunal ruled that it would allow the BCVMC to file its aid to argument but would disregard any portion that contained new evidence or that was somehow unfair to the WSPC.

14. Following the hearing, the Tribunal carefully reviewed the BCVMC's aid to argument and confirmed that it did not contain any new evidence and was, as submitted by the BCVMC at the hearing, a written version of its oral argument.

2. *Transcript of Public Hearing*, Vol. 3, 22 July 2015, at 293.

15. It also carefully considered whether and how the aid to argument could somehow be unfair to the WSPC. In the Tribunal's view, whether the WSPC heard the BCVMC's arguments or read them in the aid to argument could not have made any difference because they were the same, and neither presented anything unexpected that should have taken the WSPC by surprise. Indeed, as the transcript of the hearing indicates, counsel for the WSPC thoroughly and effectively addressed the BCVMC's arguments in her remarks.

PRODUCT

Product Definition

16. The subject goods are defined as follows:

whole potatoes originating in or exported from the United States for use or consumption in the province of British Columbia, but excluding:

- imports during the period from May 1 to July 31, inclusive, of each calendar year;
- seed potatoes;
- red potatoes;
- yellow potatoes;
- exotic potato varieties; and
- white and russet potatoes imported in 50-lb. cartons in the following count sizes: 40, 50, 60, 70 and 80.

Additional Product Information

17. B.C. growers produce various types of russet, white, yellow and red potatoes for the retail market. Unlike the retail markets in Central and Eastern Canada, russet potatoes, rather than white or yellow and red potatoes, dominate the B.C. retail market.³

BCVMC

18. The BCVMC is a commission established by legislation and is empowered to regulate the growing, transportation, packing, storing and marketing of certain vegetables grown in British Columbia, including potatoes.

19. The BCVMC administers its mandate by sub-delegating powers to six sales agencies, in which the growers are stakeholders.⁴ These six agencies include the following:

- BC Fresh Vegetables Inc. (BC Fresh);
- Island Vegetable Co-operative Association;
- Fraserland Organics Inc. (Fraserland Organics);
- Okanagan Grown Produce Ltd.;
- Vancouver Island Farm Products Inc.; and
- Vancouver Island Produce Ltd.

3. Exhibit RR-2014-004-A-11 at para. 46, Vol. 11.

4. Exhibit RR-2014-004-A-01 at para. 11, Vol. 11.

20. Taken together, the BCVMC and the six agencies sell potatoes to all major retail chains, food service companies and to licensed wholesalers, which in turn distribute directly to other retail chains, independent retail outlets and foodservice accounts.⁵ They account for approximately 90 percent of production and sales of like goods in British Columbia.⁶

21. The remaining 10 percent of production and sales in British Columbia is outside of the BCVMC's control. It includes those potatoes sold at private roadside stands or in small, locally owned outlets⁷, and those few potatoes grown north of the 53rd parallel given British Columbia's mountainous terrain (or what is known as the BCVMC's "regulated area").⁸

22. The BCVMC, in consultation with the six agencies, sets weekly minimum guidance prices for the potatoes sold under its control.⁹ It works with the agencies to gather daily information about the current status of inventory, availability, pricing, and "deals" of potatoes in the B.C. market to ensure that B.C. potatoes are priced competitively with U.S. ones.

23. These weekly minimum guidance prices are based on the landed Vancouver price (also known as the "FOB Vancouver" price) of potatoes imported from the United States. The BCVMC requires inventory statistics to be supplied by each of the agencies on the first day of every month, commencing on November 1 until June 1. This information is compiled, using 30-day, 60-day, 90-day, year-over-year and 5-year comparisons so that the desired rate of sale of product can be factored into pricing discussions. The BCVMC also references the United States Department of Agriculture National Potato and Onion Report, which provides daily "... shipping point availability and prices throughout the US..."¹⁰ by grade, size, variety and packaging. In addition, the BCVMC also references available market reports which are prepared by the United Potato Growers of Canada, the United Potato Growers of America (UPGA) and the North American Potato Market News, Inc. (NAPMN).

24. The BCVMC has no authority over prices of imported goods sold in British Columbia.

LEGAL FRAMEWORK

25. The Tribunal is required, pursuant to subsection 76.03(10) of *SIMA*, to determine whether the expiry of the order is likely to result in injury.¹¹

26. The Tribunal is also required, pursuant to subsection 76.03(12) of *SIMA*, to determine whether to rescind the order, if it determines that its expiry is unlikely to result in injury, or continue the order, with or without amendment, if it determines that the expiry of the order is likely to result in injury.

5. Exhibit RR-2014-004-05B, Vol. 1.1 at 232.

6. *Transcript of Public Hearing*, Vol. 1, 20 July 2015, at 125-26; Exhibit RR-2014-004-A-19 at para. 11, Vol. 11B.

7. Many of these sales are nevertheless reported to the agency by the grower. *Transcript of Public Hearing*, Vol. 1, 20 July 2015, at 111-12.

8. *Transcript of Public Hearing*, Vol. 1, 20 July 2015, at 27.

9. The entirety of the description of the weekly minimum price setting by the BCVMC is taken from Exhibit RR-2014-004-A-11 at paras. 20-26, Vol. 11.

10. Exhibit RR-2014-004-A-11 at para. 22, Vol. 11.

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

27. Given that the likelihood of injury to the domestic industry must be assessed in relation to domestic growers of like goods in relation to the subject goods, the Tribunal must first determine what constitutes “like goods”. Once that determination has been made, the Tribunal must determine which domestic growers of the like goods constitute the “domestic industry”.

LIKE GOODS AND CLASSES OF GOODS

28. Subsection 2(1) of *SIMA* defines “like goods”, in relation to any other goods, as follows:

- (a) goods that are identical in all respects to the other goods, or
- (b) in the absence of any goods described in paragraph (a), goods the uses and other characteristics of which closely resemble those of the other goods.

29. In the last two expiry reviews, potatoes grown in British Columbia, defined in the same manner as the subject goods, constituted like goods in relation to the subject goods.

30. There does not appear to be any evidence on the record of the current expiry review that warrants a departure from that same conclusion. U.S.-grown and B.C.-grown whole potatoes remain highly substitutable. Potatoes continue to be a commodity product. Both russet and white potatoes have similar physical characteristics and uses, and are grown and harvested using similar farming methods.

31. Accordingly, the Tribunal will analyze the likelihood of injury on the basis that B.C. whole potatoes are like goods and comprise a single class of goods.

DOMESTIC INDUSTRY/REGIONAL MARKET

32. Subsection 2(1) of *SIMA* defines “domestic industry” as follows:

... 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 except that, where a domestic producer is related to an exporter or importer of dumped or subsidized goods, or is an importer of such goods, “domestic industry” may be interpreted as meaning the rest of those domestic producers.

33. As noted above, the growers represented by the six agencies under the BCVMC account for the vast majority of production and sales of like goods in British Columbia; witnesses testified that approximately 90 percent of production and sales of like goods are captured by these agencies. As a result, the Tribunal is satisfied that a major proportion of total domestic production is indeed represented.

BC Fresh as Part of the Domestic Industry

34. The WSPC submitted that one of the agencies, BC Fresh, and its growers should be excluded from the domestic industry for the purpose of determining likelihood of injury. The rationale for this request was that BC Fresh is an importer of the subject goods.¹²

35. When considering this kind of request, the Tribunal has stated that it would not exclude parties from the domestic industry if such an exclusion effectively denied the existence of a domestic industry.¹³

12. BC Fresh is the only Canadian grower reporting imports. Exhibit RR-2014-004-33.01, Vol. 7.10 at 148.

13. *Solder Joint Pressure Pipe Fittings and Solder Joint Drainage, Waste and Vent Pipe Fittings* (18 October 1993), NQ-93-001 (CIIT) at 14.

