



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Dumping and Subsidizing

ORDER AND REASONS

Expiry Review No. RR-2014-005

Greenhouse Bell Peppers

*Order issued
Friday, October 16, 2015*

*Reasons issued
Friday, October 30, 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 the finding made by the Canadian International Trade Tribunal on October 19, 2010, in Inquiry No. NQ-2010-001, concerning:

**THE DUMPING OF GREENHOUSE BELL PEPPERS ORIGINATING IN OR
EXPORTED FROM THE NETHERLANDS**

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 finding made on October 19, 2010, in Inquiry No. NQ-2010-001, concerning the dumping of greenhouse bell peppers originating in or exported from the Netherlands.

Pursuant to subparagraph 76.03(12)(a)(ii) of the *Special Import Measures Act*, the Canadian International Trade Tribunal hereby rescinds its finding in respect of greenhouse bell peppers originating in or exported from the Netherlands.

Jean Bédard

Jean Bédard
Presiding Member

Peter Burn

Peter Burn
Member

Rose Ritcey

Rose Ritcey
Member

The statement of reasons will be issued within 15 days.

Place of Hearing:	Ottawa, Ontario
Dates of Hearing:	August 24 and 25, 2015
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STATEMENT OF REASONS

1. This is an expiry review, pursuant to subsection 76.03(3) of the *Special Import Measures Act*,¹ of a finding made by the Canadian International Trade Tribunal (the Tribunal) on October 19, 2010, in Inquiry No. NQ-2010-001, concerning the dumping of greenhouse bell peppers originating in or exported from the Netherlands (the subject goods).

PROCEDURAL BACKGROUND

2. The Tribunal initiated this expiry review on February 4, 2015.

3. On February 5, 2015, the Canada Border Services Agency (CBSA) initiated its investigation to determine whether the expiry of the Tribunal's finding was likely to result in the continuation or resumption of dumping of the subject goods.

4. On June 4, 2015, the CBSA determined, pursuant to paragraph 76.03(7)(a) of *SIMA*, that the expiry of the finding was likely to result in the continuation or resumption of dumping of the subject goods.

5. On June 5, 2015, following the CBSA's determination, the Tribunal began its expiry review to determine, pursuant to subsection 76.03(10) of *SIMA*, whether the expiry of the finding was likely to result in injury or retardation. The Tribunal's period of review (POR) is from January 1, 2012, to March 31, 2015.

6. As part of these proceedings, the Tribunal sent questionnaires to known domestic growers, domestic grower associations, domestic marketers and agencies, importers and foreign growers of greenhouse bell peppers. The responses to these questionnaires were used to prepare public and protected investigation reports and various supplements.²

7. The Tribunal held a hearing, with public and *in camera* testimony, in Ottawa, Ontario, on August 24 and 25, 2015.

8. The Ontario Greenhouse Vegetable Growers (OGVG) and the British Columbia Vegetable Marketing Commission (BCVMC) filed written submissions, provided evidence and made arguments in support of a continuation of the finding. Both the OGVG and the BCVMC also provided written responses to the Tribunal's requests for information, issued on August 12, 2015. The OGVG was represented by counsel and presented witnesses at the hearing.

9. Although the Delegation of the European Union to Canada filed a notice of participation, the Tribunal did not receive any submissions opposing the continuation of the finding.

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

2. The record of this review consists of all relevant documents filed or accepted for filing by the Tribunal, including the following: the CBSA's protected expiry review report, public statement of reasons, index of background information and related documents; written Tribunal communications; the Tribunal's notice of expiry review; the protected and public replies to the expiry review questionnaires; the public and protected investigation reports for this expiry review, as well as the revisions and supplements thereto; witness statements and other exhibits; and the exhibit list and the Tribunal's finding, statement of reasons, and public and protected staff reports prepared for Inquiry No. NQ-2010-001. All public exhibits were made available to interested parties, while protected exhibits were provided only to counsel who had filed a declaration and undertaking with the Tribunal in respect of the protection of confidential information.

10. Mr. Jean-François Delorme, Senior Category Manager, Loblaw Companies Limited (Loblaw), and Mr. Steve Macchio, Chief Financial Officer, Jem D International Partners LP (dba Red Sun Farms) appeared as witnesses for the Tribunal.

11. The Tribunal did not receive any requests for product exclusions.

PRODUCT

12. The goods that are subject to this expiry review are greenhouse bell peppers originating in or exported from the Netherlands.

Product Information

13. Greenhouse bell peppers are greenhouse-grown bell peppers of the family *Solanaceae* and the species *Capsicum annuum* L. A greenhouse is an enclosed structure with a controllable dynamic system, managed for intensive production of high-quality, fresh market produce. Greenhouse production allows for crop production under very diverse conditions. By controlling a number of variables, such as air temperature, root zone temperature, vapour pressure deficit, fertilizer feed, carbon dioxide enrichment, selection of growing media and plant maintenance, the greenhouse growers aim to obtain maximum performance from the crop over the production season. High fruit quality and yield of coloured bell peppers are difficult to obtain in open field environments. Therefore, they are usually grown in protected environments, such as high passively ventilated greenhouses. Greenhouse peppers are grown from specialized cultivars.

14. Young, unripe bell peppers are bright green. As they mature, according to the cultivar, they turn the following colours, among others: yellow, orange, red, purple, brown, white and lilac. In Canada, the majority of commercial production of greenhouse bell peppers is sold as red peppers, followed by yellow and orange peppers.

15. Bell peppers vary in size, from approximately 3 1/2 to 5 1/2 inches long and from 2 1/2 to 4 inches wide.

Production Process

16. Greenhouse bell pepper production is based on a full-year cycle. In Canada, transplants go into the production greenhouse in approximately mid- to late December at six weeks of age. The first harvest of fruit generally begins in March and continues until the following December.

17. The greenhouses are empty for only two or three weeks during the year to allow for the removal of the old crop and the thorough cleaning of the greenhouse and to set up the greenhouse for the new crop. An entire year's crop is grown from the same set of plants. Normally, it takes approximately 20 weeks (four months) from seeding the crop to first pick. Throughout the harvesting season, pepper fruits ripen in flushes or waves of production at different nodes on the plant (on average 5-6 "settings" per production year). Each setting, at which the stock grows a flower and the flower produces a pepper, represents an opportunity for harvest. A setting is usually produced every 5-6 weeks.

STRUCTURE OF THE DOMESTIC INDUSTRY

18. All domestic growers in Ontario and British Columbia are licensed members of the OGVC or the BCVMC respectively.

19. Under Regulation 417 of the *Farm Products Marketing Act*,³ the OGVG has the power to establish regulations that provide for the control and regulation of production and marketing of greenhouse vegetables grown in Ontario. This power extends to matters such as licensing, fees, pricing and contracting, together with dispute resolution with respect to both the production and marketing of greenhouse vegetables in Ontario. The OGVG also lobbies for and conducts research on behalf of Ontario greenhouse vegetable growers. In addition, the OGVG promotes greenhouse vegetables through various media and trade shows. In 2014, the OGVG represented more than 231 growers, 49 of which grew greenhouse bell peppers.⁴

20. Having been established under the *Natural Products Marketing (BC) Act*,⁵ the BCVMC licenses and registers all producers of regulated products. Its activities include evaluating the performance of the various segments of the vegetable marketing industry, settling disputes between growers and sales agencies, and reviewing, enforcing, changing or making regulations for the orderly marketing of B.C. vegetables.

21. The marketing of greenhouse bell peppers grown in Ontario and British Columbia is only done through marketers and agencies licensed by the OGVG and the BCVMC.

22. Marketers and agencies market greenhouse bell peppers by negotiating prices with customers and arranging for transportation and packaging, as necessary. The marketer or agency is paid directly by the purchaser and, after deducting its costs and commission, returns the balance to the grower. This is sometimes referred to as “farm-gate value to the grower”. In certain cases, the marketers and growers are affiliated with one another.

23. Sales of both domestic and imported greenhouse bell peppers for consumption in Canada are made primarily to retailers, but also to the foodservice industry, wholesalers and terminal markets.

LEGAL FRAMEWORK

24. The Tribunal is required, pursuant to subsection 76.03(10) of *SIMA*, to determine whether the expiry of the finding in respect of the subject goods is likely to result in injury or retardation.⁶ Subsection 2(1) of *SIMA* defines “injury” as “. . . material injury to a domestic industry”.

