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the tariff board

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THE TARIFF BOARD

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THE TARIFF BOARD

A study prepared for

The Law Reform Commission of Canada

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Notice

This study describes an important part of the federal administrative process. In the course of this description the authors identify a number of problems and suggest solutions for them. These suggestions may be useful for legislators and administrators currently considering reforms in this area. They are, however, solely those of the authors, and should not be considered as recommendations by the Law Reform Commission of Canada.

The concerns of the Law Reform Commission are more general and embrace the relationships between law and discretion, administrative justice and effective decision-making by administrative agencies, boards, commissions and tribunals. This study, and its companions in the Commission's series on federal agencies, will obviously play a role in shaping the Commission's views and eventual proposals for reform of administrative law and procedure.

The main research for this paper was completed in the summer of 1979. The Commission's major objective in publishing studies of federal agencies is to shed light on how an agency functions and the context within which it operates rather than to provide a current statement of the law in a regulated area. However, efforts have been made to update the information wherever this was possible.

Comments are welcome and should be sent to:

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I

Introduction

This study of the Tariff Board is one in a series of studies of federal administrative agencies, boards and tribunals, commissioned by the Law Reform Commission of Canada. It describes the complex legal context of the Board; the Board's organization and procedure; its work as an appellate body; and the Board's economic inquiry function. In the final chapter we offer some critical analysis of the Board's work together with appropriate recommendations.

The Tariff Board was created in 1931; royal assent was given the *Tariff Board Act*[1] on August 3 of that year. The Board was neither unexpected nor novel. In 1912 the House of Commons passed a Bill (Bill 88) to provide for the appointment of a Tariff Commission, but the legislation died because the government would not accept Senate amendments. In 1926 the government of Mackenzie King established, by Order in Council,[2] an Advisory Board on Tariffs and Taxation, scrapped by R. B. Bennett as soon as he assumed office.[3] And the Board of Customs, established by the *Customs Act*[4] and hearing certain appeals under that Act and the *Special War Revenue Act*,[5] had existed since Confederation.

The proposed 1912 Tariff Commission was intended to have inquiry powers very similar to those of the 1931 Board.[6] It was to be empowered to make inquiry, under the direction of the Minister of Finance, into the costs, in Canada and elsewhere, of raw materials, transportation, production, labour — indeed, "all conditions and factors which effect or enter into the cost of production and the price to consumers in Canada" and "generally all the conditions affecting production, manufacture, cost and price in Canada as compared with other countries . . ."(par. 1(*f*) and (*g*)). It was to make inquiry "into any other matter upon which the minister desires information, in relation to any goods which if brought into Canada or produced in

Canada are subject to or exempt from duties of customs . . .''(s. 2). The Commission was to hold, when empowered to do so by the Governor in Council, an inquiry under section 12 of the *Customs Tariff, 1907* (s. 3); that is, the Commission would be able, at the instance of the Governor in Council, to make investigations where it was thought that there existed a conspiracy or combination among manufacturers or dealers for the purpose of unduly enhancing prices. And, finally, the proposed Commission was ''[t]o inquire into any other matter or thing in relation to the trade or commerce of Canada which the Governor in Council sees fit to refer to the Commission for inquiry and report''.(s. 4)

When W. T. White, Minister of Finance in the government of Sir Robert Borden, moved second reading of the Bill for the Appointment of a Tariff Commission he commented that ''there is probably no question in the whole of the realm of political science upon which men and parties and economists have more widely or more earnestly differed than as to the principle upon which tariff rates would be based and established''.[7] White stressed the complexity and scope of the facts that must be known before tariffs can be wisely made; previous governments, the Minister said, had relied upon roving temporary committees of ministers (in 1893, 1897, and 1905-6), but it was impossible for such committees to obtain accurate information, particularly statistical information, on all the products and commodities in the tariff schedule. ''We propose, therefore,'' said White, ''to create a Tariff Commission with the duty of obtaining and collating information of which the government may avail itself in making its tariff law''.[8]

Bill 88 died in the Senate. For fourteen years nothing was done. Then, in 1926, by Order in Council, Mackenzie King's government established the Advisory Board on Tariffs and Taxation. The duties of this three-man board were ''to inquire into and hear representations on all matters pertaining to the tariff and other forms of taxation, as may be directed by the Minister of Finance, and to advise the minister in regard thereto''.[9] Apparently this short-lived Board was a success. One of its major tasks was to recommend changes in the tariff on iron and steel; in his 1930 budget speech, Finance Minister Charles A. Dunning referred to the ''active and intelligent'' leadership given by the Tariff Advisory Board on this question and commented that ''[o]fficers of the board and their experts have won the commendation of the industry for their efficiency and impartiality''.[10]

When Bennett became Prime Minister, as we have observed, he quickly scrapped the Board. But in the March 12, 1931 Throne speech notice was given that a bill to create a tariff board would be introduced.[11] In the debate on the resolution proceeding to the bill, Prime Minister Bennett made clear that the new Board would, in addition to having the inquiry function of the Tariff Advisory Board, take over the appeal function at that time possessed by the Board of Customs.[12] The Board of Customs was a creature of the *Customs Act*;[13] it reviewed the decision of appraisers as to fair market value of goods for duty purposes (s. 4), and was empowered to declare rates of duty when there was dispute or uncertainty over the proper rate (s. 54). In the debate on second reading, Bennett's bill was severely attacked by the opposition. A major argument was that section 4 empowered the new Board to recommend tariffs, and that this power was a derogation from Parliament's power to make tariffs. For example, Mackenzie King commented in this way on subsection 4(2):

> This board is not as has already been said to be merely a fact finding board. Here again it is to draw inferences. By the subterfuge of this language it is in reality to be a price fixing board. It will indicate to the ministry of the day that a certain price is a fair price, that if it is maintained the consumer will be free from exploitation and as such it will be claimed that the price should be maintained.[14]

He made the same point later:

> MR. MACKENZIE KING: I should like to make it clear that one of the powers conferred upon the board is to determine what increases of duty are to be made in certain cases.
>
> MR. BENNETT: No.[15]

Most changes to the 1931 Act have dealt with periodic revision of the pensions and salaries of Board members, and such other more or less housekeeping matters as appointment of temporary members, appointment of staff members through the Public Service Commission rather than by Order in Council, continuation in office of previously appointed Board members, appointment of Vice-Chairmen, and the quorum for appeals. The two major changes have been the repeal in 1948 of Part II as a result of abolition of the Board of Customs, and the addition of subsection 5(13) in 1950. These changes are discussed in the next Chapter.

The *Tariff Board Act*[16] sets forth the structure and powers of the Board and establishes the economic inquiry function. Because of historical accident described later, the Act barely mentions the

Board's appellate jurisdiction, and the details of that jurisdiction must be found in other statutes discussed in this study. Briefly, under the *Customs Act*[17], appeals on classification or value for duty may be made from a customs officer to a Dominion customs appraiser, from the appraiser to the Deputy Minister, and from the Deputy Minister to the Tariff Board. Under the *Excise Tax Act*[18] the Board has jurisdiction to declare whether any or what rate of tax is payable under the Act when there is some doubt, or a dispute between the person liable and the Deputy Minister. Under the *Anti-dumping Act*[19] the Tariff Board may hear appeals concerning final determinations of dumping made by the Deputy Minister; final determinations establish the margin of dumping (and hence the anti-dumping duty) by fresh computation of normal value. It may also hear appeals from reviews and redeterminations by the Deputy Minister on the question of whether later imports are of the same description as the goods or description of goods to which anti-dumping duties apply. Finally, under the *Petroleum Administration Act*[20] there may be an appeal from the National Energy Board on the question of whether under the Act any charge is payable or as to the amount of the charge payable.

The main purpose of the tariff was originally to generate revenue. When, for example, the import duty on manufactured goods was set at twenty per cent in 1859, the government emphasized revenue requirements, admitting only that the duty "might afford a degree of 'incidental' protection".[21] The tariff provided eight-five per cent of revenue required for World War I: Sir Thomas White said in his war budget that "[t]he chief source and mainstay of our revenue is the tariff and it is to this we must look principally for relief of present financial conditions".[22] Introduction of the *War Tax Act* in 1917 marked, in one sense, the end of the tariff era in Canadian politics. In 1919 there were general tariff reductions and a corresponding rise in income tax. By 1921 the tariff was providing only thirty-three per cent of government revenue.[23]

Today the tariff's remaining purpose, protection, is not of great importance. That is simply because, as a result of successful post World War II multi-lateral trade negotiations under the auspices of the General Agreement on Tariffs and Trade, the tariff walls have been lowered and in some cases eliminated. For example, when the Tokyo Round tariff changes are fully implemented, about eighty per cent of American imports of industrial products from Canada will be tariff-free, and about sixty-five per cent of Canadian imports from the United States will not attract duty. In addition, the levels of tariffs on

dutiable imports will have been lowered substantially. Now it is non-tariff barriers to trade — anti-dumping and countervail duties, technical standards, and so on — that are the focus of trade liberalization efforts.

As the importance of the tariff declines, a corresponding decline in the importance of the Tariff Board might be anticipated. But, first of all, so long as there are tariffs, appeals to the Board under the *Customs Act* will be crucial in some cases. One may also expect other aspects of the Board's jurisdiction — the anti-dumping jurisdiction, for example — to increase in significance. Finally, the Board's economic inquiry role may develop to give the Board a new influence in broad matters of trade policy. Instead of performing "industry studies" leading to tariff recommendations, the Board may undertake wide-ranging analyses. The August, 1980 reference, directing the Board to undertake a review of draft legislation on customs valuation and to study the impact of the proposed legislation on Canadian customs duties, suggests such a development.

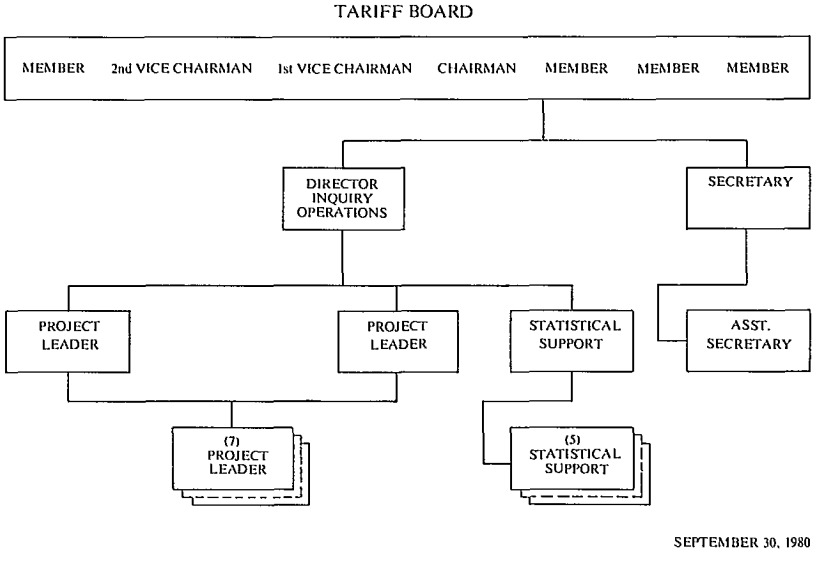
II

Board Organization

The Tariff Board consists of a Chairman, first Vice-Chairman, second Vice-Chairman, and four members. Board personnel is divided into administration and research. The research section, numbering sixteen, consists of the Director of Inquiry Operations and a staff of economists and statisticians. The Secretary of the Board and the Assistant Secretary are responsible for administration, and have a staff of twelve. Figure 1 shows the Board's organizational structure; Figure 2 indicates the growth of manpower from 1955 to 1976.