36. Instead, the Tribunal has focused its analysis on whether BC Fresh is “essentially” a grower of like goods in Canada or is more heavily engaged in importing or exporting activities. Specifically, the Tribunal has considered “structural” and “behavioural” factors when determining whether a party that imports goods should also be considered part of the domestic industry. In Inquiry No. NQ-2006-001, the Tribunal stated as follows:¹⁴

57. Factors that the Tribunal typically considers when making its decision on whether to exclude a domestic producer from the definition of the domestic industry can be characterized as “structural” or “behavioural”.

58. *Structural factors* are concerned with the characteristics of the domestic market and the producer’s place in that market. *SIMA* requires the Tribunal to determine whether dumping has caused or threatens to cause injury in relation to the whole of the domestic production of like goods, whether sold for domestic consumption or export or used in downstream processing, and producer imports need to be viewed in this context. Structural factors include the ratio of the producer’s sales of dumped goods to its total sales in the domestic market; the ratio of the producer’s volume of dumped goods to its production of like goods; and the producer’s actual volume of imports of dumped goods and its share of the total volume of dumped goods.

59. *Behavioural factors* focus on the behaviour of the producer (both directly and in terms of its association with related companies) and assist in the assessment of the circumstances that led to the structural outcomes observed in the market. For example, the Tribunal may consider whether the producer imported the dumped goods as a defensive measure against other dumped goods or as an aggressive measure to capture market share from other domestic producers of like goods. Similarly, it may assess whether the producer imported the dumped goods to fill a specific market niche or to compete broadly with the like goods produced by other domestic producers. The Tribunal may also consider whether the producer’s own like goods compete in the domestic market with the dumped goods that it imports.

[Emphasis added, footnote omitted]

37. Applying these factors to the case at hand, the evidence and the testimony Mr. Murray Driediger confirm that BC Fresh is indeed a domestic grower.

38. Evidence indicates that BC Fresh is the largest of the six agencies under the BCVMC and that its growers account for the majority of production and sales of like goods in British Columbia. Furthermore, evidence demonstrates that BC Fresh is the only one of the six agencies to report imports during the POR. At their highest level, BC Fresh’s imports of the subject goods accounted for only a minor portion of its total domestic sales, and this occurred during the earliest period of the POR.¹⁵ The ratio of imports of the subject goods to overall domestic sales in the subsequent periods of the POR was even lower.¹⁶

39. When explaining why BC Fresh imported the subject goods during the POR, Mr. Driediger testified that the subject goods were imported to “back fill” for short domestic supply. In other words, imports were brought into British Columbia to provide a consistent 12-month supply of potatoes to BC Fresh’s buyers.¹⁷ Mr. Driediger explained that this was a deliberate strategy to preserve market share when BC Fresh lacked a

14. *Cross-linked Polyethylene Tubing* (29 September 2006) (CITT) at paras. 56-59.

15. Exhibit RR-2014-004-18.01 (protected), Vol. 4.1 at 6-8.

16. *Ibid.*

17. *Transcript of Public Hearing*, Vol. 1, July 20, 2015 at 119.

sufficient supply of B.C. potatoes to meet demand. Furthermore, he noted that most of BC Fresh's imports occurred during the non-dutiable period.¹⁸

40. On the basis of evidence on the record and Mr. Driediger's testimony, the Tribunal will include BC Fresh and its growers in the composition of the domestic industry and in its related injury analysis. BC Fresh's import activities do not show any of the "behavioural" or "structural" factors, which would exclude it from the domestic industry.

Regional Market

41. The Tribunal must also determine whether the B.C. potato growers continue to sell in a regional market, i.e. in British Columbia.

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

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

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

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

43. If the Tribunal finds that a regional industry exists, subsection 42(5) of *SIMA* provides as follows:

(5) Where subsection 2(1.1) applies in respect of the dumping or subsidizing of goods to which the preliminary determination applies, the Tribunal shall not find that the dumping or subsidizing of those goods has caused injury or retardation or is threatening to cause injury unless

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

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

44. On the basis of these provisions, the Tribunal will consider three tests to determine whether it should continue to apply a regional market analysis to the case at hand. Specifically, it will consider:

- Whether all or almost all of the like goods were sold in the B.C. market;
- Whether B.C. demand was to any substantial degree, supplied by like goods from elsewhere in Canada; and
- Whether there is a concentration of dumped goods in the B.C. market.

45. If these tests are met, the Tribunal will then conduct its injury analysis based on its finding of a regional market.

18. Exhibit RR-2014-004-A-19 at paras. 55-57, Vol. 11B.

WSPC's Argument on "Exceptional Circumstances"

46. Before it proceeds with an analysis of whether these three tests are met, the Tribunal will first consider an argument by the WSPC regarding the phrase "exceptional circumstances" of subsection 2(1.1) of *SIMA*. The WSPC argued that the phrase "exceptional circumstances" means that the domestic industry must first show that exceptional circumstances exist; if it cannot, the Tribunal need not consider if the tests for a regional market are met. In its view, no such exceptional circumstances exist in this case, and as a result British Columbia cannot be considered a "regional market".

47. The Tribunal does not agree with the WSPC's interpretation of subsection 2(1.1) of *SIMA*. The phrase "exceptional circumstances" is not a test for determining if there is a regional market; it is a means of differentiating the exception from the general rule, i.e., injury analyses based on a national market. This is why the Tribunal does not conduct injury analyses on the basis of a regional market unless the above-noted three tests are met.

48. Having found no validity in the WSPC's interpretation of "exceptional circumstances", the Tribunal will now turn to an analysis of whether there is evidence that meets the three tests for the period under review.

Whether All or Almost All of the Like Goods Were Sold in the B.C. Market

49. Counsel for the BCVMC and the WSPC agreed at the hearing that the regional market tests require a flexible and broad analysis which involves more than merely applying numerical thresholds to certain data—in their words, the regional market analysis is an art, not a science.¹⁹

50. Nevertheless, the WSPC also submitted that the Tribunal should apply a threshold of 90 percent to the phrase "almost all" rather than the 80 percent applied by the Tribunal in the previous expiry review.²⁰

51. The WSPC argued that the BCVMC cannot provide evidence that 90 percent of the like goods were sold in the B.C. market because their data is only with respect to the production and sales that it regulates.²¹ In support of this argument, the WSPC pointed to Agriculture Canada data suggesting that a significant amount of the BCVMC's sales were exported over the POR and could not therefore be considered sales within British Columbia.²²

52. After reviewing the evidence, the Tribunal finds that "all or almost all" of the whole potatoes grown in British Columbia were sold in British Columbia during the POR.²³

53. Even if the Tribunal were to apply the 90 percent threshold argued by the WSPC, the Tribunal accepts the BCVMC's evidence that production and sales from production outside its "regulated area" (i.e. territory north of the 53rd parallel) are minimal. If any other unregulated production (i.e. production sold at private roadside stands or in small, locally owned outlets) was to be exported from British Columbia

19. *Transcript of Public Hearing*, Vol. 3, 22 July 2015, at 334-35, 348, 392.

20. Exhibit RR-2014-004-Q-01 at paras. 85-91, Vol. 13.

21. *Transcript of Public Hearing*, Vol. 1, 20 July 2015, at 125-26; Exhibit RR-2014-004-A-19 at para. 11, Vol. 11B.