25. The Tribunal is also required, pursuant to subsection 76.03(12) of *SIMA*, to make an order either rescinding the finding, if it determines that its expiry is unlikely to result in injury, or continuing the finding, with or without amendment, if it determines that the expiry of the finding is likely to result in injury. As discussed later in these reasons, while the phrase “likely to result in injury” is not expressly defined in *SIMA*, in reaching its determination, the Tribunal applied this term in a manner consistent not only with its previous decisions but also in the context of the language provided in subsection 76.03(10) of *SIMA*, Article 3.5 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*⁷ and the relevant jurisprudence from the World Trade Organization (WTO).

26. Given that the Tribunal’s likelihood of injury analysis must assess the likely impact of the subject goods on the domestic producers of like goods, the Tribunal must first determine what constitutes “like

3. R.S.O. 1990, c. F. 9.

4. Exhibit RR-2014-005-A-01 at para. 2, Vol. 11; Exhibit RR-2014-005-05A, Vol. 1.1 at 71-72.

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

6. Subsection 2(1) of *SIMA* defines “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 finding is likely to result in retardation does not arise in this expiry review.

7. 15 April 1994, online: https://www.wto.org/english/docs_e/legal_e/19-adp_01_e.htm.

goods” in relation to the subject goods. Once that determination has been made, the Tribunal must determine which domestic producers of the like goods constitute the “domestic industry”.

LIKE GOODS AND CLASSES OF GOODS

27. In order for the Tribunal to determine whether the resumed or continued dumping of the subject goods is likely to cause material injury to the domestic growers of like goods, it must determine which domestically produced goods, if any, constitute like goods in relation to the subject goods. The Tribunal must also assess whether there is, within the subject goods and the like goods, more than one class of goods. 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.

28. In deciding the issue of like goods, as well as whether there is more than one class of goods,⁸ the Tribunal typically considers a number of factors, including the physical characteristics of the goods (such as composition and appearance) and their market characteristics (such as substitutability, pricing, distribution channels, end uses and whether the goods fulfill the same customer needs).⁹

29. In the original inquiry, the Tribunal determined that domestically produced greenhouse bell peppers were like goods in relation to the subject goods and that there was a single class of goods.¹⁰ In the conduct of this expiry review, the parties did not present any new evidence or argument in this regard.

30. Consequently, the Tribunal finds that the record contains nothing to warrant a departure from the Tribunal’s past conclusions on the issue of like goods or classes of goods concerning greenhouse bell peppers. Accordingly, the Tribunal finds a single class of domestically produced greenhouse bell peppers that are like goods in relation to the subject goods.

DOMESTIC INDUSTRY

31. 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.

8. In order to decide whether there is more than one class of goods, the Tribunal must determine whether goods potentially included in separate classes of goods constitute “like goods” in relation to each other. If they do, they will be regarded as comprising one class of goods. See, for example, *Aluminum Extrusions* (17 March 2009), NQ-2008-003 (CITT) at para. 115; *Thermal Insulation Board* (11 April 1997), NQ-96-003 (CITT) at 10.

9. See, for example, *Copper Pipe Fittings* (19 February 2007), NQ-2006-002 (CITT) at para. 48.

10. *Greenhouse Bell Peppers* (19 October 2010), NQ-2010-001 (CITT) at para. 57.

32. The Tribunal must therefore determine whether there is a likelihood of injury to the domestic producers as a whole or those domestic producers whose production represents a major proportion of the total production of like goods.¹¹

33. The Tribunal notes that 32 responses were received from domestic growers that are members of the OGVG, a number that far exceeds the 3 responses received from domestic growers that are members of the BCVMC. Nonetheless, the responses received from domestic growers as a whole represented approximately 60 percent of domestic production in 2014.¹² As such, the Tribunal is satisfied that these domestic growers represent a major proportion of domestic production of the like goods.

LIKELIHOOD OF INJURY ANALYSIS

34. An expiry review is forward-looking.¹³ 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, for purposes of this review, is 18 to 24 months. Evidence from the POR during which an order or a finding was enforced is therefore relevant insofar as it bears upon the prospective analysis of whether the expiry of the order or finding is likely to result in injury.¹⁴

35. There is no presumption of injury in an expiry review; findings must be based on positive evidence, in compliance with domestic law and consistent with the requirements of the WTO.¹⁵ In the context of an expiry review, positive evidence can include evidence based on past facts that tend to support forward-looking conclusions.¹⁶

36. At the outset of the analysis, the Tribunal notes that this expiry review was unopposed. Although the Delegation of the European Union to Canada was a party to the proceedings and Frugi Venta, a Dutch fruit and vegetable trade association, expressed its opposition to a continuation of the Tribunal's finding further to the issuance of the notice of expiry in Expiry No. LE-2014-004, neither of them submitted evidence in this expiry review to challenge the arguments advanced by the OGVG or the BCVMC. The Tribunal strives to be as thorough as possible in its own examination of the evidence and questioning of witnesses. This is particularly important in cases such as this one where there is limited participation by parties opposing the continuation of the Tribunal's finding and no participation at the hearing.

11. The term "major proportion" means an important, serious or significant proportion of total domestic production of like goods and not necessarily a majority. *Japan Electrical Manufacturers Assn. v. Canada (Anti-Dumping Tribunal)*, [1986] F.C.J. No. 652 (F.C.A.); *McCulloch of Canada Limited and McCulloch Corporation v. Anti-Dumping Tribunal*, [1978] 1 F.C. 222 (F.C.A.); *China – Anti-dumping and Countervailing Duties on Certain Automobiles from the United States* (23 May 2014), WTO Doc. WT/DS440/R, Report of the Panel at para. 7.207; *European Community – Definitive Anti-dumping Measures on Certain Iron or Steel Fasteners from China* (15 July 2011), WTO Doc. WT/DS397/AB/R, Report of the Appellate Body at paras. 411, 419, 430; *Argentina – Definitive Anti-dumping Duties on Poultry from Brazil* (22 April 2003), WTO Doc. WT/DS241/R, Report of the Panel at paras. 7.341-7.344.

12. Exhibit RR-2014-005-05A, Vol. 1.1 at 73; Exhibit RR-2014-005-06B (protected), Table 5, Vol. 2.1.

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

14. *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.

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

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

37. Subsection 37.2(2) of the *Special Import Measures Regulations*¹⁷ lists the factors that the Tribunal may consider in addressing the likelihood of injury in cases where the CBSA has determined that there is a likelihood of continued or resumed dumping resulting from the expiry of a finding or an order. The factors that the Tribunal considers relevant in this expiry review are discussed in detail below.¹⁸

Changes in Market Conditions

38. In order to assess the likely volumes and prices of the subject goods and their impact on the domestic industry if the finding were rescinded, the Tribunal will first consider changes in international and domestic market conditions.¹⁹

International Market Conditions

39. Although the Netherlands remained a significant global producer of greenhouse bell peppers, its overall production of greenhouse bell peppers decreased by 1 percent over the POR.²⁰ It also remained heavily export dependent, as an average of over 80 percent of its production was exported from 2009 to 2013.²¹

40. The volume of exports of the subject goods decreased by 10 percent over the POR, as the Netherlands faced increased local and foreign competition in key export markets.²² For example, exports from the Netherlands to Germany (the largest export market for the subject goods) and Japan fell by 23 percent and 43 percent, respectively, over the POR.²³ In each of these markets, there is evidence of initiatives to increase local production of greenhouse bell peppers.²⁴ The Tribunal notes that the presence of the subject goods does not seem to prevent other countries from establishing their own production of greenhouse bell peppers.

41. In North America, there were a number of important changes in market conditions during the POR. The Mexican greenhouse bell pepper industry continued to extend its growing season and became more than merely a countercyclical supplier.²⁵ The greenhouse vegetable industry expanded in the United States, and a number of Canadian growers began production or announced plans to expand their production in the United States.²⁶ At the same time, exports to the U.S. market of the like goods grown in Canada increased

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

18. The Tribunal collected information separately from individual domestic growers and marketers and agencies. The Tribunal primarily relied on these responses in its assessment of the financial results of the domestic industry, as well as other indicia of performance, such as sales, pricing, capacity, employment and market share. The Tribunal relied on data published by Statistics Canada for annual volumes of domestic production, imports and exports and on data provided by the Department of Agriculture and Agri-Food for monthly volumes of imports. Because a domestic grower submitted a late response to the Tribunal's domestic growers' questionnaire, revised tables relating to the domestic industry were presented in a confidential supplement to the investigation report (Exhibit RR-2014-005-06B (protected), Tables 1-6, Vol. 2.1). The Tribunal will generally refer to the results from the previously issued public investigation report, but will also provide references to the final results presented in the confidential supplement.