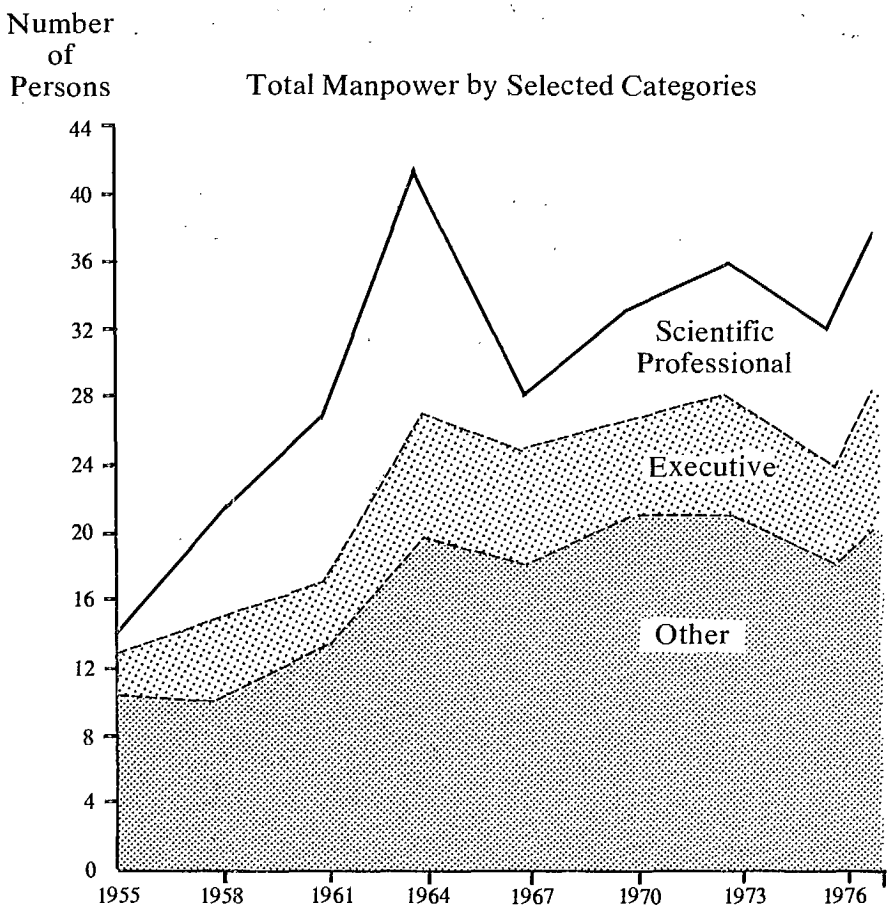
Tariff Board Organizational Structure

Figure 1



Total Manpower by Selected Categories

Figure 2



Source: Tariff Board. The executive category refers to Board Members.

The Director of Inquiry Operations serves as economic advisor to the Board and is in charge of the Board's Reference program; he is

responsible, under the Chairman, for the quality of the studies and reports on which the Board's recommendations rest. The senior project officers, under the direction of the Director, plan and conduct Reference research, assisted by project officers. The Head of Statistical Support is in charge of the statistical unit and acts as research assistant to the Director; statistical support officers collect and evaluate the statistical data necessary for the research.

The Board Secretary, under the general direction of the Chairman, acts as chief administrator, directing and coordinating all aspects of financial and personnel planning. The Secretary acts as official Board Secretary for the purposes of the *Tariff Board Act*, the *Excise Tax Act*, the *Customs Act* and the *Anti-dumping Act*. He is Clerk of the Court at appeal hearings, and official secretary at public sittings on References. The Assistant Secretary maintains records and files and assumes the duties of Secretary in the latter's absence.

Tariff Board membership has represented a fairly broad range of experience. Excluding members sitting at the time of writing (August, 1979), of twenty-one Board members, seven had mostly a career in the federal public service;[24] there were three lawyers[25] and three economists or accountants;[26] three former provincial politicians or civil servants;[27] two ex-Members of Parliament;[28] two ex-judges;[29] one farmer[30] and a businessman.[31] There is some slight overlap in some of these categories.

A look at sitting members (in the middle of 1979) shows similar backgrounds. K. C. Martin (appointed in 1973) has a business background. J. Bertrand (1977) is a lawyer. Grant Deachman (1973) is an ex-M.P. with a public relations background. A. C. Kilbank is an economist who was in the public service. P. McDougall, the Chairman,[32] has had a career in the federal public service.

The preponderance of federal public servants over the history of the Board, as valuable as a background in the public service is, may have been at the expense of highly relevant expertise. We have pointed out elsewhere in this study the legal and commercial complexity of much of the Board's work. Some, but not many, lawyers or economists have found their way onto the Board. Nor is there in-house legal counsel. One conception of the Board that serves to answer this objection is that the Board is a "People's Court". Presumably this notion implies, not that the Board is non-expert, but rather that it is broadly representative of Canada. The backgrounds of members suggest this is not the case. In particular, the private

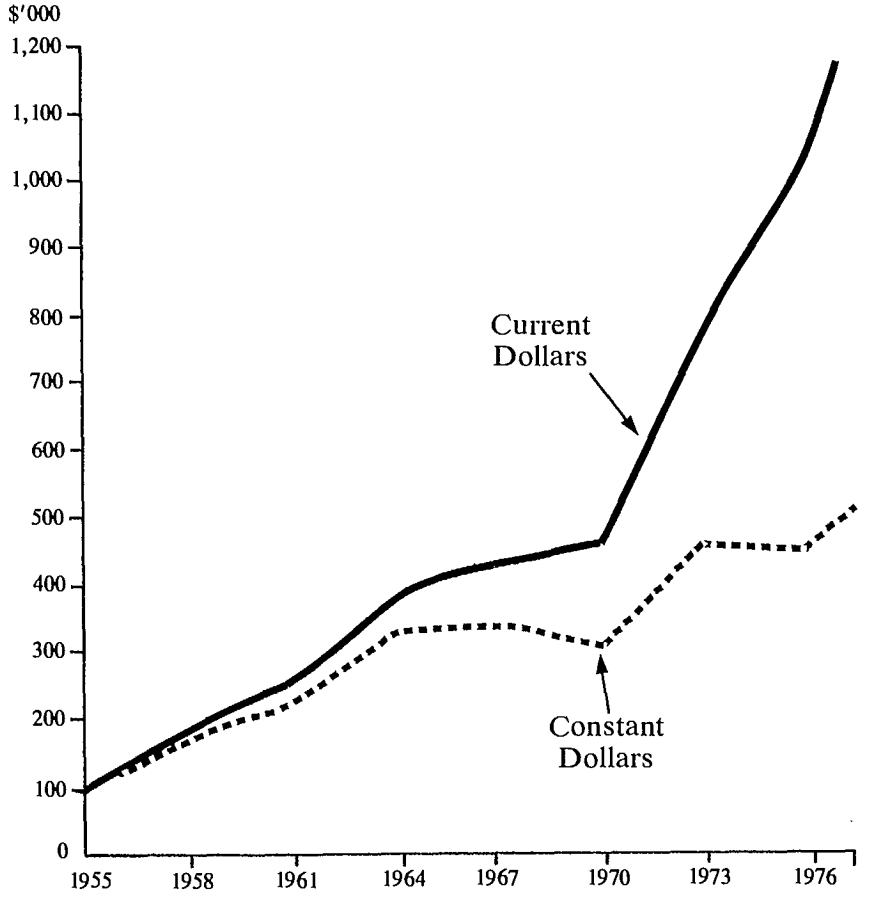
sector is significantly under-represented; there would seem to be an argument for having more members with substantial business experience.

Figure 3 illustrates the annual expenditure of the Board from 1955 to 1977. It shows that expenditure has increased regularly in current dollars, and has increased most years in constant dollars. Figure 4 shows, in constant dollars and for selected years, the estimated breakdown of total expenditures. The major part of expenditure, well over 80% every year, is on salaries. Services — transportation and communication, professional services, and so on — account for most of the remainder.

Total Expenditures, Current and Constant

Figure 3

Total Expenditures, Current and Constant
(1955) Dollars

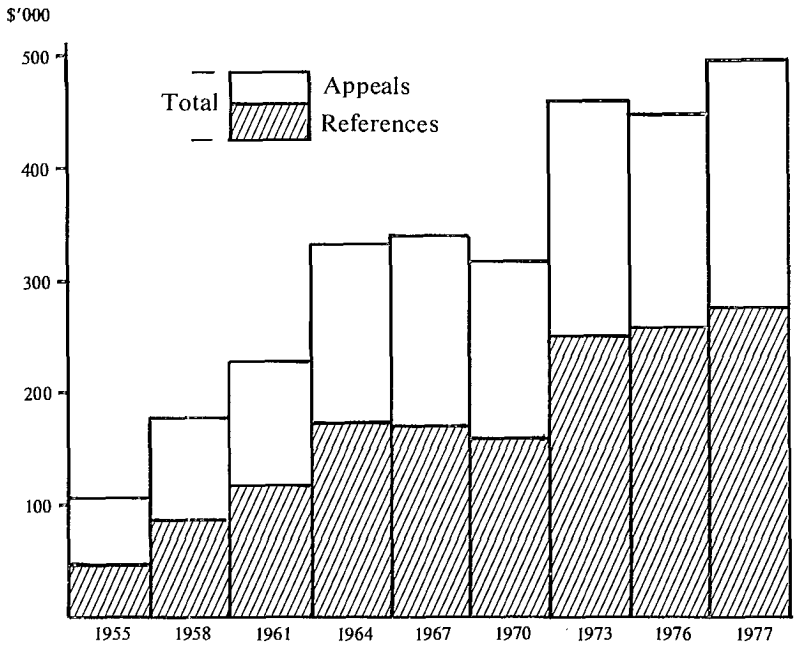


Source: Tariff Board

Estimated Breakdown of Total Expenditures, References and Appeals

Figure 4

Estimated Breakdown of Total Expenditures, References and Appeals, in Constant (1955) Dollars, for Selected Years



Source: Tariff Board

III

Procedure: The Legal Context

A. STATUTORY FRAMEWORK OF THE APPELLATE FUNCTION

1. The *Tariff Board Act*

Originally, the *Tariff Board Act*[33] was divided into two parts. Part I dealt with the Board's economic inquiry function; Part II, with the appellate function, the special concern of this section of our study. As an appellate body the Board originally assumed the duties of the old Board of Customs. The Board of Customs had been empowered to hear certain appeals under the *Customs Act*[34] and the *Special War Revenue Act*[35] (now the *Excise Tax Act*). In 1948 the *Customs Act* and the *Excise Tax Act* were amended to provide for an appeal to the Tariff Board rather than the Board of Customs;[36] thus Part II of the *Tariff Board Act* became redundant and was repealed.[37] Subsequently the Board acquired new jurisdiction by virtue of the *Anti-dumping Act* and the *Petroleum Administration Act*.