22. Exhibit RR-2014-004-Q-03 at para. 40, Vol. 13C.

23. Exhibit RR-2014-004-A-11 at para. 31, Vol. 11; Exhibit RR-2014-004-A-12 (protected), tabs 2, 17, Vol. 12; Exhibit RR-2014-004-06B (protected), Table 30, Vol. 2.

or shipped to another province, it would occur through an authorized BCVMC agency and would therefore be captured in their data.²⁴

54. Furthermore, the Tribunal finds that the data from Agriculture Canada data cited by the WSPC is unhelpful because it contains non-subject goods. Indeed, much of the data includes varieties and seed potatoes that are excluded from the Tribunal's order.²⁵

55. Lastly, the Tribunal finds it unlikely that there are material amounts of potato sales unregulated by the BCVMC during the exclusion period (May 1 to July 31 of each calendar year) because it is the same period in which B.C. growers have very limited or no supply.

56. Therefore, Tribunal is satisfied that the first test is met—all or almost all B.C. whole potatoes were sold in British Columbia during the POR.

Whether B.C. Demand was, to any Substantial Degree, Supplied by Like Goods from Elsewhere in Canada

57. With respect to the second test, the BCVMC submitted that “[i]t is rare to see potatoes in the BC market from elsewhere in Canada in the dutiable period.”²⁶ In support of this submission, it provided evidence of the high transportation costs into British Columbia from other provinces.²⁷

58. As well, the Tribunal heard testimony from major retail purchasers of the like goods that they buy local first, and only seek supply from the rest of Canada if or when there is a gap in local supply.²⁸ Evidence on the Tribunal's protected record supports their testimony.²⁹

59. On this basis, the Tribunal finds that the second test is satisfied – the B.C. market was not significantly supplied by whole potatoes originating in other Canadian provinces during the POR.

Whether There was a High Concentration of Dumped Goods in the B.C. Market

60. With respect to the third test, the Tribunal used the following different indicators to determine whether there is a concentration of dumped goods in the regional market: the distribution indicator to assess the value of the subject goods relative to the value of imports from the rest of Canada; the density indicator to consider the percentage of subject goods relative to the domestic market; and the import penetration indicator to compare the import penetration in the regional market vis-à-vis the import penetration into the whole of Canada.

61. In the last expiry review, the Tribunal found that the distribution indicator ranged between 40 and 60 percent.³⁰ It also found that the density indicator ranged from 43 to 52 percent.³¹ In the present expiry review, the density indicator continues to show that a significant portion of the B.C. market consists of imports from the United States. Likewise, the penetration of imports from the United States into British

24. *Transcript of Public Hearing*, Vol. 1, 20 July 2015 at 123.

25. Exhibit RR-2014-004-A-19 at paras. 19-23, Vol. 11B.

26. Exhibit RR-2014-004-A-11 at para. 34, Vol. 11.

27. Exhibit RR-2014-004-A-19 at paras. 16-18, Vol. 11B.

28. *Transcript of Public Hearing*, Vol. 1, 20 July 2015 at 254-57, 269, 274.

29. Exhibit RR-2014-004-06B (protected), Table 30, Vol. 2; Exhibit RR-2014-002-25.20B (protected), Vol. 6 at 191.

30. Exhibit RR-2014-004-10, Table 17, Vol. 1.3.

31. *Ibid.*

Columbia as compared to the rest of Canada is also very high. It is telling that British Columbia receives such a significant proportion of imports from the United States over and above what would be expected per capita, given that British Columbia represents only 13 percent of the total population in Canada.³²

62. Therefore, the Tribunal finds that the third test is met—there was a high concentration of the subject goods imported into British Columbia during the POR.

63. In summary, the Tribunal determines that British Columbia is a regional market and will conduct its injury analysis on this basis.

LIKELIHOOD OF INJURY ANALYSIS

64. An expiry review is forward-looking.³³ It follows that evidence from the POR during which an order was being enforced is relevant insofar as it bears upon the prospective analysis of whether the expiry of the order is likely to result in injury.³⁴

65. There is no presumption of injury in an expiry review; the Tribunal's findings must be based on positive evidence, in compliance with domestic law and consistent with the requirements of the World Trade Organization.³⁵ In the context of an expiry review, positive evidence can include evidence based on past facts that tend to support forward-looking conclusions.³⁶

66. In making its assessment of likelihood of injury, the Tribunal has consistently taken the view that the focus should be on circumstances that can reasonably be expected to exist in the near to medium term, which is generally considered to be from 12 to 24 months from the expiry of the finding or order.

67. Subsection 37.2(2) of the *Special Import Measures Regulations*³⁷ lists factors that the Tribunal may consider in addressing the likelihood of injury. These factors include the following: changes in international and domestic market conditions; the likely volumes of dumped or subsidized goods; the likely prices of dumped or subsidized goods; the likely impact of the dumped or subsidized goods on the domestic industry; the likely performance of the domestic industry, taking into account that industry's recent performance (including trends in production, capacity utilization, employment, exports); and the diversion of dumped or subsidized goods caused by anti-dumping or countervailing measures taken by the authorities in another country.

32. Exhibit RR-2014-004-06B (protected), Table 30, Vol. 2.1; Exhibit RR-2014-004-53.01, Vol. 1A at 36.

33. *Certain Dishwashers and Dryers* (25 April 2005), RR-2004-005 (CITT) at para. 16.

34. *Copper Pipe Fittings* (17 February 2012), RR-2011-001 (CITT) at para. 56. In *Thermoelectric Containers* (9 December 2013), RR-2012-004 (CITT) [*Thermoelectric Containers*] at para. 14, the Tribunal stated that the analytical context pursuant to which an expiry review must be adjudged often includes the assessment of retrospective evidence supportive of prospective conclusions. See, also, *Aluminum Extrusions* (17 March 2014), RR-2013-003 (CITT) [*Aluminum Extrusions*] at para. 21.

35. *Flat Hot-rolled Carbon and Alloy Steel Sheet and Strip* (16 August 2006), RR-2005-002 (CITT) at para. 59.

36. *Thermoelectric Containers* at para. 14; *Aluminum Extrusions* at para. 21.

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

Changes in Market Conditions

68. In order to assess the likely volumes and prices of the subject goods and their impact on the domestic industry if the order is rescinded, the Tribunal typically first considers any changes in international and domestic market conditions.³⁸

69. The Tribunal finds that conditions in the U.S. potato market have not changed significantly since the last expiry review. Despite the recommendations of the UPGA to cut back on production, U.S. production levels remain extremely high and British Columbia remains the Pacific Northwest's top export market for a persistent oversupply of fresh potatoes.³⁹

70. The Tribunal also finds that the B.C. potato market has not changed significantly since the last review. B.C. growers remain unable to supply the B.C. market year-round, and imports from the United States are required to meet demand, typically beginning in April and ending in August.⁴⁰

71. In terms of pricing, B.C. growers remain price takers.⁴¹ B.C. growers continue to set minimum selling prices on the basis of the landed Vancouver prices for the most dominant varieties of imported U.S. potatoes. Some retailers in British Columbia do likewise. The two largest grocery retailers in British Columbia testified that they regularly monitor U.S. prices to negotiate prices with B.C. growers, effectively setting a floor price within their "buy local" strategies.⁴²

72. Notwithstanding these similarities in market conditions, however, the WSPC suggested that a potato processing industry has developed in British Columbia since the last expiry review. It cited evidence that FirstMate Pet Foods, Naturally Homegrown Foods and Pemberton Distilleries were using like goods to develop processed potato products in British Columbia.

73. The Tribunal does not accept this submission. Evidence confirms that the like goods are not used by FirstMate Pet Foods.⁴³ Evidence also demonstrates that only insignificant volumes of the like goods are used by Naturally Homegrown Foods to produce a specialty brand potato chip called Hardbite and by Pemberton Distilleries to produce Schramm potato vodka.⁴⁴ This evidence is consistent with the uncontroverted testimony of Mr. Driediger that British Columbia still cannot support a potato processing industry because one would require a minimum of 25,000 acres dedicated to potato production; unlike Alberta or the Columbia Basin in the state of Washington, British Columbia only has a small fraction of that amount of available land base.⁴⁵

38. Paragraph 37.2(2)(j) of the *Regulations* states that the Tribunal may consider "...any changes in market conditions domestically or internationally, including changes in the supply of and demand for the goods, as well as any changes in trends and in sources of imports into Canada"

39. *Certain Whole Potatoes* (10 September 2010), RR-2009-002 (CITT) [*Certain Whole Potatoes 2009*] at para. 140; *Transcript of Public Hearing*, Vol. 2, 21 July 2015, at 190; Exhibit RR-2014-004-Q-03 at paras. 70-77, Vol. 13C.