19. See paragraph 37.2(2)(j) of the *Regulations*.

20. Exhibit RR-2014-005-A-05 at 53, Vol. 11.

21. Exhibit LE-2014-004-4.01, Vol. 1 at para. 20, Appendices 1, 2; Exhibit RR-2014-005-03A, Vol. 1A at para. 86.

22. Exhibit RR-2014-005-A-05 at 41, 43-44, 51-52, Vol. 11.

23. *Ibid.* at 51-52.

24. *Ibid.* at 6, 12, 19, 23-24, 84.

25. *Ibid.* at 14, 28-29.

26. Exhibit RR-2014-005-34.01, Vol. 1A at 55-57; Exhibit RR-2014-005-34.02, Vol. 1A at 59-60; Exhibit RR-2014-005-34.03, Vol. 1A at 62-63; *Transcript of Public Hearing*, Vol. 1, 24 August 2015, at 28-29.

by 17 percent.²⁷ New participants entered the North American market, including the Dominican Republic and Honduras.²⁸ Meanwhile, exports of the subject goods to the U.S. market decreased by 32 percent.²⁹

Domestic Market Conditions

42. The structure of the domestic industry remained stable following the 2010 inquiry, although Ontario increased its share of total production of the like goods by 6 percentage points, from 62 percent in 2009 to 68 percent in 2014.³⁰ As well, there were significant increases in the production and consumption of the like goods since the 2010 inquiry, which will be discussed later in these reasons.

43. The domestic industry became even more export-oriented, with the proportion of like goods exported to the United States rising from “at least half” of domestic production at the time of the 2010 inquiry to nearly 60 percent of domestic production in 2014.³¹

44. The sources of imports of greenhouse bell peppers into the Canadian market changed substantially following the 2010 inquiry.

45. During the POR, there were almost no imports of the subject goods.³² Imports from Mexico became an even more dominant source than previously, accounting for at least 89 percent of total imports in each full year of the POR, compared to approximately 60 percent of total imports in each full year of the period of inquiry (POI) for the 2010 inquiry.³³ Further, whereas imports from Mexico had been minimal in the Canadian market in June, July and August during the POI, things have changed since the 2010 inquiry. During the POR, they accounted for at least 41 percent of imports in these three months.³⁴ In fact, in 2014, imports from Mexico accounted for more than 50 percent of total imports in every month.³⁵ There was also a greater presence of greenhouse bell peppers from Spain and the Dominican Republic in the Canadian and U.S. markets, generally during the winter months.³⁶

46. At the time of the 2010 inquiry, the Tribunal observed that the nature of greenhouse bell pepper production results in variations in supply over the course of a growing season.³⁷ In this expiry review, Mr. George Gilvesy testified that there are no gaps in domestic production during the growing season because of the different flush times caused by diverse climates and staggered planting by growers.³⁸ The Tribunal also

27. Exhibit RR-2014-005-34.10 at 68.17, Vol. 1A.

28. Exhibit RR-2014-005-05A, Table 11, Vol. 1.1; Exhibit RR-2014-005-A-05 at 25, Vol. 11, *Transcript of Public Hearing*, Vol. 1, 24 August 2015, at 49; Exhibit RR-2014-005-36A, Vol. 1A at 82.3-82.4.

29. Exhibit RR-2014-005-A-05 at 51-52, Vol. 11.

30. Exhibit RR-2014-005-10.01, Table 29, Vol. 1.3; Exhibit RR-2014-005-05A, Table 10, Vol. 1.1.

31. *Greenhouse Bell Peppers* (19 October 2010), NQ-2010-001 (CITT) [*Greenhouse Bell Peppers*] at para. 80; Exhibit RR-2014-005-05A, Table 10, Vol. 1.1; Exhibit RR-2014-005-34.10, Vol. 1A at 68.17.

32. Exhibit RR-2014-005-06A (protected), Table 11, Vol. 2.1.

33. Exhibit RR-2014-005-34.09, Vol. 1A at 68.9-68.11, 68.13-68.15; *Greenhouse Bell Peppers* at para. 96.

34. Exhibit RR-2014-005-34.09, Vol. 1A at 68.13-68.15; *Greenhouse Bell Peppers* at para. 83. The Tribunal notes one exception in July 2012 when imports from Mexico represented only 14 percent of all imports in that month.

35. Exhibit RR-2014-005-34.09, Vol. 1A at 68.15.

36. Exhibit RR-2014-005-05A, Table 11, Vol. 1.1; Exhibit RR-2014-005-34.09, Vol. 1A at 68.11-68.15; Exhibit RR-2014-005-04 (protected), Vol. 2 at 9; *Transcript of Public Hearing*, Vol. 1, 24 August 2015, at 28, 49, 104-105; *Transcript of In Camera Hearing*, Vol. 1, 24 August 2015, at 22-23. The Tribunal heard testimony that there were significant quality issues with the greenhouse bell peppers imported from the Dominican Republic and recognizes that the same level of imports may not materialize in future years.

37. *Greenhouse Bell Peppers* at para. 74.

38. *Transcript of Public Hearing*, Vol. 1, 24 August 2015, at 9.

heard testimony from Mr. Delorme and Mr. Macchio that, at times during the 2015 domestic growing season (and possibly past seasons), there was a shortage of like goods available in Canada.³⁹

47. The Tribunal considers that both statements, which may appear contradictory, are accurate. The apparent contradiction arises from the fact that growers do not directly control the destination of their products. Rather, the destination is determined by the marketers, which (as will be discussed later in these reasons) are often choosing to export rather than to sell in the domestic market. Therefore, while there may be no gaps in *production*, and while domestic growers may strive to avoid shortages or gaps in the marketplace, the preponderance of the evidence is that, at times, there is still a shortage of like goods available for the domestic market.⁴⁰

48. Finally, the Tribunal heard testimony that, since 2010, the peaks and valleys that used to influence the price of greenhouse bell peppers have mostly disappeared. In particular, Mr. Jack Greydanus testified that the pricing peaks have largely been eliminated due to the increased presence of imports from Mexico during the shoulder seasons and that the pricing valleys were eliminated once the finding against the subject goods was put in place.⁴¹

Likely Performance of the Domestic Industry

49. The Tribunal will examine the likely performance of the domestic industry if the finding is continued, taking into account the industry's recent performance.⁴² For the purposes of this analysis, the Tribunal will consider whether there are any relevant factors other than the dumping of the subject goods affecting or likely to affect the domestic industry's performance in the next 18 to 24 months.⁴³

50. The OGVG pointed to the ongoing cost pressures from increases in wages, natural gas and electricity costs, the "vagaries of the weather", concerns over the energy infrastructure and the increased presence of imports from Mexico during the shoulder seasons as factors contributing to the current and future vulnerability of the domestic industry.

Production, Sales, Exports and Market Share

51. Domestic production of greenhouse bell peppers grew continuously over the POR, rising by 15 percent in 2013 and 2 percent in 2014, for a total increase of 16 percent.⁴⁴ As previously noted, the volume of exports of like goods increased by 17 percent over the POR, and, as a result, the proportion of exports from domestic production was almost 60 percent.⁴⁵ A corroborating view of the domestic industry's

39. *Ibid.* at 77-79, 112-14.

40. *Ibid.*

41. *Ibid.* at 10, 43-44.

42. See paragraph 37.2(2)(c) of the *Regulations. 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, in an expiry review, it is required 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.

43. See paragraph 37.2(2)(k) of the *Regulations*.

44. Exhibit RR-2014-005-05A, Table 10, Vol. 1.1. The increase in production reflects a 9 percent increase in the area harvested and an almost 7 percent increase in yield. Exhibit RR-2014-005-34.06, Vol. 1A at 68.2.

45. Exhibit RR-2014-005-05A, Tables 10, 18 (notes), Vol. 1.1; Exhibit RR-2014-005-34.10, Vol. 1A at 68.17.

export orientation came from Mr. Delorme, who testified that he perceived that as much as 65 to 70 percent of domestic production is exported to the United States.⁴⁶

52. The Tribunal heard testimony that demand for greenhouse bell peppers has been positively influenced by the promotion of healthy eating and healthier food choices and the consumer movement to buy locally produced goods.⁴⁷ In this regard, the Tribunal notes that, from 2012 to 2014, the size of the Canadian market increased by 10 percent.⁴⁸ However, sales of the like goods increased by only 6 percent, resulting in the market share of like goods decreasing from 69 percent to 66 percent.⁴⁹

53. Looking to the future, the Tribunal is of the view that the domestic industry's outlook in terms of production, sales, exports and market share is positive.