By subsection 3(1) of the present *Tariff Board Act* the Board consists of seven members appointed by the Governor in Council. It is also composed of a chairman and two vice-chairmen (subs. 3(2)); the term of office is ten years and is renewable (subs. 3(3) and (5)); and the quorum for an appeal is three (subs. 3(8)). Section 4 deals with the Board's economic inquiry functions. Section 5 sets forth the powers and procedures of the Board. It may summon witnesses (subs. 5(1)) and must give an opportunity to appear to persons not summoned (subs. 5(2)). The Board is a court of record (subs. 5(6)).

Subsection 5(9) allows the Board to "obtain information that in its judgment is authentic, otherwise than under the sanction of an oath or affirmation, and use and act upon such information". Subsection 5(10) is the confidentiality provision. Subsection 5(13) contains one of two references in the Act to the Board as an appellate body: "This section, except subsections (3) and (7), applies in respect of an appeal to the Board pursuant to any other Act or regulations thereunder as if the appeal were an inquiry within the meaning of this Act."[38] The remaining five short sections of the Act deal with the laying of reports before Parliament (s. 6); the appointment of Board staff (s. 7); the salaries of Tariff Board members (s. 8); publication of the Board's decisions (s. 9); and the making of regulations (s. 10).

This apparently straightforward statute is not without a curious feature. A major part of the Board's time is taken up with its appeal function, and yet that function is only recognized incidentally in subsections 3(8.1) and 5(13); the effect is that the powers and procedures for inquiries become those for appeals. So, for example, the Board is permitted to obtain information outside hearings and act on that information (subs. 5(9)).

2. The *Customs Act*

The Tariff Board, hearing appeals concerning value for duty and classification for duty, is only one stage in a complex system of customs administration set forth in the *Customs Act*. When imported goods enter the country they are first classified for duty by a customs official; the *Customs Tariff*[39] schedules define classes of goods and give tariff rates for each class. The official must then assess the value for duty of the goods in order to quantify the duty payable. If the importer is dissatisfied with these decisions, he may, under section 46 of the *Customs Act*, make a written request to a Dominion customs appraiser for a re-determination or a re-appraisal. By subsections 46(3) and 46(4), if the importer is dissatisfied with the decision of the appraiser, he may, within ninety days, make a written request to the Deputy Minister for a re-determination or re-appraisal. By section 47 an appeal may, in turn, be taken to the Tariff Board. Section 48 permits appeals from the Board to the Federal Court, and section 31 of the *Federal Court Act*[40] gives an ultimate appeal (by leave) to the Supreme Court of Canada.

Section 49 of the *Customs Act* enables the Deputy Minister to refer valuation and classification questions to the Board.

3. The *Excise Tax Act*

The *Excise Tax Act* imposes federal taxes upon a variety of goods. Part I imposes a tax on certain insurance premiums paid to foreign companies. Part II imposes a tax on transportation by air. Parts III and IV impose an excise tax on certain specific goods (cosmetics, jewellery, radios, playing cards, wine, and so on).

Part V of the Act imposes a general consumption or sales tax upon both imported and domestic goods. Subsection 27(1)[41] imposes a 12% tax calculated on the basis of the "sale price" of domestic goods and the "duty paid value" of imported goods: the tax is generally payable by the producer or manufacturer, or importer.[42]

Subsections 27(2), (4), 28(2) and section 29 (all in Part V) provide for certain exemptions from tax. Subsections 29(1), (2) and (3) exempt in full or in part the articles listed in Schedules III, IV and V of the Act. Section 42 in Part VI (the general part) exempts from tax goods exported from Canada and section 44 provides for deductions, refunds and drawbacks.

Section 59 of the Act enables both the Crown and the taxpayer to seek a declaration from the Tariff Board "as to whether any or what rate of tax is payable". Section 60 provides for appeals to the Federal Court, Appeal Division, and ultimately to the Supreme Court of Canada.

4. The *Anti-dumping Act*

Section 19 of the *Anti-dumping Act* provides for an appeal to the Tariff Board from the Deputy Minister's final determination of dumping under subsection 17(1) with respect to goods that were entered into Canada before a finding of injury by the Anti-dumping Tribunal, and from the Deputy Minister's re-determination or re-appraisal

under subsection 18(4) with respect to goods entered into Canada after a Tribunal finding. By section 20 there is a further appeal to the Federal Court and from there to the Supreme Court of Canada.[43]

5. The *Petroleum Administration Act*

The *Petroleum Administration Act*, according to its long title, is designed to "impose a charge on the export of crude oil and certain petroleum products, to provide compensation for certain petroleum costs and to regulate the price of Canadian crude oil and natural gas in interprovincial and export trade". By section 17 a declaration may be sought from the Tariff Board "as to whether any charge is payable or as to the amount of the charge that is payable on the exportation of any oil . . .". Under section 65.18 the Board may be asked to make similar declarations with respect to charges on domestic or imported oil processed, consumed or sold in Canada. At the time of writing the Board has not made any declarations under the *Petroleum Administration Act*.

B. ASPECTS OF JURISDICTION

1. The *Tariff Board Act*

The earliest case concerning the Tariff Board's jurisdiction was *Reference Concerning the Jurisdiction of the Tariff Board*.[44] Subsection 49(1) of the then *Customs Act*[45] authorized the Governor in Council to fix the value for duty of certain items by Order in Council when he was satisfied that the imports were harmful to Canadian manufacturers. In 1932 the section was amended to exclude from its operation states entitled to British Preferential treatment.[46] Importers from these states, previously affected by orders in council fixing the value for duty of their goods, applied to the Tariff Board for a declaration that the orders were annulled. Domestic producers objected that the Board had no jurisdiction to make such a declaration,

and the Governor in Council referred the matter to the Supreme Court.

Rinfret J., giving the judgment of the Court, observed that Part II of the *Tariff Board Act* transferred to the Board only the powers and duties of the Board of Customs. Said the judge:

> The Board of Customs was, and the Tariff Board is, in no sense, a court. By force of the provisions of the *Customs Act*, it is not a judicial body but an administrative body. Its functions were and are purely departmental. Its duties as set forth in the Act are all in respect to questions of fact; and there is nothing in the *Customs Act* which purports to exclude from the jurisdiction of the ordinary courts any question of law, either with regard to the validity of the Minister's acts or otherwise . . . It follows that in the performance of its duties under Part II the Board must give effect to the orders of the Minister . . . .[47]

The Board, Rinfret said, had no jurisdiction to determine the validity of Orders in Council. It decided only facts, and not matters of law:

> The enactment does not intend to confer jurisdiction to deal with anything but physical values and facts. Of course, in so doing, the Dominion appraiser, or the Board must be guided by a certain view of the law; but, in so far as they are concerned, the law includes the Orders in Council and the order of the Minister. In no way are they authorized to dispute the validity of those orders . . .[48]

The Supreme Court accepted the argument of the domestic producers.

In 1934 the *Tariff Board Act*, the *Customs Act* and the *Special War Revenue Act* were not what they now are. The Board of Customs had had no obligation to hold a formal hearing. Nor was any such obligation imposed by Part II of the *Tariff Board Act*. Section 48 of the 1927 *Customs Act* enabled the Tariff Board to hear evidence, but did not oblige it to do so. The Board's function under the section was simply to re-appraise value for duty if the original appraisal was wrong. There was no provision for an appeal from the re-appraisal and no mention of "questions of law".

In 1948 the *Customs Act* was amended.[49] By subsection 49(1) of the amended Act, an importer could take an appeal to the Tariff Board as of right. By subsection 49(3), a further appeal could be taken, with leave, to the Exchequer Court on questions of law. By subsection 49(6) there might be further appeal to the Supreme Court of Canada. The Act was further amended in 1950 to oblige the Board to publish notice of hearing and to allow interested parties to be

heard.[50] Similar amendments to the *Excise Tax Act* were made in 1951.[51]

Likewise the *Tariff Board Act* itself was amended in 1950.[52] A new subsection 5(13) provided that most of section 5, hitherto applicable only to the Board's inquiry function, now applied to the appellate function as well. Now, for example, the Board was obliged to give persons who had not been summoned an opportunity to be heard, and the Board in its appellate function was a court of record.

2. The *Customs Act*

(a) classification

Under section 47 of the *Customs Act* the Board may, among other things, determine the appropriate tariff classification of imported goods (as we have seen, it performs a similar function under the *Excise Tax Act*). The *Hunt Foods* case[53] was an appeal to the Exchequer Court from a Tariff Board declaration that imported shortening should be classified under Tariff item 71100-1, the "basket provision" for goods not otherwise enumerated. The appellant and respondent had agreed that shortening *was* otherwise enumerated, either as "hydrogenated oils" under item 27700-1 or as "lard compound and similar substances" under item 1305-1; this agreement was contained in an agreed statement of facts placed before the Board. It was argued before the court that the Board had exceeded its jurisdiction by disregarding this agreement, and had erred in disregarding the express or implied admissions of the Deputy Minister that if the article should not be classified under 27700-1 then it should be classified under 1305-1. Kerr J. did not agree. The Tariff Board, he said, has a statutory duty to "make such order or finding as the nature of the matter may require". The Board's jurisdiction cannot be limited by an agreed statement of facts or by admissions of the Deputy Minister.[54]

(b) value for duty

The jurisdiction of the Board is not unlimited, however. In the *Elliott* case[55] the Board had determined the value for duty of a "loading tool" as $196. The Deputy Minister had previously deter-

mined that the lowest value which could be accepted for duty purposes was $185. The Board stated that its declaration did not confer upon the Deputy Minister the right to levy duties in excess of his original appraisement. In the Exchequer Court, Cameron J. said that the Board had no jurisdiction to make any such order. Subsection 43(4) of the *Customs Act* stated:

> The Deputy Minister may re-determine the tariff classification or reappraise the value for duty of any goods
>
> . . .
>
> (c) at any time, to give effect to a decision of the Tariff Board, the Exchequer Court of Canada or the Supreme Court of Canada with respect to those goods . . . .[56]

Although the Board may make "such order or findings as the nature of the matter may require", it may not take away this statutory power of the Deputy Minister.