40. *Transcript of Public Hearing*, Vol. 1, 20 July 2015, at 118-23; *Transcript of Public Hearing*, Vol. 2, 21 July 2015, at 254, 268-70.

41. *Certain Whole Potatoes 2009* at paras. 158-79; Exhibit RR-2014-004-A-11 at paras. 20-26, 56-71, Vol. 11; *Transcript of Public Hearing*, 20 July 2015 at 122, 133-34.

42. The Tribunal notes evidence that the four largest grocery retailers in British Columbia now control from 80 to 90 percent of the retail market in Western Canada. *Transcript of Public Hearing*, Vol. 2, 21 July 2015, at 78, 272.

43. Exhibit RR-2014-004-RI-20 (protected), Vol. 10.

44. Exhibit RR-2014-004-A-15 at para. 3, Vol. 11B; Exhibit RR-2014-004-A-20 (protected) at para. 43, Vol. 12B.

45. *Transcript of Public Hearing*, Vol. 1, 20 July 2015, at 129; Exhibit RR-2014-004-06B (protected), Table 3, Vol. 2.1.

Likely Performance of the Domestic Industry if the Order is Continued

74. Paragraph 37.2(2)(c) of the *Regulations* directs the Tribunal to examine the likely performance of the domestic industry if the order is continued by accounting for specific indicators about the industry's recent performance, such as trends in production, capacity utilization, employment levels, prices, sales, inventories, market share, exports and profits.⁴⁶

Production, Capacity and Employment

75. The Tribunal's record shows that production and acreage in British Columbia has remained very stable,⁴⁷ dropping or rising by only 1 percent in any comparable period in the POR. The exception was in 2014 when acreage declined due to factors unrelated to the potato market, such as land claim settlements and the retirement of a key grower.⁴⁸ At the same time, yields increased over the POR.⁴⁹

76. Witnesses for the domestic growers testified that they have plans to expand acreage and production if the order is continued. For example, some growers highlighted plans for future expansion on Vancouver Island and in the B.C. interior with some additional acreage already acquired.⁵⁰ Another grower reported that his operation started growing new varieties of potatoes during the POR.⁵¹ Others reported that they had plans to significantly increase investments over the coming months only if the order is continued.⁵²

77. Regarding employment, the evidence indicates that employment levels declined over the POR. The total number of employees declined in each period of the POR, while the total number of hours worked was constant except for a more notable decline in 2014-2015.⁵³ Witnesses for the domestic industry testified that the decline in employment levels could be attributed to an increasing amount of automation in the industry (e.g. automated packing and grading equipment).⁵⁴

Exports

78. Exports of whole potatoes from British Columbia grew throughout the POR but remained small in volume and value when compared to domestic sales.⁵⁵ For example, Mr. Driediger testified that, while BC Fresh sells to major distributors in Western Canada, including Sysco Foods and Gordon Food Services, the vast majority of its sales remain in British Columbia.⁵⁶

46. *Hot-rolled Carbon Steel Plate and High-strength Low-alloy Steel Plate* (7 January 2014), RR-2013-002 (CITT) at para. 85. In *Thermoelectric Containers* at para. 14, the Tribunal stated that the requirement in an expiry review is for the Tribunal to draw logical conclusions from the relevant information before it, and that information will often appropriately include the performance of the domestic and foreign industries during the POR, when anti-dumping and countervailing duties were in place. See, also, *Aluminum Extrusions* at para. 21.

47. Exhibit RR-2014-004-06B (protected), Tables 5, 41, Vol. 2.1.

48. Exhibit RR-2014-004-A-12 (protected) at paras. 37-40, Vol. 12.

49. Exhibit RR-2014-004-06B (protected), Table 41, Vol. 2.1.

50. Exhibit RR-2014-004-A-03 at para. 20, Vol. 11.

51. Exhibit RR-2014-004-A-07 at para. 18, Vol. 11.

52. Exhibit RR-2014-004-A-03 at para. 20, Vol. 11; Exhibit RR-2014-004-A-05 at para. 24, Vol. 11; Exhibit RR-2014-004-A-07 at para. 17, Vol. 11; Exhibit RR-2014-004-A-09 at para. 15, Vol. 11.

53. Exhibit RR-2014-004-05B, Table 37, Vol. 1.1.

54. *Transcript of Public Hearing*, Vol. 1, 20 July 2015, at 132-33.

55. Exhibit RR-2014-004-06B (protected), Tables 16, 19, 27, 28, Vol. 2.1.

56. Exhibit RR-2014-004-A-12 (protected) at para. 33, Vol. 12.

Prices, Sales and Market Share in British Columbia

79. Turning to prices, sales and market share, average unit values for domestic sales of like goods remained fairly stable, with a decline in 2012-2013, an increase in 2013-2014 and a continued increase in the 2014-2015 interim period (as compared to the 2013-2014 interim period).⁵⁷

80. The volume of sales from domestic production declined over the POR, with a slight rebound in 2014-2015.⁵⁸ The value of sales from domestic production remained fairly consistent across the POR.⁵⁹ While the value of sales from domestic production declined in 2012-2013, it returned to 2011-2012 levels in 2013-2014.⁶⁰ The rebound continued in 2014-2015.⁶¹

81. The market share of domestic production increased in 2012-2013, but in 2013-2014, it returned to 2011-2012 levels. Market share also fell slightly in the interim 2014-2015 period.⁶² Average market share over the POR, however, was higher than the 50 percent share held by domestic growers in the previous expiry review and also slightly higher than the historical market share over the last 20 years.⁶³

Profitability

82. Total revenue reported by B.C. growers for like goods rose in each period during the POR.⁶⁴ Expenses first declined in 2012-2013 but then increased in the subsequent periods.⁶⁵ Compared to 2011-2012, net farm income rose significantly in 2012-2013 and then fell in 2013-2014 but remained well over 2011-2012 levels when the average net income for the industry was negative.⁶⁶

Summary

83. Overall, these indicators demonstrate that the order has had the intended effect. It has provided stability for B.C. growers and allowed them to maintain production levels, invest in new equipment, experiment with new varieties to meet changing market demand and, subject to land availability, expand their planted acreage.

84. Looking ahead, these indicators lead the Tribunal to conclude that B.C. growers are likely to remain in a position to successfully compete with imports from the United States in the coming 12 to 24 months if the order is continued. Notably:

- production and sales of like goods are likely to remain at or above present levels given recent and projected trends in production;
- prices are likely to remain stable given consistent average unit values during the POR, as there is no evidence to suggest that production levels, sales and market share would markedly change prices in the near future; and
- B.C. growers are likely to remain profitable given their current stable financial position and improved profit margins over the POR.

57. Exhibit RR-2014-004-06B (protected), Table 22, Vol. 2.1.

58. *Ibid.*, Table 16.

59. *Ibid.*, Table 19.

60. *Ibid.*

61. *Ibid.*

62. Exhibit RR-2014-004-06B (protected), Table 18, Vol. 2.1.

63. *Certain Whole Potatoes 2009* at paras. 114-15.

