
**BEFORE THE
DEPARTMENT OF COMMERCE
INTERNATIONAL TRADE ADMINISTRATION**

**COMMENTS TO THE UNFAIR TRADE PRACTICES TASK FORCE
Canadian Practices Affecting U.S. Potato Exports**

**WRITTEN SUBMISSION OF THE
NATIONAL POTATO COUNCIL (NPC)**

John Keeling
Executive Vice President/CEO
National Potato Council
1300 L Street, NW, Suite 910
Washington, D.C. 20005
(202).682.9456

Jerry C. Hill
Pamela D. Walther
McDermott Will & Emery LLP
600 13th Street, NW
Washington, D.C. 20005-3096
(202) 756.8217
(202) 756-8220

Legal Counsel for NPC

June 28, 2004

**BEFORE THE
DEPARTMENT OF COMMERCE
INTERNATIONAL TRADE ADMINISTRATION**

**COMMENTS TO THE UNFAIR TRADE PRACTICES TASK FORCE
Canadian Practices Affecting U.S. Potato Exports**

**WRITTEN SUBMISSION OF THE
NATIONAL POTATO COUNCIL**

The following comments regarding unfair trade practices affecting U.S. potato exports to Canada are being submitted on behalf of the National Potato Council (Council) in response to the *Federal Register* notice of May 27, 2004 (69 *Fed. Reg.* 30285), requesting public sector comments on unfair trade barriers adversely affecting U.S. sectors, to be addressed on a priority basis by the Unfair Trade Practices Task Force of the U.S. Department of Commerce.

The National Potato Council represents the interests of all commercial potato growers in the United States. The Council assists its potato growers in addressing market access issues for both fresh and processed potatoes. The Council coordinates its efforts on trade policy matters with the American Potato Alliance, which is a trade group representing many major U.S. potato processors and retailers.

The industry's comments are specific to two **unfair trade practices of Canada** that have persistently frustrated fair and equitable access to the Canadian market for U.S. fresh potatoes.

These are:

- (i) Canada's **prohibition on exports of U.S. fresh potatoes in bulk quantities**, unless a Ministerial waiver is granted; and
- (ii) Canada's **unfair application of its antidumping law** that has resulted in artificially high antidumping duties on fresh potatoes being shipped from the Northwest into British Columbia.

These practices, individually and collectively, limit access to the Canadian market and increase costs for U.S. potato growers. In contrast, there are no restrictions on Canadian potato exports to the U.S. market. In addition, the following comments address certain **Canadian assistance programs** that provide unfair advantages to Canadian potato growers and processors.

For nearly two decades, the U.S. industry has been seeking relief from both the bulk shipment restriction and the unfair methodology used by Canada to assess antidumping duties on Northwest potato exports. Although U.S. industry efforts have been numerous on both issues and there have been many U.S. government interventions by the U.S. Trade Representatives Office (USTR) and the U.S. Department of Agriculture (USDA) on the bulk shipment issue, Canada has consistently refused to change its laws or apply them in a more equitable, less trade-restrictive manner.

This past year, the U.S. Trade Representative's Office and USDA have intensified efforts to correct the unfair and discriminatory practices, but those efforts have yet to yield relief. The industry is therefore requesting that the Unfair Trade Practices Task Force identify the two Canadian practices as priority unfair trade barriers and coordinate efforts with USTR and USDA to aggressively pursue reform of both measures.

I. Canada's Prohibition on Bulk Shipments Unfairly Blocks U.S. Exports of Fresh Potatoes to Canada.

A. The Bulk Shipment Prohibition

Canada prohibits imports of fresh potatoes from the United States in bulk quantities (*i.e.*, in containers larger than 50 kg), whether the potatoes are being imported for fresh consumption or processing, unless a "Ministerial Exemption" is granted by the Canadian government. The authority for the bulk shipment restriction is found in Canada's Standard Container Law, which is part of the Fresh Fruits and Vegetable Regulations of the Canadian Agricultural Products Act.