(c) effect of the order

In the *Javex* case[57] the issue was the classification of "Clorox". In Appeal 363 the Tariff Board, on a reference from the Deputy Minister, had ruled that Clorox was not properly classifiable under tariff item 219a, an end-use item giving favourable treatment to the imported product. Oppenheimer Brothers, a Clorox importer, had not known of the appeal (and hence had been unable to intervene). Oppenheimer imported a new shipment of Clorox in order to launch a new classification hearing on the same issue. As expected, the Deputy Minister ruled that this importation should not be classified under item 219a (and classified it under item 711). Oppenheimer appealed to the Board (Appeal 398). The Board, contrary to its declaration in the earlier reference, now classified Clorox under 219a. The Deputy Minister (incensed, one presumes) appealed to the Exchequer Court arguing that the Board's decision in Appeal 363 was a judicial decision *in rem* by a court of record and the matter was therefore *res judicata* — in other words, the Board was not free to now classify Clorox under 219a. The Deputy Minister relied on subsection 5(6) of the *Tariff Board Act* (the Board is a court of record) and on subsection 44(3) of the *Customs Act* (now subs. 47(3)) which states that the "order, finding or declaration of the Tariff Board is final and conclusive".

Cameron J. rejected the Deputy Minister's argument. The decision in Appeal 363 was not a judicial decision *in rem* because it "did not operate on the thing known by the trademark "Clorox" but merely upon the personal rights, liabilities or interests of the parties thereto in relation to "Clorox".[58] Nor was the matter *res judicata*, for there was no identity of issues; in Appeal 363 the decision merely stated that Clorox was not properly classifiable under item 219a, whereas in Appeal 398 the issue was whether the Deputy Minister was right in classifying Clorox under item 711. The Supreme Court upheld Cameron J.'s decision. Said Mr. Justice Martland, speaking of the *Customs Act:*

> When the Act states that such an order, finding or declaration shall be final and conclusive, subject to further appeal, I do not interpret it as meaning anything more than that it shall be final and conclusive in relation to the appeal which is before it. It does not mean that a decision rendered on one appeal can preclude some other person, not a party to that appeal, from appealing a decision of the Deputy Minister made in relation to an importation of specific goods by him, nor does it preclude the Board from dealing with such an appeal upon its merits. The Board does not have a jurisdiction under the Act to decide general questions as to the status of goods or persons with that finality which is necessary to set up an estoppel by a judgment *in rem*.[59]

It seems clear that a Tariff Board decision is not a decision *in rem*, and it is unlikely that *res judicata* applies. No doubt, of course, the Board would feel compelled, simply as a matter of good sense, to decide two very similar cases the same way. And there is an obligation to avoid anomalous results. In the *Jay-Zee* case[60] a product had been refused tax exemption under Schedule III of the *Excise Tax Act*; it was common ground that a very similar product was exempt. Mr. Justice Gibson in the Exchequer Court overturned the contested classification on the basis that there was an alternative classification that would avoid an anomalous result.

3. The *Excise Tax Act*

In the *Goodyear* case[61] the issue was liability for tax on "special brand" tires. The *Excise Tax Act* provides that the manufacturer or producer of domestic goods is liable. Goodyear had made the tires in question — but had made them specifically for the T. Eaton Company

and other retailers, with the retailers' names stamped on them. Was Goodyear or Eatons liable for the tax? On a reference from the Deputy Minister, the Tariff Board held that Eatons was not the "manufacturer". Goodyear appealed to the Exchequer Court, arguing among other things that the Board had no jurisdiction to make such a declaration.

The charging section of the *Excise Tax Act* was then section 57:

> 57. (1) Where any difference arises or where any doubt exists as to whether any or what rate of tax is payable on any article under this Act and there is no previous decision upon the question by any competent tribunal binding throughout Canada, the Tariff Board constituted by the *Tariff Board Act* may declare what amount of tax is payable thereon or that the article is exempt from tax under this Act.[62]

The appellant claimed that this section allowed the Board only to determine the rate of tax, if any, and not to declare who is liable for such tax. Thorson P. in the Exchequer Court disagreed, but he was reversed by the Supreme Court of Canada. Said Fauteux J.:

> Whether a particular person is a person upon whom a tax is imposed in respect of an article or whether a particular article is one in respect of which a tax is imposed upon a person are two separate questions . . . "whether any or what rate of tax is payable on any article" means only whether an article is one in respect of which any and, if so, what rate of tax is imposed.[63]

Furthermore, said Mr. Justice Fauteux, to give the Board jurisdiction to determine who is liable for tax would be a departure from the ordinary course of the law with respect to tax collection, which considers the recovery of taxes as a matter between the particular party and the Exchequer Court or some other competent tribunal; "a legislature is not presumed to depart from the general system of the law without expressing its intention to do so with irresistible clearness."[64] Finally, Fauteux J. noted that subsection 57(2) obliges the Board to hold a hearing, since the question of whether or not tax is payable on a particular article is a matter of public interest and third parties should have an opportunity to intervene. But the question whether a particular person is liable for tax is a matter solely between that person and the Crown. To give the Tariff Board such a jurisdiction would provide for third parties to appear, and would again depart from the ordinary system of law.[65]

C. APPEAL FROM THE TARIFF BOARD

1. Subsection 49(3): Difficulties with the Old Appeal Provision

In 1948 provision was made in the *Customs Act* for appeal from the Tariff Board to the Exchequer Court:

> An importer or the Deputy Minister may, upon leave being obtained from the Exchequer Court of Canada or a judge thereof upon application being made within thirty days after the making of the finding or order sought to be appealed (or within such further time as the Court or judge may allow), appeal to the said court upon any question which in the opinion of the said court or judge is a question of law.[66]

In the *Parke, Davis* case Thorson P. considered the meaning of "any question which in the opinion of the said court or judge is a question of law". Said Thorson:

> This language permits possible anomalous results since the jurisdiction of the Court to maintain an appeal is made to depend not on whether a question is actually a question of law but on whether in the opinion of the Court or judge it is so. That being the case, it is quite possible, through an erroneous opinion of the Court or judge that a particular question is a question of law, that the Court will find itself vested with jurisdiction to entertain an appeal on what is actually a question of fact. Conversely, if the Court or judge is erroneously of the opinion that the question in issue is not a question of law, the Court will have no jurisdiction to entertain an appeal, although the question is actually one of law.[67]

The unlikely effect is that the Court must decide a question thought to be of law by the judge granting leave, even although it believes that judge to have been mistaken. Thorson P. himself later fell victim to the anomaly he identified. In the *John Bertram* case he sat on the application for leave to appeal and the appeal itself. In dismissing the appeal Thorson P. made this confession:

> I must say, at the outset, that I cannot find any error of law in the Board's decision. During the hearing of the appeal I stated that I could not understand why I had given leave to appeal. I am now of the opinion, after reading the transcript of the proceedings before the Board that I should have refused leave to appeal . . . That would, in my opinion, have been an appropriate course to follow but since I did not

adopt it I must proceed to consideration of the arguments advanced on the hearing of the appeal.[68]

Another difficulty with the old appeals provision arose from the requirement that "leave be obtained". In *Freedman* Thorson said this meant that in addition to the question being one of law it must be a question thought by the judge to be worthy of appeal.[69] What are the criteria for exercise of judicial discretion on this point? Said Thorson P.:

> I am of the view that, as in the case of applications for leave or special leave to appeal to the Supreme Court of Canada, it is not possible to lay down specific and all-embracing rules for the granting of leave to appeal . . . But I see no reason why the grounds for refusing leave to appeal should not be similar to those taken by the Supreme Court of Canada in dealing with applications for leave to appeal to it. Consequently, in my opinion, if it appears to the Court or judge hearing an application for leave to appeal . . . that the order, finding or declaration of the Tariff Board from which leave to appeal is sought was plainly right or sound or that there was no reason to doubt its correctness or that the applicant would not have a fairly arguable case to submit to the Court leave to appeal should be refused.[70]

In 1958 the *Customs Act* appeals provision was amended.[71] The section became 45 and reads:

> **45.** (1) Any of the parties to an appeal under section 44, namely,
>
> (*a*) the person who appealed
>
> (*b*) the Deputy Minister, or
>
> (*c*) any person who entered an appearance in accordance with subsection (3) of section 44, if he has a substantial interest in the appeal and has obtained leave from the Court or a judge thereof,
>
> may, within sixty days from the making of an order, finding or declaration under subsection (3) of section 44, appeal therefrom to the Exchequer Court of Canada upon any question of law.

This change removed most of the difficulties described above, since, except for applicants under what is now paragraph 48(1)(*c*), it is no longer necessary, for appeals under the *Customs Act*, to obtain leave to appeal. The same is true of the *Anti-dumping Act* (s. 20). But, regrettably, similar amendments have not been made to the corresponding appeal provisions of the *Excise Tax Act* (s. 60) and the *Petroleum Administration Act* (s. 65.18); those appeal provisions remain substantially similar to the old subsection 49(3) of the *Customs Act*, and presumably, *mutatis mutandis*, are subject to the same difficulties.

2. Grounds for Appeal from the Tariff Board

It appears widely recognized that all appeals from the Tariff Board are limited to questions of law.[72] The Appeal Court has no jurisdiction to deal with questions of fact. In *Parke, Davis*, for example, the issue was whether Penicillin S.R. was a "biological product". Thorson P. concluded:

> The issue in this appeal is not whether Penicillin S.R. was actually a biological product . . . but whether the Tariff Board erred as a matter of law in deciding that it was . . . If there was material before the Board from which it could reasonably decide as it did this court should not interfere with its decision even if it might have reached a different conclusion if the matter had been originally before it.[73]

In *Dentist's Supply* Thorson P. commented on his *Parke, Davis* definition of the appellate jurisdiction:

> If the decision of the Tariff Board was a finding of fact and there was material before it on which it could reasonably have based its finding it is not within the competence of this Court to interfere with it no matter what its conclusion might have been if a right of appeal *de pleno* from the decision had been conferred by the *Customs Act*. There is no right of appeal from the decision of Tariff Board on findings of fact and it seems to me that the same is true in respect of findings of mixed law and fact. . . . Thus, to the extent that the declaration of the Tariff Board in the present case was a finding of fact, this Court has no right to interfere with it unless it was so unreasonable as to amount to error as a matter of law.[74]

As we shall see, most questions of law in appeals from the Tariff Board concern statutory construction. But, as Thorson P. makes clear, lack of evidence to justify a finding is also an error in law. Kellock J. said in *Canadian Lift Truck*:

> The question of law propounded involves at least two questions, namely, the question as to whether or not the Tariff Board was properly instructed in law as to the construction of the statutory items, and the further question as to whether or not there was evidence which enabled the Board, thus instructed, to reach the conclusion it did.
>
> While the construction of a statutory enactment is a question of law, and the question as to whether a particular matter or thing is of such a nature or kind as to fall within the legal definition is a question of fact, nevertheless if it appears to the appellate Court that the tribunal of fact had acted either without any evidence or that no person, properly instructed as to the law and acting judicially, could have reached the particular determination, the Court may proceed on the assumption that a misconception of law has been responsible for the determination.[75]

Kellock J. appears to contemplate two varieties of error in law. The first is a mistake in statutory construction. The second contemplates a deficiency in evidence or in the interpretation of evidence. The courts appear far more willing to find the first variety of error than the second. They prefer to search for possible errors in statutory construction.