64. Exhibit RR-2014-004-06B (protected), Table 33, Vol. 2.1.

65. *Ibid.*

66. *Ibid.*

Likely Volumes of Dumped Goods if the Order is Rescinded

85. Paragraph 37.2(2)(a) of the *Regulations* directs the Tribunal to consider the likely volume of the dumped goods if the order is rescinded and, in particular, whether there is likely to be a significant increase in the volume of imports of the subject goods, either in absolute terms or relative to the production or consumption of like goods.

86. The Tribunal's assessment of the likely volumes of dumped imports should encompass the likely performance of the foreign industry, the potential for the foreign producers to produce goods in facilities that are currently used to produce other goods, evidence of the imposition of anti-dumping measures in other jurisdictions, and whether measures adopted by other jurisdictions are likely to cause a diversion of the subject goods to Canada.⁶⁷

Likely Performance of the Foreign Industry

– Production levels, acreage and yields

87. As noted above, U.S. growers in the Pacific Northwest continue to overproduce relative to demand in their domestic market.⁶⁸ Their potato acreage and yields have also continued to increase.⁶⁹ Efforts to limit or reduce overproduction have not been effective.⁷⁰ In fact, during nearly every year of the POR, the NAPMN unsuccessfully urged growers to plant less and highlighted that market prices have, at times, been below the actual cost of production.⁷¹ For his part, Mr. Matt Harris testified that the WSPC does not plan or discuss production levels with growers in the state of Washington.⁷²

88. Evidence on the record confirms these trends. Total fall potato production in the United States averaged almost 395 million hundredweight (cwt) each year over the POR. The average production from 2011 to 2014 increased relative to 2010, and those increases were most substantial in the Pacific Northwest, including the states of California, Washington, Oregon and Idaho.⁷³

89. Taking the state of Washington on its own, total production averaged almost 96 million cwt over the POR, and acreage in the state of Washington increased by 30,000 acres between 2010 and 2014.⁷⁴

90. When compared to the B.C. market, these production and acreage levels are extremely high. Indeed, they continue to dwarf average production volumes of B.C. growers many times over.

91. This is particularly true when comparing B.C. production to U.S. "fall acreage", i.e. crops that are planted in the spring, harvested from July to October and then stored and marketed throughout the year up until the next harvest, and against which B.C. growers typically compete.⁷⁵ U.S. fall acreage is several hundred times greater than the acreage of whole potatoes planted in British Columbia.⁷⁶ The United States

67. Paragraphs 37.2(2)(a), (d), (f), (h) and (i) of the *Regulations*.

68. Exhibit RR-2014-004-Q-04 (protected), tab 7, Vol. 14; Exhibit RR-2014-004-A-11 at para. 93, Vol. 11.

69. Exhibit RR-2014-004-A-11 at paras. 91-96, Vol. 11.

70. Exhibit RR-2014-004-A-01 at para. 72, Vol. 11; Exhibit 2014-004-A-11, tab 10, Vol. 11.

71. Exhibit RR-2014-A-01 at para. 72, Vol. 11; Exhibit RR-2014-A-11, tab 6, Vol. 11.

72. *Transcript of Public Hearing*, Vol. 2, July 21, 2015, at 171.

73. Exhibit RR-2014-004-A-11, tab 10, Vol. 11.

74. Exhibit 2014-004-A-11, tab 10, Vol. 11.

75. Exhibit RR-2014-004-A-01 at para. 48, Vol. 11.

76. Exhibit RR-2014-004-06B (protected), Table 41, Vol. 2.1.

Department of Agriculture (USDA) reports that, in each year from 2010 and 2014, growers across the United States planted an average of 946,000 acres of fall acreage. Of that, 39 percent was planted across the states of California, Oregon and Idaho and 17 percent in the state of Washington alone.⁷⁷

92. Not only are production and acreage levels extremely high relative to British Columbia, crop yields reported by U.S. growers are high as well. Yields reported to the Tribunal by the two U.S. growers that responded to the Tribunal's Foreign Grower Questionnaire were more than double those in British Columbia over the POR.⁷⁸

- Impact of heat and drought conditions in the Pacific Northwest on production and yields

93. The Tribunal is mindful that, as with any agricultural commodity, production volumes, acreage figures and yields can be impacted by factors outside the growers' control. In that regard, the Tribunal carefully considered the testimony and submissions of Mr. Harris about extreme heat and drought conditions in the Pacific Northwest, including three declarations of drought from the Governor of the state of Washington between March 13 and May 13, 2015.⁷⁹

94. In both his witness statement and oral testimony, Mr. Harris suggested that potato yields in the states of Washington, Oregon, Idaho and California will decrease over the next 12 to 24 months as a result of drought.⁸⁰ He testified that drought and extreme heat will strain export sales, yields, sizes and quality of U.S. potatoes and will ultimately drive prices upwards.⁸¹

95. Furthermore, he projected that current weather conditions have changed "everything" and that the impact of the drought and heat will extend into the next calendar year and cause problems for processors.⁸² In his view, the drought will impact potato seed purchased from drought affected western states, thereby impacting the subsequent crop of seed potatoes and table crop as well.⁸³

96. Placing Mr. Harris's projections in the context of the likely performance of the foreign industry, the Tribunal finds that they are not persuasive given other evidence on the record. For example, the July 1, 2015, edition of the NAPMN stated that U.S. 2015 fall potato production is expected to increase by 1.9 percent over 2014 based on the 20-year fall potato yield trend, notwithstanding current weather conditions, and that this year's outlook is mixed, given that much depends on how well irrigation systems in the Pacific Northwest are able to keep up with the heat.⁸⁴ On that point, Mr. Harris conceded, on cross-examination, that he had not presented evidence that water use had been restricted in the state of Washington.⁸⁵

77. Exhibit RR-2014-004-A-11 at 254, Vol. 11A.

78. Exhibit RR-2014-004-06B (protected), Tables 41, 42, Vol. 2.1.

79. Exhibit RR-2014-004-Q-03, tab 45, Vol. 13D.

80. Exhibit RR-2014-004-Q-03 at paras. 84-88, Vol. 13C; *Transcript of Public Hearing*, Vol. 2, 21 July 2015, at 148, 177-78.

81. *Ibid.*

82. Exhibit RR-2014-004-Q-03 at paras. 84-88, Vol. 13C; *Transcript of Public Hearing*, Vol. 2, 21 July 2015, at 148, 177-78, 242-43.

83. *Transcript of Public Hearing*, Vol. 2, 21 July 2015, at 242-43; Exhibit RR-2014-004-Q-03 at para. 86, Vol. 13C.

84. Exhibit RR-2014-004-Q-01B, tab 51 at 702, Vol. 13B.

85. *Transcript of Public Hearing*, Vol. 2, 21 July 2015, at 178.

97. Furthermore, the September 10, 2014, edition of the NAPMN noted that, while that summer's heat conditions had resulted in smaller than estimated yields, 2014 yields were still higher than in 2013.⁸⁶ Other news articles submitted by the WSPC also stated that, while production in 2014 was lower than expected, heat conditions resulted in the same volume of crops as the prior year instead of larger crops.⁸⁷

98. Finally, the Tribunal notes that the three declarations from the Governor of the state of Washington do not specifically mention the impact of drought on potato production.⁸⁸

99. In the last expiry review, the Tribunal considered arguments by the WSPC regarding the impact that land and water limitations put on production levels in the state of Washington. It found that, even if there were limits on production, sales of fresh potatoes in the state of Washington were still 9 times the size of the B.C. market and 18 times the size of B.C. growers' sales of like goods.⁸⁹ That finding continues to apply in this expiry review, as will be discussed more fully below.⁹⁰

– Sales

100. The WSPC argued that the volume of production in the state of Washington and across the United States does not, in and of itself, suggest that the subject goods will necessarily continue to flow into Canada. Mr. Harris's evidence was that the vast majority of U.S. potatoes continue to be sold to the processing industry on the basis of contracts.⁹¹ In his experience, this means that most of the top varieties of white potatoes grown in the state of Washington are primarily for processing and not sold in the fresh market.⁹² He noted, for example, that Burbank russets are sold for processing under contract.⁹³