In practice, the Ministerial Exemption requirement acts as a ban to bulk shipments of U.S. fresh potatoes to Canada. Exemptions are granted on a case-by-case basis and only if "there is no domestic (Canadian) production" to supply the order. The regulations allow any neighboring province to that where the bulk shipment is going to object to the granting of a Ministerial

Exemption on the basis that domestic (Canadian) potatoes are available. That objection is based solely on the fact that Canadian potatoes are available to fill an order, without consideration of the price and quality of the available Canadian product. As a result, Ministerial Exemptions are rarely granted.

What makes the practice unfair is that the bulk shipment prohibition does not apply to Canadian potatoes shipped within a province and is applied in a much less trade-restrictive manner to Canadian potatoes shipped between provinces. For inter-provincial shipments between provinces, only the receiving Canadian province (not all neighboring provinces) can object to bulk imports on the basis that there is local production available. Because the bulk shipment prohibition and the criterion for exemptions treat U.S. imports less favorably than “like” Canadian potatoes, the law is a clear violation of the National Treatment principle of the WTO (GATT Article III) and the comparable NAFTA provision (Article 301). GATT Article III and NAFTA Article 301 require Canada to treat imports “no less favorably” than the treatment it accords to its own “like” domestic products. Granting Ministerial Exemptions to inter-provincial trade on much less onerous requirements than the requirements applied to imports is *per se* “treatment less favorable” and a violation of the National treatment principle. The discriminatory nature of the bulk shipment restriction was identified by the International Trade Commission in its 1997 Section 332 report on *Fresh and Processed Potatoes: Competitive Conditions Affecting the U.S. and Canadian Industries* (Inv. No. 332-378, July 1997).

B. The Prohibition and Onerous Exemption Requirements Cost U.S. Growers Tens of Millions of Dollars Annually

The U.S. potato industry estimates that the bulk shipment restriction and onerous Ministerial Exemption requirements applied to the importation of U.S. fresh potatoes into Canada cost U.S. growers \$25 million to \$30 million annually in lost sales. Most of the losses are incurred by potato growers in the U.S. Northeast or Pacific Northwest states, near the border of Canada. These growers would have a lucrative market in exporting fresh potatoes to Canada for processing, if they could freely ship in bulk quantities.

C. U.S. Government Action Requested

Efforts by the U.S. potato industry and U.S. government over the course of two decades to remove the WTO-inconsistent bulk shipment prohibition have been unsuccessful. Recently, the industry has been working with USTR and USDA to intensify efforts and develop a more aggressive strategy to remove the prohibition and Ministerial Exemption, even if this requires resorting to formal dispute settlement. U.S. potato growers ask that the Unfair Trade Practices Task Force support the ongoing government efforts to ensure a reasonable and timely resolution, resulting in unrestricted and fair access for U.S. fresh potatoes to Canada.

II. Canada's Antidumping Laws are Applied Unfairly, Resulting in Artificially High Antidumping Duties on Northwest U.S. Potato Exports

A. Canada's Methodology Allows for an Outdated and Inflated Normal Value-Import Price Comparison and Determines Injury Based on a Small "Regional" Industry.

Since 1984, Canada has imposed antidumping duties on imports of fresh potatoes from Washington, Oregon and Idaho that enter British Columbia below an established "normal value." Although the dumping duties have been applied only after a formal review under Canada's Special Import Measures Act, the review methodology is unfair in three ways, resulting in inflated dumping margins and high duties on U.S. potato exports.

The first two problems relate to the methodology used by Canadian authorities to determine the import price and "normal value," which are then compared to determine if U.S. exported potatoes to Canada are being sold at an unfair low price (*i.e.*, below the normal value). First, the "normal value" established by Canada for Northwest fresh potatoes, which is intended to reflect the price of the product in "the ordinary course of trade when destined for domestic consumption," is artificially high compared to the true cost of production of U.S. potatoes. The normal value is based on old, outdated data and does not account for higher yields, more advanced technology and improved packaging - - all which have lowered the U.S. cost. Efforts by the U.S. potato industry to update the cost and price information and lower the normal value price through Canada's administrative antidumping review procedures have been rebuffed by Canadian authorities.