3. Errors in Statutory Construction

As a general rule, the construction and interpretation of statutes, including tariff items, is a matter of law; whether a particular thing falls within the statute once construed is a matter of fact. This general rule has proved most difficult to apply in appeals from the Tariff Board.

(a) classification

(i) *particular words*

Is the interpretation of particular words in *Excise Tax Act* schedules, or tariff items, always a question of law? Some earlier cases say that it is,[76] but more recent cases have found this matter complicated.

In *Freedman* the respondent argued that, while statutory construction in general is a question of law, the meaning of a particular word in the tariff, if it is a common word, is a question of fact, and a decision of the Tariff Board may not be overturned because of its interpretation of such a word. The word was "fruits". Although Thorson P. held that a question of law was involved, he did not completely reject the respondent's argument:

> But counsel for the Deputy Minister did not put his argument on the basis that the meaning of the word "fruits" *per se* was a question of law. It was the meaning of the whole Tariff Item that was involved. While there is much to be said for the contention of counsel for the respondent that the meaning of common words is a question of fact rather than of law I am of the opinion that a question of law was involved in the Tariff Board's declaration in this case.[77]

In *Dentist's Supply* Thorson P. appeared to distinguish between choice of methodology and application of a chosen methodology. The

Tariff Board must first decide how to define the word in question — for example, whether to give it an ordinary or technical meaning. This question is a question of law, and is reviewable. Then the methodology must be applied — for example, the ordinary or technical meaning of a word must be ascertained. This, thought Thorson P., is a question of fact:

> . . . once it has been decided that, in the absence of a clear expression to the contrary, words in a statute should receive their ordinary meaning but that if it appears from the context in which they are used that they have a special technical meaning and should be read with such meaning, then it seems clear that what the ordinary meaning of the words is or what their special technical meaning is, if they have one, is a question of fact.
>
> The ordinary meaning of a word is the meaning with which it is ordinarily used by persons having a knowledge of the language in which it is used. It is unrealistic, in my opinion, to say that such a meaning is a matter of law. When it is sought to ascertain the ordinary meaning of a word resort is had to recognized dictionaries, not to judicial decisions . . .
>
> And similarly, when it has been held that, in view of its context or for any other reason, a word has a special technical meaning and should be read with such meaning then what such special technical meaning is should be construed as a matter of fact. The same is true in the case of words which have a particular meaning by reason of the circumstances under which or the persons by whom they are generally used. For example, if a word is used in a profession or trade with a particular meaning then the particular meaning which such words have when used by persons in such profession or trade is a question of fact.[78]

At first sight the *Baking Industry* case,[79] an appeal on classification under the *Excise Tax Act*, seems to go the other way. The Tariff Board decided that certain wire trays were "usual coverings to be used exclusively for covering goods". The crucial words were "usual coverings". At the appeal the respondent argued that no question of law was involved, but Cameron J. disagreed, rejected the Board's definition, and substituted a definition of his own. The Board had looked to the definition of "coverings" in the *Customs Act*. Cameron J. rejected that approach as wrong in law.[80] Accordingly, his decision may be explained as a rejection of the Board's methodology. And yet his real objection to the Board's decision seems simply to have been their definition of "coverings"; rather than send the issue back to the Board with instructions as to appropriate methodology, he preferred to define the word himself. In *Jay-Zee Food Products* the issue was whether Saico reconstituted orange juice was exempt from tax as 85% "pure" orange juice. The Tariff Board held that it was not "pure" although a similar product had

previously been held exempt. In holding that the Board had erred as a matter of law in interpreting "pure" as synonymous with "fresh" and "natural", Gibson J. said: "There is thus an anomaly or absurdity in respect to these two products. One is declared to be exempt from sales tax while the other . . . is declared to be subject to the tax. If the Court on a true interpretation of the statute can avoid such a result it should do so."[81] Gibson went on to hold that "pure" meant "uncorrupted" rather than "fresh", and that the Board erred in law in holding the product not to be exempt. Once again the Court substituted its definition for that of the Board. On this occasion both the Board and Court considered that the word was to receive its ordinary meaning. But the Court's objection to the Board's definition can be considered a methodological objection: the Board might be regarded as having ignored a presumption against anomalies. In *Moirs* the question was whether a graham sandwich was a "biscuit . . . or other similar article". The appellant maintained that the Board had erred in law in its treatment of the phrase "other similar article". Said Kearney J.: "In my opinion, no pure question of law arises in respect of the phrase 'other similar article', and we are more concerned with the ordinary meaning to be attributed to the word 'similar' than with a question of legal interpretation. I think at most this issue gives rise to a mixed question of fact and law . . .".[82] Thus Kearney introduced a new possibility — that the meaning of a word might be a question of mixed fact and law. The most recent statement on this whole issue is found in *Pfizer*. Is oxytetracycline a "derivative" of tetracycline? The Tariff Board said that it is, taking a wide view of the meaning of "derivative". On appeal, Chief Justice Jackett said this about the Court's jurisdiction:

> In legal theory, as I understand the law, the general rule is that a word in a document such as a statute or order in council having the effect of law is to be given its ordinary or popular meaning according to the context and that meaning is a question of law to be determined by the Court with the aid of dictionaries and other legitimate aids to construction, but where it is found that word has been used in such a statute or other document in the jargon or vernacular of a particular area, part of the community, trade or field of learning, then it is to be given that meaning and, in such a case, the Court may require the evidence of persons with knowledge of the sense in which the word is so used in order to determine the meaning, and, in such a case, its meaning becomes a question of fact. It would seem, however, that, where the Court has sufficient familiarity with the words to take judicial knowledge, such evidence is not necessary and the meaning or the words is a question of law for the Court.[83]

Jackett was of the opinion that the Board had considered the ordinary meaning of "derivative" in antibiotics and related fields, and that the

definition, accordingly, was a question of law; upon review, the Court upheld the Board's decision. The Supreme Court of Canada reversed the Federal Court, partly on the basis that the Board's approach to definition of the word — its methodology — had not been right. Giving the judgment of the Court, Pigeon J. made clear that the correct methodology in this case was to look to the meaning in common language, and not to the meaning in a more specialized language. Pigeon J. agreed that "usual meaning" was "a matter of which a court or board exercising judicial or quasi-judicial authority may take judicial notice." Despite the different results, Jackett and Pigeon seem to be in broad agreement on the relevant principles. *Pfizer* appears to stand for these new propositions: (1) ordinary meaning is a question of law; (2) technical meaning is normally a question of fact; but (3) technical meaning is a question of law if the Court is sufficiently familiar with the meaning to take judicial notice.

Pfizer has supplanted *Dentist's Supply* as the law on this complex point. It may be that the methodology/meaning distinction has weaknesses; after all, the best test of a methodology is its results. But on the other hand, emphasis on methodology accommodates the flexibility of language. A word may have several meanings. Confining the court to a review of methodology would prevent the court from reversing the Board every time it finds a meaning which it regards as somewhat preferable to that accepted by the Board.

(ii) *ordinary or technical meaning*

Whether a word in a tariff item is to receive its ordinary meaning or a technical meaning is a matter of methodology, and hence a question of law. Generally there is a presumption that a word in a statute is to be interpreted in accordance with common usage; but the presumption is rebuttable. *Parke, Davis* said:

> . . . in the absence of a clear expression to the contrary, words in the Customs Tariff should receive their ordinary meaning but if it appears from the context in which they are used that they have a special technical meaning they should be read with such meaning.[84]

In *E.T.F. Tools* Cattanach J. made this observation:

> The words of the Customs Tariff and of the particular items of the Schedule under consideration are to be construed as they are understood in common language, there being no clear expression that they have a special technical meaning. As stated in Craies on Statute Law, p. 152, the rule is that the particular words used by the Legislature in the denomination of articles are to be understood according to the common

> commercial understanding of the terms used and not in their scientific or technical sense.[85]

Cattanach's reference to "common commercial understanding" suggests that there are three categories of words in a statute: (1) ordinary words, to be interpreted according to common usage; (2) commercial words, to be interpreted according to common commercial understanding; and (3) scientific or technical words. Choice of category is a question of law.

In *Hunt Foods* the issue was whether the appellant's shortening fell under a "lard compound or similar substances" item. The shortening contained no lard. The Tariff Board held that it was not a similar substance; the Board heard expert evidence and decided that a similar substance to lard must contain some animal fat, which this shortening did not. Kerr J. reversed the Board:

> [Lard compound] is not defined in the Customs Tariff . . . It describes an article of commerce and is not, I think, an expression in common speech, except by persons who manufacture, sell or deal in the article. I think that it was open to the Tariff Board to determine the sense in which the expression is used in the mouths of those persons and to construe it . . . in that sense . . .
>
> The Tariff Board properly sought to ascertain from the experts to what extent and in what way the products in issue are similar to or dissimilar from lard compounds, as the latter are known in the trade. The experts were competent to give evidence in that respect. But the words "similar substances" in item 1305-1 are ordinary words that have no technical or special meaning, and it was for the Tariff Board to construe them in their ordinary and popular sense. It was not for the witnesses to define them or give a meaning to them.[86]

Kerr considered that the Board had erred in law by giving the phrase "similar substances" a narrow technical meaning.

(iii) *class or kind made in Canada*

A number of tariff items distinguish between goods "of a class or kind made in Canada" and goods not of such a class or kind. How the Tariff Board applies these categories in its classification work can make a large difference in duty payable in particular cases. A number of appeals from the Board are based on the allegation that the Board erred in law in declaring that the goods were or were not of a class or kind made in Canada.

In *Canadian Lift Truck* the Court had to decide whether the Tariff Board erred in law when it held that certain fork lift trucks were of a class or kind made in Canada. The Board had adopted load capacity as the test for differentiating between classes of fork lift trucks, and found that machines of the same capacity, and hence class or kind, were built in Canada. Cameron J. upheld the Board's decision. He considered that the question of class or kind was a question of fact, and that the Board's decision was justified by the evidence:

> . . . the question is not whether their conclusion was right or wrong, but whether in reaching that conclusion they erred as a matter of law. Various alternatives were presented to them and of these they selected the one which to them seemed the most practical and feasible. It was entirely a matter of exercising their discretion in the light of the evidence adduced.[87]

The Supreme Court of Canada further upheld the Board in this case.