101. According to his understanding of the market in the state of Washington, even those potatoes grown in excess of contracts eventually wound up as dehydrated potatoes or cattle feed.⁹⁴ When asked about volumes in excess of processing contracts, he noted that contracts in the state of Washington are subject to renegotiation.⁹⁵ Processors may either purchase the excess production or wait to assess their future needs; growers could be forced to hold the excess supply until well into the growing year, at which point it may be too costly to package the excess and sell on the fresh market.⁹⁶

102. The Tribunal is not convinced by Mr. Harris's testimony that varieties grown primarily for processing will not be sold into the fresh market. Mr. Harris admitted that his knowledge is limited to potatoes grown in the state of Washington.⁹⁷

103. Furthermore, evidence on the record indicates that varieties including round and long white potatoes and russet potatoes are marketed as "Table-Stock" potatoes by the U.S. Potato Board.⁹⁸ It also confirms that

86. Exhibit-RR-2014-004-A-11 at 183, Vol. 11.

87. Exhibit RR-2014-004-Q-03 at 560, Vol. 13D.

88. *Ibid.*, tab 45.

89. *Certain Whole Potatoes 2009* at para. 137.

90. Exhibit RR-2014-004-06B (protected), Table 16, Vol. 2.1; Exhibit RR-2014-004-Q-04 (protected), tab 7, Vol. 14.

91. Exhibit RR-2014-004-Q-04 (protected) at para. 24, Vol. 14.

92. Exhibit RR-2014-004-Q-03 at paras. 23-27, Vol. 13C.

93. *Transcript of Public Hearing*, Vol. 2, 21 July 2015, at 182-83.

94. *Ibid.* at 238-42.

95. *Ibid.*

96. *Ibid.*

97. *Ibid.* at 245-46.

98. *Ibid.* at 186-88; Exhibit RR-2014-004-A-19 at 54, Vol. 11B.

varieties primarily for processing can be, and are, sold as fresh potatoes. For example, Burbank russets are sold for table use in Idaho, a point conceded by Mr. Harris on cross-examination.⁹⁹ The U.S. Potato Board notes that russets are the most widely used all-purpose potato in the United States and that white potatoes are also regarded as all-purpose potatoes.¹⁰⁰

104. In addition, Mr. Waites testified that he frequently receives opportunities to buy excess supply from U.S. growers when they have to move inventory that is not purchased by processors.¹⁰¹

105. Nevertheless, even if the Tribunal were to focus only on Norkotah russets, the one variety noted by Mr. Harris to be primarily for fresh table sales, the WSPC data reveal that the volume of production for this variety grown in 2013-2014 in the state of Washington is almost 20 times greater than the size of the entire B.C. market and more than 30 times the size of B.C. growers' sales of like goods.¹⁰² There is no evidence to suggest that this will change over the next 12 to 24 months.

– Market share

106. Turning from sales to market share, the subject goods consistently held a significant share of the B.C. market over the POR.¹⁰³ Witnesses explained that imports from the United States are sought by retailers and domestic growers to meet demand when B.C. potatoes are in short supply.¹⁰⁴ For example, Mr. Driediger noted that B.C. Fresh imports from the United States to ensure that it can provide a 12-month supply to its customers.¹⁰⁵ In the case of russets, B.C. Fresh typically has a domestic supply for 8 to 9 months and imports for the remaining 3 to 4 months of the year.¹⁰⁶

– Summary

107. Growers and exporters from the United States continue to have an enormous capacity to grow and sell the subject goods. As such, the Tribunal finds that exports to British Columbia are likely to continue in light of the well-established channels of distribution,¹⁰⁷ and testimony that imports from the United States are readily available and used to supplement domestic supply, including by B.C. growers and major retailers such as Loblaws¹⁰⁸ and Overwaitea.¹⁰⁹

Likely Price Effects of Dumped Goods if the Order is Rescinded

108. Having considered the likely volumes of dumped goods and the likely performance of the foreign industry, the Tribunal will now consider whether, if the order is rescinded, the dumping of goods is likely to significantly undercut the prices of like goods, depress those prices or suppress them by preventing increases

99. *Transcript of Public Hearing*, Vol. 2, 21 July 2015, at 246.

100. *Ibid.* at 186-88.

101. *Ibid.* at 276-77.

102. Exhibit RR-2014-004-06B (protected), Table 16, Vol. 2.1; Exhibit RR-2014-004-Q-04 (protected), tab 7, Vol. 14.

103. Exhibit RR-2014-004-06B (protected), Table 3, Vol. 2.1.

104. *Transcript of Public Hearing*, Vol. 2, 21 July 2015, at 251.

105. *Ibid.* at 118.

106. *Ibid.*

107. *Ibid.* at 170.

108. *Ibid.* at 252-55.

109. *Ibid.* at 269.

in those prices that would likely have otherwise occurred.¹¹⁰ In this regard, the Tribunal distinguishes the likely price effects of the dumped goods from any likely price effects of other factors.

Price Undercutting

109. The WSPC argued that the BCVMC is a price maker as opposed to a price taker. However, this argument is not supported by evidence on the record. As the Tribunal has found in previous reviews and as noted above, the evidence confirms that purchasers (including B.C. growers and certain retailers) consistently use the landed price of the subject goods as the basis for negotiating and setting prices for the like goods.¹¹¹ Upon cross-examination, Mr. Harris acknowledged that it is rational market behaviour to price to the import market.¹¹²

110. The Tribunal finds that the landed prices of the subject goods, which reflect prevailing U.S. market prices, is an accurate indicator of future B.C. market prices and that, as production levels in the United States continue to increase, it is likely that U.S. prices will decline further. The August 8, 2012, edition of the NAPMN estimated that an 8.5 percent increase in production would translate into a 26 percent decline in prices.¹¹³ As production volumes rose in Idaho and the Columbia Basin in 2014, prices for russet table potatoes in those regions dropped below the cost of production.¹¹⁴ In the May 20, 2015, edition of NAPMN, prices for russets were reported as “weak” given surplus supply.¹¹⁵

111. As expected, with the order in place, average unit values for the subject goods were above those of the like goods over the POR. However, current pricing differentials¹¹⁶ between the subject goods and the like goods have narrowed since the previous expiry review. Current price differentials range between CAN\$5 and CAN\$8, whereas they ranged between CAN\$8 and CAN\$15 in 2009. Therefore, the Tribunal finds it even more likely that significant price undercutting will occur if the order is rescinded.¹¹⁷

Price Depression and Suppression

112. Testimony indicated that there are a number of factors other than price involved in purchasing decisions, including quality and reliability of supply. For two of the major retailers in the B.C. market, Loblaws and Overwaitea, high-quality, local supply is a central feature of their corporate purchasing policies. Mr. McCausland and Mr. Waites indicated that, even if the order was rescinded and prices fell, they would continue to buy local first.¹¹⁸

110. Paragraph 37.2(2)(b) of the *Regulations*.

111. *Certain Whole Potatoes 2009* at paras. 158-79; Exhibit RR-2014-004-A-11 at paras. 20-26, 56-71, Vol. 11; *Transcript of Public Hearing*, 20 July 2015 at 122, 133-34.

112. *Transcript of Public Hearing*, Vol. 2, 21 July 2015, at 197.

113. Exhibit RR-2014-004-A-11 at 87, Vol. 11.

114. *Ibid.* at 184.

115. *Ibid.* at 229.