The second problem relates to the “import price” of U.S. potatoes that is compared to the normal value. The Canadian government uses an artificially low import price, widening the gap between the import price and normal value and increasing the dumping margin. Instead of using the actual invoice price for each shipment of U.S. potatoes as the import value, and comparing that to the normal value, the Canadian government uses a published price (*i.e.*, prices reported in the *USDA Market News*) for russet potatoes (which are higher volume and lower priced than most potatoes) as the import price for all varieties of potatoes, even if the exported potatoes are a higher-priced variety. The artificially low import price often results in a dumping margin, even if the true invoice price of the shipment is above the normal value.

The third problem relates to Canada’s determination that the small British Columbian potato industry is a “regional industry” for purposes of determining injury. The small, inefficient size of the provincial industry and relatively high production costs lessen the burden required to show that U.S. potato exports are “materially injuring” B.C. potato growers.

B. Antidumping Duties are Preventing U.S. Exports to Canada

High dumping duties increase the price of U.S. potatoes, such that they cannot compete in the British Columbian market with locally grown potatoes. This means U.S. growers in the Pacific Northwest are losing important sales to Canada and significant revenue.

C. U.S. Government Action Requested

The U.S. Pacific Northwest potato industry has contested the Canadian dumping allegations and duties and the methodology used by Canadian authorities for calculating those duties during annual reviews of the dumping order in 1984, 1986, 1990, 1995, and 2000. Each time, the Canadian authorities have refused to revise the dumping order in a manner which is equitable to U.S. exporters. The U.S. industry plans to again challenge those calculations in this year’s Canadian review, but is not hopeful that Canadian authorities will consider the arguments any more this time than in past reviews. The industry is therefore requesting that the Unfair Trade Practices Task Force work with the U.S. Trade Representatives’ Office to closely review the methodologies being used by Canada and to consider whether a more formal challenge can be made by the U.S. government against Canada’s antidumping duties on U.S. Northwest potatoes.

III. Canadian Assistance Programs Benefit Canadian Potato Growers

In the past, both the International Trade Commission (ITC) and the Foreign Agricultural Service (FAS) of the U.S. Department of Agriculture have identified various Canadian Federal and Provincial subsidy programs benefiting Canadian potato growers and processors. Although some of these programs have been changed or reduced since the late 1990's when the U.S. government undertook reviews of the Canadian potato industry, U.S. potato growers understand that several Canadian assistance programs continue to benefit the Canadian industry to the detriment of U.S. potato growers. These include:

- *New Technology Grants* that are made available to potato growers in Canada to develop new technology for production and storage of potatoes. These grants have been used to purchase equipment and improve and build storage facilities.
- *Freight Assistance* provided to shippers to lower the cost of transportation of potatoes, including to the U.S. market. Although this program has been scaled back in recent years, the U.S. industry is told that there is interest within Canada to expand the program to help offset the increase in the Canadian dollar.
- *Net Income Stabilization Account (NISA)*, which was established in 1991, is a voluntary program designed to help participating agricultural growers in Canada, including potato growers, stabilize their farm income. Under the program, agricultural producers can deposit a percentage of their eligible sales into a NISA account and receive a matching contribution from the Federal and Provincial governments, which monies can be saved for retirement or withdrawn in years of low income.
- *No Interest Loans* at zero interest rate are provided to growers by the Canadian government for up to six months for crops that have been harvested and are in storage waiting to be sold.

The U.S. potato industry asks the Unfair Trade Practices Task Force to review these and other subsidy programs benefiting Canadian potato growers and to take all necessary steps to

have Canada remove any and all measures that provide Canadian growers with unfair advantages.

IV. Conclusion

The U.S. potato industry is frustrated by unfair trade practices of the Canadian government that have stifled access for U.S. potato exports. Although significant efforts have been made by the industry and U.S. government officials to reform the trade barriers, Canada has taken no steps to remove the unfair trade practices. The U.S. industry strongly urges the Unfair Trade Practices Task Force to work closely with USTR and USDA to develop a strategy to aggressively pursue resolution of these Canadian trade barriers, including pursuing formal trade remedy action, if necessary.

A handwritten signature in cursive script, appearing to read "John Keeling".

John Keeling
Executive Vice President/CEO
National Potato Council