54. Mr. Delorme testified that Loblaw, which is responsible for 35 percent of all sales of greenhouse bell peppers in Canada, is forecasting that the Canadian market for greenhouse bell peppers will continue to grow at 3 to 5 percent per year.⁵⁰ Witnesses for the OGVG also testified that demand for greenhouse bell peppers will continue to increase in the future, albeit not at the same rate as seen in the past.⁵¹ The Tribunal also heard testimony that the trends toward healthier eating and buying local product will continue to influence consumers and be a factor in that growth.⁵² Mr. Delorme also testified that Loblaw "always" looks to buy domestic product as opposed to imported product because of quality, freshness and consumer demand.⁵³ Therefore, the Tribunal finds that market growth of 3 to 5 percent per year during the next 18 to 24 months is likely.

55. With growing demand in Canada, albeit at a slower pace than previously, and the strong preference of retail buyers for local product, the Tribunal is of the view that the domestic industry is likely to retain its current share of the domestic market and to continue to experience strong sales, to the extent that like goods are not sold instead to the United States. Although imports from Mexico encroached on the shoulder seasons during the POR, they do not seem to have negatively affected the domestic industry's market share in a substantial manner, which, as noted above, fell by only 3 percentage points. Accordingly, the Tribunal sees no evidence to support the contention that the domestic industry will lose substantial market share to imports from Mexico in the future.

56. As noted above, intermittent shortages of like goods in the Canadian market are the result of marketers choosing instead to service customers in the United States. While the current favourable Canadian-U.S. exchange rate clearly enhances the attractiveness of selling greenhouse bell peppers in the United States rather than in Canada, the Tribunal finds that export sales are not solely dependent on this current favourable exchange rate being maintained. Throughout each full year of the POR, the majority of

46. *Transcript of Public Hearing*, Vol. 1, 24 August 2015, at 77-78.

47. *Ibid.* at 29-31, 65, 110-11.

48. Exhibit RR-2014-005-05A, Table 14, Vol. 1.1.

49. *Ibid.*

50. *Transcript of Public Hearing*, Vol. 1, 24 August 2015, at 67-68.

51. *Ibid.* at 29-30. One witness described the market as "mature".

52. *Ibid.* at 67-68.

53. *Ibid.* at 64-65, 67-69. However, Mr. Delorme testified that price is also very important and that there is "a trade-off between quality, price and origin". For example, Loblaw may look at using imported product for discount banners in certain months because a smaller size may be available for a lesser cost.

domestic production was exported notwithstanding a “much stronger” Canadian dollar during that period.⁵⁴ Therefore, the Tribunal concludes that exports to the United States are likely to continue to be strong even if the current favourable exchange rate does not persist.

57. The Tribunal also heard concerns that the expansion by some domestic growers into the United States may lead to a potential decline in export sales to the United States in the future.⁵⁵ Such an outcome, if it happened, would be the result of the cannibalization of sales between the Canadian and the U.S. divisions of those domestic growers also present in the United States. The Tribunal does not consider this self-inflicted situation as posing an imminent risk to the domestic growers, especially as the evidence indicates any negative impacts are not likely to materialize in the next 18 to 24 months.⁵⁶ As such, the Tribunal sees no reason why the domestic industry’s future export performance should not continue to be strong in the near to medium term.

58. In any event, the Tribunal heard evidence that the domestic industry is not currently supplying the domestic market to its fullest extent during the peak season despite the demand for local product. It is very likely that most, if not all, of the potentially lost export sales resulting from the expansion of Canadian growers in the United States could be reallocated to the domestic market.

59. The Tribunal heard testimony that at least one domestic grower is looking at increasing capacity by 20 acres in 2016, and there is evidence that other domestic growers have planned expansions in the next few years.⁵⁷ The Tribunal recognizes that some of these planned expansions may not occur due, in part, to various infrastructure constraints.⁵⁸ The Tribunal notes however that these infrastructure constraints have existed for a while and yet, overall, the domestic industry continued to be profitable. Furthermore, even if the domestic industry’s pace of expansion in Canada were to slow in the future, the Tribunal does not consider that this would overturn its likely positive performance in the next 18 to 24 months.

Prices

60. The average price of like goods in the domestic market remained flat over the POR, holding steady at CAN\$3.02 per kilogram in 2012 and 2013 and then rising by 1 percent to CAN\$3.05 per kilogram in 2014.⁵⁹ On the other hand, the average price of exports of the like goods increased by 9 percent over the POR, from CAN\$3.25 per kilogram in 2012 to CAN\$3.53 per kilogram in 2014.⁶⁰

54. Exhibit RR-2014-005-05A, Tables 10, 18 (notes), Vol. 1.1; Exhibit RR-2014-005-34.10, Vol. 1A at 68.17; Exhibit RR-2014-005-05A, Table 37, Vol. 1.1. The Tribunal also takes judicial notice of the exchange rate for the Canadian dollar against the U.S. dollar as of October 15, 2015, which was 0.7784.

55. Exhibit RR-2014-005-34.01, Vol. 1A at 55-57; Exhibit RR-2014-005-34.02, Vol. 1A at 59-60; Exhibit RR-2014-005-34.03, Vol. 1A at 62; *Transcript of Public Hearing*, Vol. 1, 24 August 2015, at 55-56.

56. Exhibit RR-2014-005-34.03, Vol. 1A at 62; Exhibit RR-2014-005-34.02, Vol. 1A at 59.

57. Exhibit RR-2014-005-A-04 at para. 2, Vol. 11; *Transcript of Public Hearing*, Vol. 1, 24 August 2015, at 31-32, 36; Exhibit RR-2014-005-06A (protected), Table 35, Vol. 2.1.

58. Exhibit RR-2014-005-34.05, Vol. 1A at 67-68; Exhibit RR-2014-005-A-06 at para. 9, Vol. 11; Exhibit RR-2014-005-34.03, Vol. 1A at 63; Exhibit RR-2014-005-A-06 at paras. 3-5, 8, Vol. 11; *Transcript of Public Hearing*, Vol. 1, 24 August 2015, at 21-22; Exhibit RR-2014-005-34.04, Vol. 1A at 65; Exhibit RR-2014-005-34.05, Vol. 1A at 67; *Transcript of Public Hearing*, Vol. 1, 24 August 2015, at 36.

59. Exhibit RR-2014-005-05A, Table 16, Vol. 1.1.

60. *Ibid.*, Table 18.

61. Given the nature of the like goods, prices may vary for any number of reasons, including the size, quality, availability and freshness of the product.⁶¹ The Tribunal heard that the pricing of greenhouse bell peppers is generally done on a daily or weekly spot basis—there are very few long-term contracts at fixed prices. In this regard, Mr. Delorme testified that Loblaw requests weekly pricing quotes on a variety of products (domestic and imported) from a large group of existing and potential vendors and uses these quotes to determine a market price for the following week.⁶² There is evidence that prices are often set in the context of the increasingly integrated North American market.⁶³ Information on domestic and import pricing is also shared at weekly OGVG “market call” meetings.⁶⁴

62. It is therefore difficult to predict the future prices of the like goods. Nonetheless, given the pricing trends seen during the POR and the supply and demand conditions described above, there is no evidence to suggest that prices of the like goods will be substantially different over the next 18 to 24 months.

Financial Performance

63. The domestic growers experienced positive financial results throughout the POR, as both aggregate and unit gross margins and net incomes increased significantly. For example, unit gross margins increased by 10 percent, while unit net income increased by 62 percent.⁶⁵

64. The Tribunal notes that domestic growers achieved these positive results despite having faced substantial increases in costs, including both labour and energy costs, as well as infrastructure constraints.⁶⁶ The domestic growers appear to have been able to offset these challenges with increased productivity so that the average unit cost of direct labour actually decreased over the POR.⁶⁷ As well, domestic growers benefitted from an increase in farm-gate returns.⁶⁸

65. Looking ahead, the Tribunal heard from growers that they face ongoing pressures which will negatively affect their profitability. As well, Mr. Gerard Verbeek and Mr. Greydanus pointed to an increasingly complex regulatory regime.⁶⁹

66. The Tribunal agrees that many of the cost and infrastructure challenges facing the domestic industry will persist in the near to medium term and that the pricing mechanism for the like goods does not allow growers on their own to increase prices to cover increased costs, despite the absence of the subject goods in the domestic market.⁷⁰ Eventually, these pressures could lead to competitiveness or structural problems for the industry. The Tribunal, however, is not convinced that these pressures will significantly worsen the

61. Exhibit RR-2014-005-A-02, at para. 7, Vol. 11; *Transcript of Public Hearing*, Vol. 1, 24 August 2015, at 71-72, 74-75, 120.