116. In 2011-2012, the average unit value of the subject goods (CAN\$/cwt) in the apparent market was CAN\$30.28, while that of the like goods was CAN\$24.55. Similarly, in 2012-2013 and 2013-2014, the average unit values of the subject goods were CAN\$28.08 and \$33.09 respectively, while those of the like goods were CAN\$23.19 and \$25.18 respectively. In the interim period 2014-2015, the price of the subject goods was CAN\$33.33 and that of the like goods was CAN\$26.36. Exhibit RR-2014-004-06B (protected), Table 3, Vol. 2.1.

117. Exhibit RR-2014-004-06B (protected), Table 3, Vol. 2.1.

118. *Transcript of Public Hearing*, Vol. 2, 21 July 2015, at 251-54, 257, 260, 268-69, 275-76, 280, 282.

113. However, even in the context of their “buy local” purchasing strategies, Mr. McCausland and Mr. Waites testified that they consider U.S. prices when negotiating with domestic suppliers. Mr. McCausland noted that he follows the market and may have a conversation once in a while about price and “. . . what we can do”,¹¹⁹ especially when looking at prices of products for a promotion. He confirmed, on cross-examination, that prices must be competitive.¹²⁰ Mr. Waites explained how the U.S. potato prices essentially set the baseline and are a factor when he creates a “lid price” for his purchases of the like goods.¹²¹ This happens throughout the year, even during those months when the order is in place.

114. Furthermore, despite having “buy local” corporate policies, both Loblaws and Overwaita also have corporate policies to reduce their prices in order to match those of their competitors. Mr. Waites, in particular, explained that Overwaita’s “Always Lowest Guarantee” (ALG) requires him to match the lowest price in the market even if it means that he might have to take a loss on a given product for a time.¹²² He also noted that he might have to pull a given product from the ALG list if he could not sustain continued losses by matching a lower price.¹²³

115. These pricing practices support the BCVMC’s argument that the price of the subject goods sets a floor price and that the like goods are priced relative to that floor price on the basis of prevailing market conditions.¹²⁴

116. During the latest period of August 2014 to March 2015, average U.S. potato prices in the state of Washington were significantly lower than B.C. prices, as has been the case to varying degrees throughout the POR.¹²⁵

117. Accordingly, the Tribunal finds that, if the order is rescinded, the floor price will be removed and that, despite the “buy local” strategies for two major B.C. retailers, the prices for the like goods will eventually converge with the significantly lower prices prevailing in the United States.

Likely Impact on the Domestic Industry if the Order is Rescinded

118. Pursuant to paragraphs 37.2(2)(e) and (g) of the *Regulations*, the Tribunal may consider the likely impact of the subject goods on the domestic industry if the order is rescinded, having regard to all relevant economic factors and indices, including any potential decline in output, sales, market share, profits, productivity, return on investments or utilization of production capacity, and any potential negative effects on cash flow, inventories, employment, wages, growth, the ability to raise capital or existing development

119. *Ibid.* at 258.

120. *Ibid.* at 263.

121. *Ibid.* at 270-72.

122. *Ibid.* at 271-72.

123. *Ibid.* at 284.

124. For instance, in 2012-2013, the selling price of the subject goods fell by over CAN\$2.00, while the selling price of the like goods decreased by CAN\$1.36. Conversely, in 2013-2014, the selling price of the subject goods rose by CAN\$5.00, while the selling price of the like goods rose by CAN\$2.00. Exhibit RR-2014-004-05B, Table 3, Vol. 1.1.

125. For example, the average USDA FOB Vancouver price for a U.S. Grade 1 russet in a 5/10 lb. format was CAN\$7.81 in 2014-2015, i.e. CAN\$5.52 with the addition of US\$2.02 for freight and brokerage to Vancouver, converted to Canadian dollars, which is significantly lower-priced than the BCVMC average weekly FOB Vancouver price for that product in the same period; price comparisons for other types of whole potato lead to the same conclusion. Exhibit RR-2014-004-06B (protected), Table 3, Vol. 2.1; Exhibit RR-2014-04-05B, Table 32, Vol. 1.1; Exhibit RR-2014-04-A-11 at para. 58, Vol. 11; Exhibit RR-2014-04-05B, Table 46, Vol. 1.1.

and production efforts. In this analysis, the Tribunal must be careful to distinguish and compare the likely performance of the domestic industry if the order is rescinded with the likely performance of the domestic industry if the order is continued, as discussed above.

119. In opposing a continuation of the order, the WSPC pointed to the high costs of farming and the seeming inability of domestic growers to increase operations due to the limited agricultural land base in British Columbia.¹²⁶ However, it must be noted that, in an expiry review, these are factors which make the domestic industry more vulnerable to renewed dumping and therefore make it more likely to be injured.

120. While consumption patterns may be changing to a certain degree, the evidence establishes that overall demand for fresh potatoes has been declining for the past 10 to 15 years.¹²⁷ Therefore, any additional market share captured by imports from the United States at dumped prices will be at the expense of the domestic industry.

121. The domestic industry submitted evidence that they would have lost millions of dollars in revenue had the order not been in place.¹²⁸ Likewise, it suggested that this will remain the case in the future if the order is rescinded. The Tribunal's own analysis of the evidence confirms the accuracy of the domestic industry's submission.¹²⁹ On the basis of this evidence, the Tribunal finds that, if the order were rescinded, the domestic industry would suffer revenue losses in the millions of dollars in the next 12 to 24 months, which would have a significant impact on its ability to sustain itself.¹³⁰

122. Furthermore, the Tribunal finds that, in the face of such losses, B.C. growers would need to cut back on production or switch to other crops in order to sustain their operations. Indeed, several witnesses were clear that their plans to increase production in the coming years were contingent on the order being continued.¹³¹ For example, Mr. Peter Schouten noted, in his written statement, that his farm planted fewer russets and whites in 2015 due to the pending expiry review.¹³²

123. There is also overwhelming evidence that B.C. growers make a conscious effort to end their sales before the non-dutiable period in May through July, since the absence of anti-dumping duties on U.S. goods

126. Exhibit RR-2014-004-Q-01 at para. 273, Vol. 13.

127. Exhibit RR-2014-004-A-11 at paras. 90-91, Vol. 11.

128. Exhibit RR-2014-004-A-12 (protected), tab 16, Vol. 11A.

129. The Tribunal applied the recent significant price differentials between U.S. landed prices and B.C. prices, as set out above, to the B.C. growers' revenues on sales of whole potatoes as reported to the Tribunal for that same period. To do so, the freight, brokerage and insurance of US\$2.02 for a 5/10 lb. package was added to the average USDA FOB Washington prices for the period of August-April of crop years 2011-2012, 2012-2013 and 2013-2014, and for the period of April 2014 to March 2015. The resulting FOB Vancouver prices for each of the product packages listed in Table 32 of the Investigation Report were compared to the average suggested BCVMC selling prices for B.C. potatoes in the same packaging in the same period, as shown in Table 31 of the Investigation Report. An average of the percentage by which the landed USDA prices undercut the BCVMC prices for each packaging type was calculated for each period. Next, the net revenue for sales of certain whole potatoes reported by growers as shown in Table 33 of the Investigation Report was reduced by the percentage differential described above, to estimate revenue that would have been lost during the POR if B.C. growers had priced their potatoes at the landed price of potatoes from the state of Washington. Exhibit RR-2014-004-06B (protected), Tables 31-33, 46, Vol. 2.1; Exhibit RR-2014-004-A-11 at para. 58, Vol. 11.

130. Exhibit RR-2014-004-06B (protected), Tables 31-33, 46, Vol. 2.1.

131. Exhibit RR-2014-004-A-01 at para. 154, Vol. 11; Exhibit RR-2014-004-A-07 at para. 27, Vol. 11; Exhibit RR-2014-004-A-03 at para. 20, Vol. 11; Exhibit RR-2014-004-A-09 at para. 15, Vol. 11; Exhibit RR-2014-004-A-05 at paras. 8, 14, 17, Vol. 11; Exhibit RR-2014-004-A11 at para. 58, Vol. 11.