In *Dominion Engineering Works*[88] the issue was whether the Board erred in law in adopting and applying dipper capacity as the test for differentiating between classes of power shovels. The appellant argued before the Exchequer Court that the Board should have considered whether the import competes with Canadian produced goods. Thorson P. rejected this argument. The class or kind question is one of fact, and the Board has wide discretion to choose a test. It chose an acceptable test, and applied it reasonably. Furthermore, there is no presumption that the purpose of the tariff is to protect Canadian industry.[89] The Supreme Court of Canada (Rand J. dissenting) upheld the Exchequer Court. Said Judson J.:

> The task of the Board was to classify a piece of machinery — to determine whether it was of a class or kind not made in Canada. This is a task involving a finding of fact and nothing more. It is not error in law to reject the classification by potential or actual competitive standards and to prefer classification based on size and capacity. I do not think there is any error in the Board's decision but if there were, it could only be one of fact.[90]

In *MacMillan & Bloedel*[91] the issue was whether a newsprint machine was of a class or kind not made in Canada. The appellant ordered a 2,500 foot per minute newsprint machine. No Canadian manufacturer had ever constructed a machine of this capacity. Then months later, before the appellant's machine was actually imported, a Canadian manufacturer received an order for a similar machine and began to build it. The Tariff Board held that newsprint machines built in Canada generally kept up with technological advances, and the

import was not to be regarded of a class or kind not made in Canada. In the Exchequer Court, Dumoulin J. reversed the Board. He considered, (1) that the relevant time for application of a test is when goods are ordered rather than when they are imported; (2) the mere willingness of a Canadian manufacturer to produce similar goods is not sufficient to show that the imported goods are not of a class or kind not made in Canada; (3) the question of which test to employ to distinguish between classes of goods is a question of fact; and (4) the Board was wrong in looking at machines built in the past, since all that is relevant is the situation at the time the imported goods are ordered. The Exchequer Court, in turn, was reversed by the Supreme Court of Canada, which held that the relevant time for classification is when the goods enter Canada and not when they are ordered.[92] Said Mr. Justice Hall:

> . . . Dumoulin J. erred in concluding that the Tariff Board was in error in not finding that the newsprint machine in question was machinery of a class or kind not made in Canada. The finding of the Tariff Board, being one of fact and there being no error in law, should not have been disturbed.[93]

The Board, however, is not immune from errors of law in the class or kind context. In *Ferguson Industries*[94] the Supreme Court of Canada (Laskin J. dissenting) considered that the Board had made a mistake in statutory construction and therefore in law by regarding parts as included in a tariff item in which they were not mentioned. In *Great Canadian Oil Sands*[95] the appellant imported trucks as "machinery . . . for operating oil sands . . . of a class or kind not made in Canada." Similar trucks were built in Canada, but they were not suitable for oil sands operation. The Board (with a dissenting member) held that the imported trucks were not of a class or kind not made in Canada; it disregarded the end-use provision for the purpose of class or kind categorization. The Federal Court overturned the Board. Heald J. considered that refusal to take account of the end-use provision was an error in statutory construction and therefore of law.

The class or kind cases may be reconciled by the distinction between methodology and application of the methodology. The statute must be interpreted correctly, and failure to do so is an error of law;[96] but the fitting of particular facts to an interpretation, provided that the fitting is not patently unreasonable, is a question of fact and not reviewable.

(iv) *"manufacture or produce"*

A common phrase in both the *Customs Tariff* and the *Excise Tax Act* is "manufacture or produce". The schedules of those statutes often provide that goods subject to tariff duties or excise tax may be taxed at a lower rate, or be exempt from tax, if they are to be used in a manufacturing process.

In *Research-Cottrell*[97] the issue was whether imported materials were "used in the manufacture of" precipitators. The Board held that the precipitators had merely been "assembled and erected". Cattanach J. held that this interpretation was an error in law, but the Exchequer Court was reversed by the Supreme Court of Canada. Mr. Justice Martland considered that what constitutes "manufacture" or "production" is a question of fact, and since there was at least some evidence to support the Board's finding, that finding should be left undisturbed. In *Quebec Hydro*[98] the issue was whether, for the purpose of the *Excise Tax Act*, transformers were "used . . . directly in the manufacture of goods" (i.e., electricity). Jackett P. in the Exchequer Court reversed the Board's finding that transformers are used to manufacture electricity, considering that by defining "manufacture" or "produce" in the way it did the Board erred in law. Jackett was in turn reversed by the Supreme Court (Pigeon J. dissenting). Mr. Justice Abbott for the majority apparently, although not obviously, regarded the question as one of fact:

> As Duff C.J. stated in *The King v. Vandeweghe Ltd.* [[1934] S.C.R. 244 at p. 248]: "The words 'manufacture' and 'production' are not words of any precise meaning and, consequently, we must look to the context for the purpose of ascertaining their meaning and application in the provisions we have to construe". Nevertheless, taking these words in their natural and ordinary sense, there is nothing in the *Excise Tax Act* which would compel such a restrictive meaning as that contended for by the respondent. Moreover such a meaning would be contrary to evidence which was accepted by the Board. In my opinion the Board correctly construed . . . the *Excise Tax Act*, and did not misdirect itself as to the law.
>
> The Board found as a fact that the transformers in issue in this appeal are "apparatus sold to or imported by the appellant for use by it directly in the manufacture of goods". There was ample evidence to support that finding . . .[99]

Abbott J. does seem to require that words be taken in their "natural and ordinary sense"; this might be regarded as a methodological question and hence one of law. In *Ayerst Organics* the issue was whether treated drums, used to collect and store mare's urine, were

used in the manufacture of hormones. The Tariff Board held that it would be too wide an interpretation of "manufacture" to extend it to such a practice. On appeal, Jackett upheld the Board, now regarding the question as one of fact: ". . . in my view, the ambit of the manufacturing process is something that must be determined in each case according to the circumstances of the case."[100] No doubt Jackett was influenced by the result in *Quebec Hydro*. In *Consumers Gas* Jackett said:

> . . . the question as to whether, in the circumstances of a particular case, a particular process is one of "manufacture" or "production" is, within wide limits, a question of fact for decision by the Tariff Board in a case that arises as this one did . . . what is "manufacture" or "production" depends on the sense in which those words are used in the context of different situations . . .[101]

The Supreme Court (with Spence J. dissenting) upheld the Federal Court decision.

(v) *classification: some conclusions*

This review of classification cases shows, for reasons of jurisdiction, a concern — almost obsession — with the distinction between questions of law and questions of fact. May the problem of distinguishing between questions be resolved? Need it be?

It is often not possible to say what is the meaning of a word — particularly words describing classes — without regard to the facts at hand. This is because — as Glanville Williams pointed out in "Language and the Law"[102] — words are in their nature vague. Glanville Williams identified five classes of vague words: (1) words indicating qualities of continuous variation; (2) class-names; (3) names suggesting unity; (4) mathematical terms; and (5) words uncertain in their time-reference. First of all, everything may depend on words of gradation:

> The question whether a man is left in freedom or detained in a mental institution depends on whether he is judicially classified as sane or insane . . . in a murder case it may be literally a question of life or death whether the accused intended to hurt by means of an act "intrinsically likely to kill". Well may a convict echo the words of the poet —
>
> "Oh, the little more, and how much it is!
> And the little less, and what worlds away!"[103]

With respect to class-names, Williams notes that the following questions concerning the boundaries of artificial classes have actually

been considered in the law reports: "Is an album a 'book'? Is a bicycle a 'carriage'? Is a flag a 'document'? Is a flying-boat a 'ship or vessel'? Are household goods 'money'? Is ice-cream 'meat'? Is sandstone a 'mineral'?"[104] Regarding names suggesting unity, Williams emphasizes that unity is only notional.[105] In applying mathematical terms, "it is just as necessary to decide questions of degree as in applying other words."[106] And finally, with respect to words uncertain in their time-reference, "does the word 'convict' or 'felon' include a person who was a convict or felon once but who has served his sentence?"[107]

Are shade guides "artificial teeth"? Is a tray a "covering"? Is a graham sandwich a "biscuit"? And, come to that, what is the meaning of "class or kind made in Canada", or "manufacture", or "produce"? Clearly words of this sort are often defined by the circumstances to which they are applied. Hodgins J.A. put it well:

> The construction of the words of any statutory enactment is a question of law, while the question of whether the particular matter or thing is of such a nature or kind as to fall within the legal definition of its terms is a question of fact . . . It is no doubt difficult to separate questions of law and fact in a case of this kind, where evidence which enables the Court to put itself in a position to construe the words of the Act is very often the same or practically the same as that which determines whether the statute covers the thing in question.[108]

The distinction between questions of law and questions of fact which so agitates the courts may be a distinction almost impossible of application.

And, in any event, what is the benefit of the distinction? It does serve, after a fashion, to apportion responsibilities between the Board and the courts. In any system with several components there must be clear, rational, and hopefully efficient, allocation of roles. But does dividing jurisdiction on the basis of a law/fact dichotomy delimit reasonable respective spheres of activity for the Board on the one hand and courts on the other? Does it organize institutions so that tariff classification is handled well and efficiently? Would some statutory reconstruction of the Board's jurisdiction be preferable?

(b) value for duty

In determining value for duty the Tariff Board must construe and apply sections 35-44 of the *Customs Act* — a fertile field for error in law. In *Semet-Solvay*[109] the Board had to apply subsection 35(1) of

the *Customs Act*[110] and determine the fair market value of coke. The coke in question sold for several different prices in several different areas, and the Board selected one particular price. This, said Thurlow J. in the Exchequer Court, was a mistake in law. A single market price is not necessarily the fair market value, although it is evidence of that value. In restricting itself to the adoption of one market price as the fair market value the Board was mistaken in its choice of methodology. In *Elliott*[111] the Board had to determine the value for duty of a gift under the then section 35 of the *Customs Act*.[112] The Board applied subsection 35(3) on the theory that the goods had not been sold. The appellant claimed that because there had been similar transactions before, subsection 35(2) was the applicable section; "comparable conditions of sale" were other transactions for no monetary consideration and the fair market value was zero. Cameron J. agreed with the Board. A "sale", he said, involved monetary consideration; the Board was correct in not using subsection 35(2). *Elliott* suggests the many preliminary questions of law that may precede the important question of fact.

4. Disposition of Appeals

Subsection 48(17) of the *Customs Act* reads:

> (17) The Court may dispose of an appeal by making such order or finding as the nature of the matter may require, and, without limiting the generality of the foregoing, may
>
> (*a*) declare what rate of duty is applicable, or that no rate of duty is applicable, to the specific goods or the class of goods with respect to which the appeal to the Tariff Board was taken,
>
> (*b*) declare the value for duty of the specific goods or class of goods, or
>
> (*c*) refer the matter back to the Tariff Board for re-hearing.

The relevant section under the *Excise Tax Act*, subsection 60(4), is equally broad:

> The Federal Court may dispose of an appeal under this section by dismissing it, by making such order as the Court may deem expedient or by referring the matter back to the Tariff Board for re-hearing.

In reality the court's order options are more limited than the statutes suggest. Jurisdiction is limited to questions of law. The courts should

not make an order that involves a new finding of fact. The matter should be returned to the Board. The only exception should be those cases where correct appreciation of the law irresistibly suggests another factual conclusion.