62. *Transcript of Public Hearing*, Vol. 1, 24 August 2015, at 62-63, 71-72.

63. *Ibid.* at 15-16, 46-49, 71, 75-78, 125-26.

64. Exhibit RR-2014-005-A-02 at paras. 5-6, Vol. 11; *Transcript of Public Hearing*, Vol. 1, 24 August 2015, at 15-16.

65. Exhibit RR-2014-005-05A, Table 29, Vol. 1.1; Exhibit RR-2014-005-06B (protected), Table 1, Vol. 2.1.

66. Exhibit RR-2014-005-05A, Tables 30, 31, Vol. 1.1; Exhibit RR-2014-005-06B (protected), Table 2, Vol. 2.1.

67. Exhibit RR-2014-005-05A, Tables 30, 33, Vol. 1.1; Exhibit RR-2014-005-06B (protected), Tables 2, 4, Vol. 2.1.

68. Exhibit RR-2014-005-05B, Figure 19, Vol. 1.1; Exhibit RR-2014-005-34.06, Vol. 1A at 68.2.

69. Exhibit RR-2014-005-A-04 at paras. 17-19, Vol. 11; Exhibit RR-2014-005-A-03 at paras. 12-15, Vol. 11; *Transcript of Public Hearing*, Vol. 1, 24 August 2015, at 15, 26, 41-42; Exhibit RR-2014-005-05A, Table 31, Vol. 1.1.

70. Exhibit RR-2014-005-06A (protected), Table 11, Vol. 2.1.

domestic industry's situation in the next 18 to 24 months or that it will become significantly more vulnerable to injury from the resumption or continuation of dumping during that period.⁷¹

Summary

67. In view of the above, the Tribunal concludes that the domestic industry will likely perform well over the next 18 to 24 months with the finding in place.

Likely Import Volume of Dumped Goods

68. Paragraph 37.2(2)(a) of the *Regulations* directs the Tribunal to consider the likely volume of the dumped goods if the finding 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.

69. The Tribunal's assessment of the likely volumes of subject imports encompasses 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 and/or countervailing measures in other jurisdictions, and whether measures adopted by other jurisdictions are likely to cause a diversion of the subject goods to Canada.⁷²

Likely Performance of the Foreign Industry

70. In its submissions supporting a continuation of the finding, the OGVG argued that excess production of the subject goods, limited demand in the Netherlands, the weak financial performance of the Dutch greenhouse bell pepper industry and its significant export orientation in the face of declining export markets will cause the Netherlands to push the subject goods into any available export market.⁷³ In particular, the OGVG pointed to the Netherlands' continued exports to the United States as evidence that they are "... ready, willing and able to export large quantities of goods across the Atlantic."⁷⁴

71. As noted above, although the Dutch greenhouse bell pepper industry remains heavily export-dependent, the volume of exports of the subject goods decreased by 10 percent from 2012 to 2014 even though production decreased by only 1 percent.⁷⁵ In the Tribunal's view, the fact that exports decreased during the POR does not support a conclusion that an increase in exports of the subject goods to Canada is likely in the next 18 to 24 months. Moreover, the fact that exports decreased to a greater extent than production makes it even less likely that an increase in exports will occur in the next 18 to 24 months.

71. Staff of the Administrative Tribunals Support Service of Canada (ATSSC) presented forecasts of the domestic industry's 2015 and 2016 financial performance in the supplement to the investigation report. The forecasts make various assumptions about future prices and costs based on actual results during the POR. Subsequent evidence caused the Tribunal to question the assumptions used in this exercise and to not use the forecasts in its analyses. The forecasts implicitly assume no increase in output or capacity in 2015 and 2016 compared to 2014. With no increase in output or capacity, the assumptions with regard to increases in overhead costs may not be appropriate. Also, the forecasts implicitly assume the inability of growers to benefit from the positive revenue impact of larger U.S. sales volumes, higher U.S. prices and a lower Canadian dollar. Exhibit RR-2014-005-06B (protected), Vol. 2.1 at 158-62.

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

73. Exhibit RR-2014-005-A-01 at para. 24, Vol. 11.

74. *Ibid.* at para. 44.

75. Exhibit RR-2014-005-A-05 at 52-53, Vol. 11.

72. Further, although the OGVG pointed to exports of the subject goods to the United States as evidence of Dutch propensity to seek out available markets, as noted above, exports of the subject goods to the United States declined by almost 32 percent over the course of the POR.⁷⁶ Given that there are no anti-dumping duties or countervailing measures in place in the United States, this evidence undermines the assertion that the subject goods will necessarily flood any available market.

73. As was the case for the like goods, the Tribunal notes it is equally difficult to predict the future prices of the subject goods. Prices of the subject goods at any point in time in any particular market depend on a myriad of factors, including daily, weekly, monthly and seasonal supply and demand conditions in the Netherlands and other countries.

74. There is little evidence to assist the Tribunal in making this assessment.

75. Although the OGVG submitted evidence suggesting that prices of the subject goods had reached a low point in late 2014,⁷⁷ the Tribunal notes that these prices were reported in November of that year, which is well outside the scope of the Netherlands' peak growing season. Therefore, the Tribunal does not consider that these prices are necessarily indicative of future prices in other markets or at other points in time.

76. As evidence of the propensity of Dutch producers to dump greenhouse bell peppers, the OGVG pointed to data showing that the export prices of the subject goods to many key markets were lower than the overall average export price of the subject goods.⁷⁸ However, there is no information whether the colour, size, quality and packaging of the subject goods sold in these various markets are the same.⁷⁹ Given that differences in these variables can significantly affect the price of greenhouse bell peppers⁸⁰ the Tribunal finds these country-specific data to be of limited use in supporting the submissions of the OGVG or at arriving at a conclusion on the future export prices of the subject goods to the various markets.

77. The Tribunal notes however that the same data show that the overall average export price of the subject goods was essentially the same in 2014 as it had been in 2012.⁸¹ Assuming that the overall product mix of Dutch exports remained relatively constant during these years, in the Tribunal's view, this price stability suggests that there is no reason to expect lower export prices of the subject goods in the next 18 to 24 months.

78. Export prices of the subject goods have remained stable despite reports that some Dutch greenhouse vegetable growers have been struggling financially.⁸² Although the evidence in question only briefly refers to greenhouse bell peppers specifically, given that greenhouse bell peppers comprise approximately 20 percent of all Dutch greenhouse vegetable production,⁸³ the Tribunal finds it reasonable to conclude that some Dutch growers of greenhouse bell peppers may continue to experience financial difficulties in the near to medium term.

76. *Ibid.* at 51.

77. *Ibid.* at 17.

78. *Ibid.* at 51-52.

79. Exhibit LE-2014-004-08.01 at para. 11, Vol. 1.

80. The terminal price data of the Agricultural Marketing Service of the United States Department of Agriculture also show that size and colour impact pricing. Exhibit RR-2014-005-34.13, Vol. 1A at 68.32.

81. Exhibit RR-2014-005-A-05 at 51-52, Vol. 11.

82. *Ibid.* at 1-2, 9.

83. *Ibid.* at 53.

Potential for Product Shifting

79. The OGVG submitted that the Tribunal should consider the Netherlands' entire greenhouse growing capacity as a potential source of exports of the subject goods, since growers of a different greenhouse product "... can convert production to a greenhouse vegetable in a subsequent year, if the alternative becomes more commercially appealing."⁸⁴

80. While the Tribunal agrees that product conversion is theoretically possible, it is nonetheless unlikely. Several responses to the Tribunal's domestic growers' questionnaire indicated that conversion would require changes to growing practices and the purchase and installation of new harvesting and packing equipment.⁸⁵ Furthermore, as noted above, the evidence suggests that Dutch growers of greenhouse bell peppers are facing some financial difficulties. This makes it even more unlikely that growers that currently operate in other segments of the industry would suddenly convert their existing operations to additional greenhouse bell pepper crops in order to access the Canadian greenhouse bell pepper market.

81. Assuming that it would be equally difficult and costly for Dutch growers to convert from growing other crops to growing greenhouse bell peppers, the Tribunal finds that there is little potential for product shifting.