132. Exhibit RR-2014-004-A-03 at para. 6, Vol. 11.

in that time means that prices are not sufficiently predictable for B.C. growers to receive a satisfactory return on their product.¹³³ Domestic growers noted that their investments are contingent on a stable foundation of sales of like goods. Development of new varieties and increased yields are contingent on profitable sales of these products.¹³⁴

124. In sum, the Tribunal finds that the B.C. growers' production and sales of like goods would be significantly reduced with consequent decreases in financial results, employment and investments.

Injury to all or Almost all of the Domestic Production

125. As set out above, subsection 42(5) of *SIMA* requires that, in a regional market analysis, injury must be shown to all or almost all of the production of the domestic producers. Although there is no express corresponding requirement in the provisions of *SIMA* relating to expiry reviews, the Tribunal adopts this requirement in expiry reviews.

126. In this regard, WSPC argued that there is insufficient evidence to support a finding of injury to all or almost all of the regional production because there is little or no evidence pertaining to an estimated 10 percent of that production¹³⁵. The Tribunal finds that positive evidence of injury to 90 percent of regional production is sufficient to support a finding of injury to almost all of the regional production.

DETERMINATION

127. The Tribunal finds that, if the order is rescinded, domestic growers will likely suffer significant injury in the next 12 to 24 months. The Tribunal, therefore, continues its order regarding the subject goods.

EXCLUSIONS

128. While *SIMA* does not expressly authorize the Tribunal to grant exclusions from the scope of an order or finding, it has been recognized by the Federal Court and Binational Panels that this authority is implicit.¹³⁶ In the context of an expiry review, the rationale is that, despite the general conclusion that all goods covered by a finding or an order are likely to cause injury to the domestic industry, there may be case-specific evidence that imports of particular products captured by the definition of the goods are not likely to cause injury. Thus, the purpose of exclusions to an order continuing a previous order or finding is to confine the assessment of anti-dumping and countervailing duties to those goods that are likely to cause or to threaten to cause material injury to the domestic industry.

129. As the Tribunal has repeatedly stated, exclusions are an extraordinary remedy that may be granted only when the Tribunal is of the view that such exclusions will not cause injury to the domestic industry. In

133. *Transcript of Public Hearing*, Vol. 1, 20 July 2015, at 118-20; *Transcript of Public Hearing*, Vol. 2, 21 July 2015, at 254, 268-69.

134. Exhibit RR-2014-004-A-11 at paras. 122-25, Vol. 11; Exhibit RR-2014-004-A-03 at paras. 17-24, Vol. 11; Exhibit RR-2014-004-A-09 at paras. 12-15, Vol. 11; Exhibit RR-2014-004-A-05 at paras. 16-17, Vol. 11; Exhibit RR-2014-004-A-07 at paras. 14-22, Vol. 11.

135. This 10 percent of production included whole potatoes sold by farms outside the regulated area, on-farm sales or sales which were otherwise exempt from reporting, e.g. manifest sales, during the exclusion period, etc.

136. *Hetex Garn A.G. v. The Anti-dumping Tribunal*, [1978] 2 F.C. 507 (FCA); *Sacilor Aciéries v. Anti-dumping Tribunal* (1985) 9 C.E.R. 210 (CA); Binational Panel, *Induction Motors Originating From the United States of America (Injury)* (11 September 1991), CDA-90-1904-01; Binational Panel, *Certain Cold-Rolled Steel Products Originating or Exported From the United States of America (Injury)* (13 July 1994), CDA-93-1904-09.

the context of an expiry review, applying this principle entails determining whether imports of the specific goods for which exclusions are requested are not likely to cause injury to the domestic industry, despite the general conclusion that, should the order or finding under review be rescinded, the continued or resumed dumping and subsidizing of all goods covered by the order or finding are likely to result in injury to the domestic industry.

130. In *Aluminum Extrusions*, the Tribunal was clear that every party must submit its best evidence either in support of, or against, an exclusion request. In this way, the evidentiary burden is to be shared by all parties so that the Tribunal can determine whether it will exercise its discretion to grant product exclusions on the basis of its assessment of the totality of the evidence on the record.¹³⁷

131. As noted in Expiry Review No. RR-2009-001,¹³⁸ evidence about factors such as whether the domestic industry produces the products for which exclusions are requested, whether it produces substitutable or competing products, whether it is an “active supplier” of the products and whether it has the capability of producing the products should be submitted to enable the Tribunal to determine whether a product exclusion is likely to cause injury to the domestic industry.

132. Consistent with its usual practice, the Tribunal examined the evidence relating to these factors in order to dispose of the five requests for product exclusions that it received from the WSPC in this expiry review.

Seasonal Exclusions (March, April and August)

133. The WSPC requested three separate exclusions for whole potatoes imported in March, April and August of each year on the grounds that whole potatoes grown in British Columbia are not available in adequate volumes in these months. According to the WSPC’s evidence, there was a fundamental shortfall of B.C supply of potatoes to meet B.C. demand in these months.

134. All three seasonal exclusion requests are denied. There is evidence on the record that B.C. growers sell like goods during each of the months of March, April and August.¹³⁹ For example, BC Fresh’s price lists show that white and russet potatoes are available in these periods.¹⁴⁰ There is also a substantial amount of inventory of the like goods in March and April of each year, with some inventory even continuing into May.¹⁴¹

Whole White Potatoes

135. The WSPC requested an exclusion for whole white potatoes. The WSPC submitted that the domestic industry will not suffer material injury as a result of such an exclusion. It argued, *inter alia*, that white potatoes are not substitutable for russet potatoes in a manner that would cause injury to the domestic industry and that white potatoes are a premium, high-quality, specialty product that commands substantially higher prices than russet potatoes.

137. *Aluminum Extrusions* at paras. 193-95.

138. *Certain Fasteners* (6 January 2010) (CITT) at para. 245.

139. Exhibit RR-2014-004-45.01 (protected), Vol. 2.5 at 15, 20, 26.

140. Exhibit RR-2014-004-32.01 (protected), Vol. 8.1 at 81-88, 138-55, 181-90, 239-58.

141. Exhibit RR-2014-004-45.01 (protected), Vol. 2.5 at 35-36.

136. The BCVMC provided evidence that domestic growers sell substantial amounts of white potatoes.¹⁴² This exclusion request is also denied.

Whole Potatoes Certified as Organic

137. The WSPC sought an exclusion for whole potatoes certified as organic by a recognized certification agency. Domestic growers consented to this exclusion request.

138. The Tribunal heard evidence that potatoes certified as organic are not yet grown to any significant degree in British Columbia and are priced higher than other potatoes.¹⁴³ While potatoes certified as organic are a growing segment of B.C.'s potato market, Mr. Driediger testified that it is still "small" and represents less than 5 percent of production (likely closer to 3 to 4 percent).¹⁴⁴ This was substantiated by Mr. McCausland's testimony that Loblaws cannot get enough supply of whole potatoes certified as organic.¹⁴⁵

139. The Tribunal therefore grants this exclusion request.

CONCLUSION

140. Pursuant to paragraph 76.03(12)(b) of *SIMA*, the Tribunal continues its order in respect of the subject goods, excluding whole potatoes certified as organic by a recognized certification agency.

Ann Penner
Ann Penner
Presiding Member

Stephen A. Leach
Stephen A. Leach
Member

Jason W. Downey
Jason W. Downey
Member

142. *Ibid.* at 38-39, 74.

143. *Transcript of Public Hearing*, Vol. 1, 20 July 2015, at 127.

144. *Ibid.* at 126-27.

145. *Transcript of Public Hearing*, Vol. 2, 21 July 2015, at 260-61.