In *Goodyear*[113] the Supreme Court held that the Board had no jurisdiction to make the declaration in question. The Supreme Court made no contrary declaration and did not send the case back; its decision simply put matters back to where they were before the Board made its declaration. In *Semet-Solvay*[114] the Exchequer Court sent the matter back to the Board; Thurlow J. quite properly did not attempt an independent assessment of the facts. In the *Baking Industry* case[115] the Exchequer Court substituted its own definition of "coverings" for that of the Board; the Court appeared not to appreciate that it did not follow from the Board's methodological error that the trays in question were not "coverings". In *Hunt Foods*[116] the Exchequer Court found a methodological error and then reclassified the product itself, and the Supreme Court did the same thing in *Pfizer*;[117] this course of action must be predicated on the notion that a word's ordinary meaning is a question of law, a controversial proposition as we have seen. In *Ferguson Industries*,[118] a class or kind case, the Supreme Court overruled the Board's declaration (the Board mistakenly held motors to be parts of winches not made in Canada when the motors should have been treated separately), and referred the matter back to the Board (which then had to decide whether the motors considered separately were of a class or kind not made in Canada); the Court recognized that the Board's error in methodology did not necessarily make the conclusion wrong. Similar restraint was not shown in *Great Canadian Oil Sands*,[119] where Heald J. found an error of law (failure to apply an end-use provision) and then proceeded to reclassify.

These disposition examples suggest some confusion in the courts about what is a proper disposition. More particularly, there is uncertainty about the appropriate judicial action when the Board has made a methodological mistake and thereby erred in law. Sometimes, as seems best, the case is sent back to the Board. On other occasions the courts themselves redefine or reclassify, even although the new definition or classification does not appear to follow irresistibly from the correction of law.

IV

Appeals: Board Procedure[120]

This Chapter describes the Tariff Board's operations in relation to appeals and applications, and to references under section 49 of the *Customs Act*.[121] Operations in relation to "economic inquiry" references are described in Chapter 6. The first part of this Chapter systematically examines the Board's proceedings in detail, while the second part analyses more closely procedural questions that have been, are, or may be in the future, the object of attention from the courts. Finally, we will offer some conclusions about the Board's procedures.

A. TREATMENT OF APPEALS

1. Initiation of Proceedings

All appeals (excluding references made under section 49 of the *Customs Act*) are regulatee-initiated. The *Customs Act* and the *Anti-dumping Act* make clear who has standing to appeal under those statutes; however, relevant provisions in the *Excise Tax Act* and the *Petroleum Administration Act* make no reference to this question.[122] The Deputy Minister has no interest in appealing under these two last statutes; indeed, he is the creator of what these acts label the "doubt or difference". Under the wording of the relevant sections, it seems an irate competitor or the Board itself could start proceedings. In practice, this has never happened, since the Board takes a quite

different view of the appeal provisions, considering that a "difference" necessarily supposes two parties, and that its resolution calls for the action of one.

Notice of appeal must be in writing. Most are sent by mail; the rest are delivered by courier or by hand. The date stamped on the document by the Board Secretariat upon receipt is proof of the date of receipt. This matters little in the case of applications under the *Excise Tax Act* or the *Petroleum Administration Act*, which may be made at any time.[123] However, notices under the *Customs Act* and the *Anti-dumping Act* must be filed with the Board within sixty days from the date of the Deputy Minister's decision, and the Tariff Board has no powers comparable to those of the Tax Review Board to extend this period. Notice of the Deputy Minister's decision refers to the right to appeal, and the time limit within which it must be filed. The Board's postal address is not mentioned, although it is different from the Department's. As a result, many appeals are still addressed to the Secretary of the Tariff Board at a Revenue Canada address, and some of these are not sent on in time to be received by the Board within the prescribed period. On occasion a notice has apparently been held in the Department until the importer's right of appeal expired. The Board has repeatedly suggested a change in the wording of the notices, but a satisfactory solution has yet to be found. Moreover, it seems no directive has been given to treat expeditiously Tariff Board mail that is erroneously sent to the Department.

Any written notice will be accepted provided it is received within the time limit. No form is prescribed or even suggested, and if a letter is received that does not state its purpose clearly enough, the Secretariat will phone the "applicant" to "confirm" his intention of having the letter formally considered as notice. The "Informal Guide for Parties in Appeals before the Tariff Board" describes the information the Board hopes to find in the notice[124], and the Board does expect to secure this information at some point, but it has never rejected a notice because it did not comply with the Guide.

The Guide provides for withdrawals. When this occurs, which is quite often, it is considered that no notice has ever been filed unless the withdrawal comes after notice of appeal has been given in the *Canada Gazette* in which case the matter will be spoken to at the hearing. At the hearing the Secretary notes the withdrawal, the presiding member calls for comments from persons in attendance, and the withdrawal is then acted upon; a notice of withdrawal is subsequently published in the *Canada Gazette*.

One interesting practice of the Board involves the determination of jurisdiction. No provision is made for preliminary rulings on jurisdiction.[125] This does not prevent the Board from "volunteering" information to the parties. If the Secretary thinks the Board lacks jurisdiction,[126] he consults members on this point. If they agree, the Secretary phones the appellant or his counsel to point to the Board's possible lack of jurisdiction, and may send copies of relevant court decisions. It is then for the appellant to decide whether to withdraw his appeal or to try and convince the Board that it has jurisdiction: both approaches are utilized about equally. This system may well save appellants unnecessary expenses and delays.

2. Pre-hearing Processes

The Secretariat takes charge of a notice from its reception until the hearing, and acts as a *de facto* registry. The Board states that this is the only level of staff involvement in appeals, apart from routine administrative matters and relations with the clientele (the Secretariat answers several requests for information each day).

Upon receipt a notice is dated and numbered, and a file opened. The Board uses a standard, card-indexed, governmental filing system. A letter is sent acknowledging receipt of the notice and giving its file number; a copy of the Guide is included with the letter. The Deputy Minister and the Litigation Branch of the Justice Department are also advised by letter of the notice's receipt. In most cases, the notice does not give all the details requested by the Guide, and the Secretary asks for the missing information. This and other practices point to the Board taking an active role in getting the file ready for the hearing; indeed, the Board will not convene a hearing until the file is complete.

The file is not circulated to the parties, and although they may consult it, they tend not to do so. Parties are notified in writing of any interventions, but the Board asks parties to circulate briefs among themselves.

The file is considered ready for hearing once there has been compliance with the Guide and notice has been given of the name of counsel for the Deputy Minister. The Secretary then tries, by

telephone, to arrange with the parties for a hearing date. A case is placed on the Board's hearing list when notice is received, and cases are called in order of filing. The Board will not hear a case before the assigned date, but will postpone a hearing for good reason — for example, if the parties are awaiting a Federal Court decision that might dispose of the issue. In such circumstances the Secretary keeps in touch with the parties on a regular basis, and the Board will not hesitate, usually after 18 to 24 months, to determine arbitrarily a date for hearing if it thinks that no strong reasons exist for continued delay. For this and other purposes, a status of appeals list is circulated from time to time.[127] The Board is not inclined to allow a postponement requested after publication of notice in the *Canada Gazette*. The previous Guide talked of the need in such circumstances for "very cogent reasons" and "most extenuating circumstances". The current Guide is more restrained, but the Board's attitude does not seem to have changed.

The Chairman, as chief executive officer, designates those members who will sit on an appeal; this is done about two months in advance of the appeal, at the monthly members' meeting. In choosing panels, a member's workload, language ability and specialization are taken into account, although an effort is made to keep every member in contact with each of the Board's areas of jurisdiction. Any reasons for disqualification are also taken into account when selecting a panel; perhaps as a result, the Board has never had to consider a request, at a hearing, for a member to withdraw.

Subsection 3(2) of the *Tariff Board Act* provides that the Chairman preside over any sitting at which he is present. For those where he is not, he is to designate one of the members as presiding officer. Such designation is done when the panel is chosen. Again, language and specialization play a role in the selection, but the main factor is workload, since the presiding member is expected to draft the Board's decision. The fact that a member is or is not a lawyer plays no part in the selection of presiding officer, nor does the fact that he is an ordinary member or one of the Vice-Chairmen.

The Board strongly encourages the production of "written submissions" or briefs. In its opinion, such briefs set the subject and "advertise" the arguments. The Guide asks for briefs to be received by the Board at least three weeks before the hearing, and suggests their contents; the Guide asks for reference to relevant legal provisions, and a description of points in issue and arguments.[128] While it is not compulsory to file briefs, government counsel always do so.

Representation is allowed in all cases, and by anyone a party chooses. The Board likes to know in advance the identity of counsel or agent. The Deputy Minister is always represented by a lawyer from the Justice Department. Approximately 75% of appellants are represented. In a substantial minority of cases, counsel is one of a handful of customs specialists concentrated in Ottawa, who continually appear before the Board. Counsel are lawyers in approximately 50% of the cases, and customs brokers in about 25%. The Board finds it useful to have parties represented by counsel, and prefers lawyers and customs specialists. This does not mean, in the Board's opinion, that a party who appears alone is put at serious disadvantage. The Board will lead the layman through the hearing and assist him in presenting his case in the best light. The Board also thinks that the technical nature of the cases it considers favours, to a certain extent, the articulate, small businessman. It is his product that is frequently under consideration, and he often knows more about it than anybody else. Finally, the Board is wary of attempts to formalize or legalize its processes unduly. It has little patience with lawyers who raise numerous technical objections.

The right to intervene is extended to any member of the public by the various statutes,[129] and the method of intervention is straightforward. One needs only to state his intention to intervene when the Secretary, at the start of the hearing, calls for interventions. However, the Board states in the Guide that it prefers interventions in writing and in advance of the hearing. The Guide gives no details as to the contents of any document an intervenor may or should file; very often, what is filed consists of no more than a mere declaration of intervention. Once a person has intervened, he or she has essentially all the rights of a party, including the right to appeal the Board's decision.[130] In practice, interventions are relatively few: there is one in about 20% of cases, and more than one in approximately 5%. Most originate from specialists holding a watching brief from a business organization. Intervenors often do little but follow the case to its conclusion: they intervene only to be able to appeal if they wish to do so. Sometimes an intervenor will file a statement; he may question one or two witnesses; rarely will he introduce fresh evidence. The right to intervene has had little impact on the Board's workload or the length of hearings.

The Board entertains no preliminary motions as such. However, jurisdictional issues may be decided either at the outset or after hearing the case on the merits, depending mainly on the approach the parties seem to favour. The filing of statements of agreed facts and

points in issue is appreciated, but the Board does not rely on them to a very large extent, as it often finds that parties have agreed to different things.[131] If a party requests permission to amend a document, either to add some details or (rarely) to modify the substance, the Board asks for notice to be given to other parties and if necessary, amends accordingly the notice to be published in the *Canada Gazette*. If the request comes after the publication of this notice, the Board decides at the hearing on what course of action is to be taken, if any.

3. Hearing

The Board holds a hearing, however brief, of every appeal that is not withdrawn before the publication of a notice of hearing in the *Canada Gazette*. All the statutes conferring jurisdiction on the Board require this notice be given at least twenty-one days prior to the date fixed for a hearing. The Board also mails to all parties, separately, a letter confirming the date of hearing enclosing a copy of the notice published in the *Canada Gazette*; this is not, however, compulsory, and "failure to receive such notice . . . shall not be sufficient ground for a postponement of the hearing unless the Board so rules".[132]

A hearing is usually handled within one day: the Board normally convenes at 10 a.m., and the average case ends, after arguments, some time in the afternoon. If it proves necessary, the Board will extend the hearing after 5 p.m. rather than put an appeal over to the following day. However, hearings are convened on Tuesdays and Thursdays only, leaving a one-day gap between cases to allow for continuing a hearing if necessary without disrupting subsequent cases.