Potential for Diversion

82. The OGVG pointed to an August 6, 2014, Russian ban on the import of a variety of agricultural goods from the European Union, as well as several other nations, as likely to cause the Netherlands to divert exports of the subject goods to Canada.⁸⁶

83. The Tribunal notes that this is a political embargo rather than a trade remedy measure.⁸⁷ Furthermore, the Tribunal notes that, even when exports of the subject goods to the Russian Federation were at their highest level of the POR in 2014, they accounted for less than 1 percent of total exports of the subject goods.⁸⁸ As such, it is unlikely that the imposition of Russian sanctions, in and of themselves, substantially increases the risk of diversion of the subject goods to Canada. Moreover, as this embargo has now been in place for more than a year, the effects have likely already been absorbed by the market.

Likely Absolute Volumes

84. Given that the subject goods were virtually absent from the domestic market throughout the POR,⁸⁹ the reappearance of the subject goods at any volume would represent a "significant" increase in relative terms.

85. As noted several times above, exports of the subject goods to the United States, a market without any anti-dumping or countervailing duties against the subject goods, declined over the POR, at the same time as exports of the like goods increased.⁹⁰

84. Exhibit RR-2014-005-A-01 at para. 46, Vol. 11.

85. Exhibit RR-2014-005-16 (protected).

86. Exhibit RR-2014-005-A-05 at 73-74, Vol. 11. As noted in the foregoing exhibit, the embargo has since been extended until August 6, 2016.

87. Pursuant to paragraph 37.2(2)(i) of the *Regulations*, the Tribunal may consider whether the imposition of measures by the authorities in other countries is likely to cause a diversion of the dumped goods into Canada.

88. Exhibit RR-2014-005-A-05 at 51-52, Vol. 11; Exhibit RR-2014-005-34.10, Vol. 1A at 68.21.

89. Exhibit RR-2014-005-06A (protected), Table 11, Vol. 2.1.

90. Exhibit RR-2014-005-05B, Tables 16, 17, Vol. 1.1.

86. Further, the Tribunal finds that consumer preferences may also impact demand for the subject goods within the domestic market. In particular, the evidence revealed that the “buy local” movement has created a strong preference for the domestic goods over imports.⁹¹ For instance, Mr. Macchio stated that retailers specifically request local product when it is in season, while Mr. Delorme testified that Loblaw would “always” look to first buy domestic goods before looking to purchase imports.⁹² While price will continue to play a major role in purchasing decisions, the preponderance of the evidence clearly indicates that there is, and will continue to be, substantial demand for domestic goods over imported goods, including the subject goods.

87. In view of the above, imports of the subject goods will almost certainly increase if the finding is rescinded. The Tribunal finds that, while the change will be significant in relative terms, it has no basis to justify a projection that the absolute volume of imports of subject goods will be substantial.⁹³

Likely Relative Volumes

88. According to testimony of both a major retailer and a marketer, imported greenhouse bell peppers are typically used to fill gaps in supply.⁹⁴ The witnesses explained that such gaps could occur because of particular circumstances, such as a poor growing season, an unexpected increase in demand or sales of domestic goods being shifted to the United States to benefit from a favourable exchange rate.⁹⁵ While retailers and marketers may supplement their greenhouse bell pepper supply with imported product, the testimony established that this was largely done during the domestic off-season (i.e. November to March), or on an as-needed basis “. . . when the market is very tight or for a specialty crop”⁹⁶

89. In particular, Mr. Delorme stated that, if the subject goods were to re-enter the domestic market free of anti-dumping duties, Loblaw “. . . would not go out and actively secure large-scale vendors or programs on these products given that we have secure sources in Canada we’ve been developing over the years, and that is our preferred sourcing region.”⁹⁷ Rather, he testified that the subject goods might be used to “augment” purchases of the like goods in the event that there were gaps in availability in supply.⁹⁸

90. Given the above, the Tribunal finds that, if the finding is rescinded, the volume of imports of the subject goods will likely not be significant relative to either the production or consumption of the like goods.

Likely Price Effects of Dumped Goods

91. The Tribunal must consider, if the finding is rescinded, whether the dumping of the subject goods is likely to significantly undercut the prices of like goods, depress those prices or suppress them by preventing increases in those prices that would likely have otherwise occurred.⁹⁹ In this regard, the Tribunal

91. *Transcript of Public Hearing*, Vol. 1, 24 August 2015, at 30, 65, 87-88, 110.

92. *Ibid.* at 64, 110.

93. Staff of the ATSSC prepared two forecasts of the volume of imports of the subject goods in the absence of the finding. Both forecasts assume that imports of the subject goods will return in 2015 to the levels seen in 2009 and then extrapolate future volumes from that base. After review of the evidence, the Tribunal finds that there is no basis for these assumptions. Exhibit RR-2014-005-06B (protected), Vol. 2.1 at 145.

94. *Transcript of Public Hearing*, Vol. 1, 24 August 2015, at 66, 105-106.

95. *Ibid.* at 78-79, 105-106.

96. *Ibid.* at 66, 105-106.

97. *Ibid.* at 69.

98. *Ibid.* at 69-70.

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

distinguishes the price effects of the dumped or subsidized goods from any price effects that would likely result from other factors affecting prices.

Price Undercutting

92. The Tribunal notes that the subject goods were imported into the domestic market in very small volumes during the POR.¹⁰⁰ It is therefore difficult to extrapolate any meaningful pricing trends from those imports.

93. However, the subject goods were present in the U.S. market, where there were no trade measures in place. Witnesses testified that the U.S. and Canadian markets “work together”, such that prices in the United States are either quite similar to those in Canada, or at the very least impact domestic prices.¹⁰¹ Therefore, the Tribunal finds that the prices of the subject goods in the United States represent the best available information with which to conduct its analysis of the likely price effects of the subject goods in the Canadian market if the finding is rescinded.

94. In order to achieve the most accurate pricing comparison, the Tribunal considered the landed price of imports from the Netherlands to the United States. As the landed duty-paid price is the point at which imports from the Netherlands are sold to marketers, importers or wholesalers, it is the closest comparator to the domestic marketers’ selling price,¹⁰² with only the marketers’, importers’ or wholesalers’ markup being absent from the Dutch price.¹⁰³ When measured against one another in each full year of the POR this comparison reveals that, notwithstanding the lack of restrictive trade measures for the subject goods in place in the United States, landed duty-paid prices of the subject goods were higher than the market price of like goods by CAN\$0.54 in 2012, CAN\$1.75 in 2013 and CAN\$2.25 in 2014.¹⁰⁴ This price difference increases further once a seller’s profit margin or markup is added to the landed duty-paid price. The trend, therefore, shows not only that imports from the Netherlands were not undercutting the domestic producers’ market price of the like goods over the POR but also that the like goods increasingly held a price advantage.

95. At the hearing, Mr. Gilvesy described OGVG market calls during which there were mentions of the subject goods potentially being sold in New York City in June 2015 at a landed price of US\$12 to US\$13 per 5 kilograms.¹⁰⁵ He further testified that these prices would have been discussed in the context of alerting market call participants that they would need to compete against lower prices in the U.S. market in the coming weeks.¹⁰⁶ However, there were significant difficulties with this evidence. Specifically, Mr. Gilvesy

100. Exhibit RR-2014-005-06A (protected), Table 8, Vol. 2.1.

101. *Transcript of Public Hearing*, Vol. 1, 24 August 2015, at 46-49, 125-26.

102. The marketers’ selling price includes the cost paid to the growers, plus the marketers’ commission. Exhibit RR-2014-004-05A, Vol. 1.1 at 71.

103. Neither the custom value nor the terminal price of imports from the Netherlands are appropriate comparators. The “custom value” of imports from the Netherlands does not include any transportation or duties payable upon importation, while the terminal prices represent the wholesale trading prices including delivery to the terminal but no retail markup or transportation to the retailer’s distribution centre. Exhibit R-2014-005-38.02, Vol. 1A at 92. However, the Tribunal recognizes that, in situations where retailers directly imported the subject goods, there would be no additional “retail markup” on those goods. In such instances, the landed paid price would be directly comparable to the domestic marketers’ selling price.

104. Exhibit RR-2014-005-05A, Table 16, Vol. 1.1; Exhibit RR-2014-005-05B, Table 17, Vol. 1.1. All prices are in Canadian dollars.

105. *Transcript of Public Hearing*, Vol. 1, 24 August 2015, at 15-16.

106. *Ibid.* at 46-47.

acknowledged that the market calls themselves used an “anecdotal process”.¹⁰⁷ However, there is no way to confirm the accuracy of this price point, the potential volumes which it included, the type of product (i.e. size or colour) or the quality of the product being sold. As such, without any additional information about the nature of these subject goods discussed during the market call, it is difficult for the Tribunal to rely on them in order to draw general conclusions about what the likely prices of the subject goods would be in Canada in the absence of the finding.

96. In addition, a US\$12 to US\$13 price would be a significant and unexplained departure from the monthly landed duty-paid prices of imports from the Netherlands to the United States from 2012 to 2014. For instance, when expressed as a price per kilogram in Canadian dollars, these market call prices would be equivalent to approximately CAN\$2.97 to CAN\$3.21.¹⁰⁸ When these prices are compared to the average annual landed duty-paid prices of imports from the Netherlands into the United States, it can be seen that the landed duty-paid prices are considerably higher than the market call prices.¹⁰⁹ The Tribunal examined the annual landed duty-paid prices of imports from the Netherlands further by using monthly data to address any seasonality that may be concealed in the annual prices. From 2012 to 2014, the Tribunal had 33 monthly comparison points and all but one of these comparison points were higher than the market call prices to which Mr. Gilvesy referred.¹¹⁰ Consequently, the Tribunal is of the view that it can put little weight on the market call pricing testimony due to its inability to confirm the volume, type or quality of the imported goods in question and the inconsistency with the U.S. data on the record.

97. Even if the Tribunal were to accept these prices as being accurate and reliable, they still do not support the contention that the subject goods are likely to significantly undercut the price of the like goods. When compared to the highest yearly average price of the like goods recorded over the POR, at the most extreme (CAN\$2.97 per kilogram), the subject goods would be just CAN\$0.08 below the price of the like goods, while, at CAN\$3.21 per kilogram, the subject goods would remain CAN\$0.16 *higher* than the lowest annual price of the like goods.¹¹¹ The Tribunal also notes that the market call price does not include a seller’s profit margin that would bring it up to a market price. Using the lowest markup used for non-subject imports seen in the Tribunal’s investigation report (8 percent) brings the lowest of the market call prices from CAN\$2.97 to approximately CAN\$3.20, which would be higher than the lowest annual price of the like goods.¹¹²

98. The OGVG submitted that, on occasion, the subject goods were sold at prices that would have undercut those of the like goods.¹¹³ The Tribunal heard that, at the end of season, or if the greenhouse bell peppers were substandard in quality, they could be sold at liquidation prices in a secondary market to so-called “undertakers”.¹¹⁴ The Tribunal does not consider these occasional market-clearing prices to be indicative of price levels generally.

99. As noted above, domestic growers do not control their prices. The like goods and the subject goods are considered commodities and are generally sold at “spot” prices. The evidence discloses that prices for greenhouse bell peppers are generally set for the North American market and that, as a result, the subject

107. *Ibid.* at 50.

108. The price per kilogram is calculated by dividing the US\$12 to US\$13 price by five and then dividing the results by 0.809, the Canadian/U.S. exchange rate for June 2015, as shown in Exhibit RR-2014-005-05A, Table 37, Vol. 1.1.

109. Exhibit RR-2014-005-05B, Table 17, Vol. 1.1.

110. *Ibid.*, Table 18.

111. Exhibit RR-2014-005-05A, Table 16, Vol. 1.1.

112. *Ibid.*, Tables 13, 16.

113. Exhibit RR-2014-005-A-01 at para. 51, Vol. 11.

114. *Transcript of In Camera Hearing*, Vol. 1, 24 August 2015, at 5-6.

goods already have an impact on prices of the like goods in Canada due to their presence in the United States.

100. In light of the foregoing, combined with the Tribunal's earlier finding that the price of the subject goods is likely to remain relatively stable, the Tribunal finds no positive evidence to support a finding that price undercutting by the subject goods is likely to occur. In so saying, the Tribunal recognizes that there may be specific instances in which a shipment of the subject goods is imported at a reduced price—for instance, in order to clear product at the end of the season—however, the Tribunal finds that such instances are not likely to be consistent or significant.

Price Depression and Price Suppression

101. As the price of the subject goods in the United States rose steadily over the POR, while, at the same time, the price of the like goods remained essentially stable,¹¹⁵ there is no evidence that the price of the subject goods has depressed the prices of the like goods.

102. Moreover, as noted above, while there may be specific instances in which the subject goods are sold at reduced prices, the Tribunal finds that such instances are not likely to be consistent or significant and are therefore not likely to have significant price-depressive effects.

103. With regard to price suppression, the Tribunal heard extensive testimony about the cost challenges facing the industry. However, the Tribunal notes that, during the POR, the industry was able to increase its profitability despite increasing costs.¹¹⁶ Moreover, given that the prices of the subject goods will likely not significantly or consistently undercut the prices of the like goods, the Tribunal finds that the subject goods will not have significant price-suppressive effects on the prices of the like goods.

104. In view of the above, the Tribunal concludes that significant price depression and significant price suppression are not likely to occur.

Likely Impact on the Domestic Industry

105. In its assessment of the likely impact of the above volumes and prices on the domestic industry if the finding is rescinded,¹¹⁷ the Tribunal is also taking into consideration the likely performance of the domestic industry if the finding is continued, as discussed above. In this analysis, the Tribunal distinguishes the likely impact of the dumped goods from the likely impact of any other factors affecting or likely to affect the domestic industry.¹¹⁸

106. While considering the likely impact on the domestic industry if the finding is rescinded, the Tribunal must determine whether the dumping is, in and of itself, likely to cause injury to the domestic industry. This is consistent with prior Tribunal decisions.¹¹⁹ While doing so, the Tribunal must carefully distinguish between any injury caused by the dumped goods and the negative impacts of other factors that may be affecting the domestic industry at the same time. In order to do so, the WTO has held the following:

... that an investigating authority establish a “causal relationship” between dumped imports and the injury to the domestic industry. In the course of identifying this causal relationship, investigating authorities are not permitted to attribute to dumped imports injuries caused by other factors which are injuring the domestic industry at the same time. Critical to the effective operation of the

115. Exhibit RR-2014-005-05A, Table 16, Vol. 1.1; Exhibit 2014-005-05B, Table 17, Vol. 1.1.

116. Exhibit RR-2014-005-05A, Table 29, Vol. 2.1.

117. See paragraphs 37.2(2)(e) and (g) of the *Regulations*.

118. See paragraph 37.2(2)(k) of the *Regulations*.

119. See *Oil Country Tubular Goods* (23 March 2010), NQ-2009-004 (CITT) at para. 209; *Unitized Wall Modules* (12 November 2013), NQ-2013-002 (CITT) at footnote 35.

non-attribution obligation, and indeed, the entire causation analysis, is the requirement of Article 3.5 to “examine any known factors other than the dumped imports which at the same time are injuring the domestic industry”, for it is the “injuries” caused by those “other” “known factors” that must “not be attributed” to dumped imports.¹²⁰

107. Thus, in considering the likely impact on the domestic industry, the Tribunal must be certain not to attribute any likelihood of injury to the other factors collectively pointed out by the OGVG as increasing the vulnerability of the domestic industry. These factors include ongoing cost pressures, difficulties caused by the weather, infrastructure constraints and the increased presence of imports from Mexico during the shoulder seasons.

108. This is not to say that these other factors are to be ignored or otherwise not taken into account by the Tribunal. The Tribunal has considered them very carefully. The Tribunal must take the domestic industry as it is and, therefore, must consider whether the dumped goods, in and of themselves, are likely to cause injury to an allegedly vulnerable industry. In this sense, the Tribunal may recognize that more than one circumstance negatively affects, or is likely to negatively affect, the domestic industry. However, within the spectrum of factors that negatively affect the domestic industry, the Tribunal must isolate the dumped goods in order to determine whether they will, in and of themselves, cause material injury to the domestic industry.

109. The Tribunal believes that, while the terms “injury caused by other factors” and “injury caused by the dumped goods” are frequently used interchangeably, for the purposes of a causation analysis under *SIMA*, they should not be conflated. Rather, in accordance with section 2 of *SIMA*, “injury means material injury to a domestic industry”. Bearing in mind that such material injury may not be attributed to factors other than the dumped goods, for the purposes of the likely impact on the domestic industry, the Tribunal must determine whether the dumped goods have caused injury to the domestic industry within the larger context of various other factors that may negatively affect that same industry.

110. Having considered all the evidence and the submissions of the parties, the Tribunal finds that, if the finding is rescinded, the continuation or resumption of dumping of the subject goods is not likely to cause material injury to the domestic industry for the following reasons.

111. As discussed above, the evidence indicates that demand for greenhouse bell peppers will continue to increase, albeit at a slower pace than previously.¹²¹ At the same time, the evidence demonstrates that the “buy local” movement, together with the importance of product freshness, has created a strong preference for domestic products over imports.¹²² Mr. Delorme testified that Loblaw, which accounts for approximately 35 percent of greenhouse bell pepper sales in Canada,¹²³ would “always” look to first buy domestic goods before looking to purchase imports.¹²⁴ As noted above, while price will continue to play a major role in purchasing decisions, the preponderance of the evidence clearly indicates that there is, and will continue to be, substantial preference for domestic goods over imported goods, including the subject goods.

120. Panel Report, *Mexico – Anti-dumping Duties on Steel Pipes and Tubes from Guatemala*, WT/DS331/R, adopted 8 June 2007, at 7.352; Appellate Body Report, *United States – Anti-dumping Measures on Certain Hot-rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001, at paras. 223-24.

121. *Transcript of Public Hearing*, Vol. 1, 24 August 2015, at 29, 67-68.

122. *Ibid.* at 30-31, 65, 86, 110.

123. *Ibid.* at 61.

124. *Ibid.* at 64-65, 67-69. However, Mr. Delorme testified that price is also very important and that there is “a trade-off between quality, price and origin”. For example, Loblaw may look at using imported product for discount banners in certain months because a smaller size may be available for a lesser cost.

112. Mr. Delorme further testified that the price differential between the subject goods and the like goods would have to be substantial in order to change purchasing decisions.¹²⁵ He mentioned that the price difference of CAN\$5.00 to CAN\$10.00 per 5-kilogram case would be significant, as far as he is concerned.¹²⁶ The Tribunal finds that, if the finding is rescinded, it is unlikely that the price of the subject goods will generally be so low as to result in a price differential of this magnitude. Therefore, demand for the subject goods will be limited, as retailers and marketers will continue to prefer the like goods.¹²⁷

113. The evidence discloses however that there is currently a shortage of availability of like goods in Canada. In this context, the subject goods may help to meet the demand in the domestic market which is not being satisfied by domestic growers, according to the evidence from Tribunal witnesses. Therefore, in view of the evidence and of the Tribunal's finding that there is no positive evidence to support a finding that price undercutting by the subject goods is likely to occur,¹²⁸ the Tribunal concludes that, if the finding were not in place, the subject goods (of a desired size, quality and colour) would likely generally replace existing imports from non-subject sources during the peak months.

114. According to the evidence, most of the workforce in the domestic industry is paid at minimum wage.¹²⁹ This, in itself, prevents a downward pressure on the wages.

115. In sum, while the subject goods could be used to fill gaps in availability, the continued strong demand for the like goods from domestic growers makes it unlikely that the domestic industry's output, sales and market share will decrease to any great extent as a result of the reappearance of the subject goods in the low import volumes anticipated by the Tribunal. Since the reappearance of the subject goods will not have a significant adverse impact on the demand for the like goods, nor are they likely to significantly undercut, depress or suppress the prices of the like goods, the Tribunal finds that the subject goods are also likely to have only a minimal impact on the domestic industry's profits.

116. Obviously, there is potential for declines in any of the domestic industry's performance indicators due to the reappearance of the subject goods in the domestic market. As the domestic industry is export-driven, there is a strong possibility that any declines in the domestic market could be offset by an increase of sales to the United States, which currently provide a greater income to the domestic industry. Therefore, while the potential of a decline of the domestic industry's performance indicators exists, there is no strong evidence to suggest that this is likely to happen.

117. The evidence also discloses that, in any event, the expected growth in domestic demand in the near to medium term is not going to match the growth witnessed since the measures were put in place. There is no evidence to suggest, however, that the growth experienced since 2010 is a result of the measures. To the contrary, the evidence discloses that the growth was the result of changing consumer preferences.

118. The domestic industry showed healthy returns both at the time of 2010 inquiry (which did not find an injury despite the presence of the subject goods at the time) and again during the POR. While conjectural arguments have been made by the domestic industry, the evidence itself does not disclose that the price effects of the subject goods or the volumes of subject imports would be sufficient to cause material injury.

125. *Transcript of Public Hearing*, Vol. 1, 24 August 2015, at 84.

126. *Ibid.* at 87-88.

127. *Ibid.* at 30-31, 65, 86, 110.

128. See paragraph 100 of these reasons.

129. Exhibit RR-2014-005-A-01 at para. 68, Vol. 11; Exhibit RR-2014-005-A-03 at para. 14, Vol. 11; Exhibit RR-2014-005-A-04 at para. 17, Vol. 11.

119. The factors other than the dumping are well documented and were also discussed by the witnesses for the domestic industry at the hearing. The Tribunal is cognizant that monthly imports from Mexico of greenhouse bell peppers to Canada during the domestic growers' peak season of June to September were higher in both 2013 and 2014 than in 2012, with the exception of September 2014.¹³⁰ The growing market presence of Mexican product could have a negative impact on the performance of the domestic industry, particularly if the prices of imports from Mexico are notably lower than the price of the like goods, although as noted above, the Tribunal does not believe such an impact would be substantial.¹³¹ Moreover, this potential harm cannot be attributed to the subject goods, as there is no evidence suggesting that prices of the subject goods would undercut imports from Mexico.

120. There were also extensive submissions and testimony relating to the challenges faced by the domestic industry in light of rising costs of labour, electricity and natural gas.¹³² Evidence was also presented that growth prospects are constrained by infrastructure limitations in the delivery of electricity¹³³ and natural gas,¹³⁴ with the evidence suggesting that these constraints will continue for at least the next 18 to 24 months.¹³⁵ Such cost and infrastructure pressures, when combined with the production location incentives provided by several U.S. states, could encourage the establishment of U.S.-based operations,¹³⁶ raising the prospect that product grown in these U.S. facilities could displace Canadian exports.¹³⁷

121. These factors are structural in nature and have existed for a while. This has not prevented the industry from being profitable during the POR. There is nothing in the evidence that leads the Tribunal to find that the situation will worsen in the next 18 to 24 months as a result of those factors. The industry will have to contend with those factors regardless of the disposition of this matter.

122. Even if these other co-existing factors were to reduce the domestic industry's profitability and growth, the Tribunal finds that the impact of the subject goods on the domestic industry's profitability will be minimal, given the likelihood of low import volumes and the unlikelihood that the subject goods will undercut, depress or suppress the prices of the like goods if the finding is rescinded. For these reasons, the Tribunal cannot conclude that the dumping itself will likely cause material injury to the domestic industry.

DETERMINATION

123. On the basis of the foregoing analysis, the Tribunal finds that, if the finding is rescinded, the continuation or resumption of dumping of the subject goods is not likely cause material injury to the domestic industry.

130. Exhibit RR-2014-005-34.09, Vol. 1A at 68.13, 68.14, 68.15.

131. See discussion at paragraph 55 of these reasons.

132. Exhibit RR-2014-005-A-04 at paras. 17-19, Vol. 11; Exhibit RR-2014-005-34.03, Vol. 1A at 63; Exhibit RR-2014-005-A-06 at paras. 7-8, Vol. 11; Exhibit RR-2014-005-34.04, Vol. 1A at 65; Exhibit RR-2014-005-A-03 at paras. 12, 14-15, Vol. 1A; *Transcript of Public Hearing*, Vol. 1, 24 August 2015, at 12-15, 20, 26, 33-40, 42, 53-54.

133. Exhibit RR-2014-005-34.04, Vol. 1A at 65; Exhibit RR-2014-005-34.05, Vol. 1A at 67.

134. Exhibit RR-2014-005-A-06 at para. 10, Vol. 11; *Transcript of Public Hearing*, Vol. 1, 24 August 2015, at 36, in which Mr. Verbeek testified that Platinum Produce Company's planned expansion is conditional upon an infrastructure upgrade being completed.

135. Exhibit RR-2014-005-A-06 at para. 2, Vol. 11.

136. Exhibit RR-2014-005-34.01, Vol. 1A at 55-57; Exhibit RR-2014-005-34.02, Vol. 1A at 59-60.

137. *Transcript of Public Hearing*, Vol. 1, 24 August 2015, at 55.

CONCLUSION

124. Pursuant to paragraph 76.03(12)(a) of *SIMA*, the Tribunal hereby rescinds its finding in respect of greenhouse bell peppers originating in or exported from the Netherlands.

Jean Bédard

Jean Bédard
Presiding Member

Peter Burn

Peter Burn
Member

Rose Ritcey

Rose Ritcey
Member