Subsection 5(11) of the *Tariff Board Act* provides for hearings to be held in Ottawa "if possible". Most appeals, and all those originating from Ontario and Québec, are heard in Ottawa. The Board now travels annually to the West (Vancouver and Edmonton) in the Autumn, and to the East (the hearings to be held where it is most convenient for the parties) in the Spring. The Board has yet to sit outside of Canada, although the Act provides for such sittings.

The Board's hearings are public; however, "public" attendance is scarce and press attendance exceptional. The appellant, his counsel,

and usually other representatives of the appellant's business concern will be present, as well as the customs officer and the Justice lawyer in charge of the case. The persons present might also include intervenors, trade association representatives, consultants on a watching brief and the odd student doing a paper on the Board. The Secretary acts as clerk, administering oaths and listing documents produced as evidence. A stenographer attends and prepares a *verbatim* transcript.

The atmosphere of a hearing might be described as "formal, but relaxed". Sometimes when a party appears alone, or in the case of a counsel appearing for the first time before the Board, the presiding member will introduce the hearing by briefing the parties on the procedure the panel intends to follow. The Board considers from experience that the procedure described by the Guide is the best in most instances: the appellant states his case, the Deputy Minister answers it, and arguments (lasting approximately half-an-hour on each side) follow in the same order. The presentation of any intervenant follows immediately upon the presentation of the party supported by the intervenant.[133]

Requiring the appellant to give evidence first reflects the Board's practice of giving him the burden of proof. Except in the case of references under section 49 of the *Customs Act*, there is a presumption by the Board that the Department's decision or practice is correct. This presumption is relied upon if the appellant does not appear at the hearing.[134] There is nothing in the *Tariff Board Act* to support this; on the contrary, it is clear from reading section 5 of the Act that what is intended is a *de novo* trial.

The Board deals with both oral and written material. Briefs tentatively establish the issues. Descriptions of goods, in company catalogues, as elaborated upon orally at the hearing, are extensively used in evidence. Parties will put questions to witnesses, and members will often continue the examination themselves. Members use recesses, after parties have declared their case closed, to determine as between themselves whether the parties have put everything on the record they should have; if they think this has not been done, members will further question on their own or try to get the parties to supplement their case.

Subsection 5(9) of the *Tariff Board Act* allows the Board to make use of "information that in its judgment is authentic".[135] The Board generally relies, although not rigidly so, on the usual rules of evidence. It is conscious that often the appellant, who may know little of the

rules of law, is the Board's sole source of information; his line of thought should not be destroyed in case he forgets seemingly trivial points important to the Board's reasoning.

Witnesses appearing before the Board are generally specialists. The appellant will call businessmen, marketing agents, production engineers, chemists, experts employed by the producer of the imported goods. The government will call the same kind of witnesses, mainly drawn from Canadian manufacturers, and also government laboratory employees, professors, and so on. The Board makes little use of its power to force witness attendance: in the few cases where a subpoena is necessary, counsel prepares it (the Board does not even have a subpoena form) and the Secretary gets a member to sign it.

Witnesses testify under oath. Those who are called upon to corroborate evidence will be excluded on request. Examination and cross-examination are conducted by the parties, and the Board is careful not to allow fishing expeditions (e.g. looking for confidential material indirectly) or questions on Government policy.

4. Decision

The decision is always taken under advisement. Deliberations are held *in camera*, with only panel members present. They meet immediately after the hearing, usually for only 15 to 20 minutes. Some kind of preliminary agreement is generally reached, and the presiding member usually undertakes to write a draft decision, to be circulated approximately four to eight weeks after the hearing (allowing about two weeks for preparation of the hearing transcript). The presiding member will also call any meetings that might be necessary, after the draft decision is circulated, to allow for further discussions.

The decision seems to be based on the hearing record. Research, perhaps for legal precedents, is undertaken by members themselves; the staff is not involved.[136] The Board describes its practice of adhering to precedents as "mere good sense".[137] Decisions are reasoned, and generally written in an easily understandable style. Dissenting opinions are allowed and published.

Unilingual copies of the final decision are sent by mail to the appellant, the Deputy Minister, his legal advisor, the director of Civil Litigation in the Justice Department and the Justice lawyer for the case. A transmission note accompanies the decision. Curiously, this note until recently gave no information on the right to appeal from the Board to the Federal Court: thus, there was a discrepancy between the standard the Board observed and the one it tried to get others to follow.[138] When asked about this discrepancy, the Board's Secretary said that it had never occurred to the Board. The practice of giving appeal information was introduced very soon after our discussions with the Secretary. The notice of *dismissal* of an appeal now contains a paragraph referring to the right to appeal from the Board, to the sixty-day period for so doing, and to the relevant statute section. When the case goes against the Department, no mention of appeal is made, as it is assumed that the Department knows of its rights. This procedural change suggests a readiness on the part of the Board to react positively to outside comments.

Pursuant to section 9 of the *Tariff Board Act*, all decisions are published in the *Canada Gazette*, usually within two months of their distribution. Until January 1980, only the more interesting ones were published in the *Tariff Board Reports*; these Reports are now presented in a looseleaf form with four updatings each year and contain all Board decisions.

5. General Information

(a) time factor

The time elapsing between the filing of a notice and the hearing has doubled in four years, and is now usually nine months to a year. This is due mainly to factors over which the Board has little control. At the time of writing the Board is considering three important economic references. Appeals have increased from 40 in 1976 to 140 in 1979, without any corresponding increase in Board membership or

staff. Some of the delay finds its source in the parties themselves: even after all the required information has been filed with the Board (which can take some time in certain cases) counsel (for reasons that are not quite clear) do not seem to feel the same sense of urgency in Tariff Board appeals as they do with cases before other agencies or courts, and will tend to select the most distant hearing date offered by the Secretary.

The time lapse from the hearing to distribution of the decision is three to four months. This delay again appears attributable to workload. There is also the difficulty of having all members of any given panel in Ottawa at the same time for discussion of the draft decision: this difficulty stems from the extensive travelling recently undertaken by Board members for references and other hearings.

(b) costs and expenses

The Guide provides that the Board charges no fees for an appeal and that no costs are assessed. Parties pay their own expenses. Subsection 5(4) of the *Tariff Board Act*, which allows for a witness to receive the fees and allowances of a witness in the Federal Court, has not been applied in recent years: if it were, the Board thinks it would be for the party who summoned the witness to meet these costs.

(c) official languages[139]

Two of the seven members are normally French-speaking. Hearings may be held, and are held, in either or both official languages, generally at the option of the appellant. The Guide states that hearings will be held in the language used in the notice of appeal unless the Secretary is advised otherwise. Simultaneous translation is arranged at no cost "when necessary or when requested by any party". In practice, if a hearing is to be held in French, one of the French-speaking members will generally preside over it, and simultaneous translation will almost always be provided, as a matter of course, for English speakers in attendance.

B. ASPECTS OF PROCEDURE

1. Quorum

Subsection 3(8) of the *Tariff Board Act* provides: "With respect to an appeal to the Board pursuant to any Act other than this Act, three or more members have and may exercise and perform all the powers and functions of the Board." In a reference to the Federal Court under subsection 28(4) of the *Federal Court Act*, the facts were that after certain hearings before the Board under both the *Excise Tax Act* and the *Customs Act* one of the panel members died before any disposition had been made of the cases. The Federal Court had to decide whether the remaining two members had jurisdiction to make valid decisions. Chief Justice Jackett said that they did not; subsection 3(8) requires a quorum of three. It was argued that by virtue of section 21 of the *Interpretation Act*[140] and subsection 3(9) of the *Tariff Board Act*[141] two members could render decisions. Jackett C.J. considered that subsection 21(1) of the *Interpretation Act* did not alter the quorum requirement, but merely allowed a majority to decide the matter. As he put it, the section "makes the 'majority' decision the decision of the group".[142] Subsection 21(2) did not apply to the board created by subsection 3(8) of the *Tariff Board Act* because subsection 3(8) does not create any board or court distinct from the Tariff Board itself. It merely "lays down a rule as to how the Tariff Board must be constituted for the hearing of an 'appeal'".[143] Nor does subsection 3(9) of the *Tariff Board Act* reduce the quorum: "it merely provides . . . that the functions of a tribunal are not to be suspended merely by reason of a vacancy in its membership".[144]

Parliament then added subsection 3(8.1) to the *Tariff Board Act*:

> (8.1) Notwithstanding subsection (8), where a member, after hearing an appeal to the Board pursuant to any Act other than this Act, ceases to hold office for any reason or is unable or unwilling to take part in the making of an order, finidng, or other declaration with respect to the appeal, the remaining members who have heard that appeal may make such order, finding or other declaration and for that purpose they shall be deemed to have exercised and performed all the powers and functions of the Board.[145]

2. Confidentiality

(a) practice

Subsection 5(10) of the *Tariff Board Act*, which by virtue of subsection 5(13) applies to appeals as well as inquiries, provides for confidential business information "given or elicited in the course of any inquiry . . . not [to] be made public in such a manner as to be available for the use of any business competitor or rival . . ." The Board is confronted from time to time (it says a few times a year) with issues of confidentiality. Any request for confidential treatment of information is dealt with at the hearing; then the Board will try to convince the interested party to drop the request, or to avoid the problem by "editing" the information. If the party insists, the Board will grant confidential treatment of information. It will try to balance confidentiality and the "right to know" by helping parties reach an agreement about how the information will be filed and used (condensed version given to other parties, counsel present when the evidence is given, etc.).

Board practice prohibits access to confidential information to anyone but Board members and those whose access is provided for by agreement between the parties. Confidential material is filed separately, with the main file referring to the existence of a confidential docket. A special stamp is put on confidential evidence, and every page of transcript of confidential testimony is so indicated. Reference to confidential material in the decision will be in terms general enough to safeguard its character.

(b) principles

The Board's practice is generally considered satisfactory by appellants. This does not mean, however, that the Board has established an entirely clear concept of confidentiality. In *Leland Electric*,[146] a "class or kind" appeal, the Deputy Minister introduced evidence to show the amount of Canadian production of a commodity. The Board made these observations:

> The Deputy Minister is entitled and obliged to shield from harmful disclosure those firms or sources which have supplied him with confidential information; his failure to inform the appellant cannot go beyond

> this because of the appellant's right to full disclosure of the facts upon which the Deputy Minister's act has been made.
>
> . . . The Deputy Minister, by his office, is in a specially favourable position for the ascertainment of the necessary facts; he therefore has the correlative responsibility of disclosure to the taxpayer within the limits of the confidence necessarily imposed upon him because of the sources of his information.

The key concepts of "harmful disclosure", "confidential information", "appellant's right to full disclosure" and "correlative responsibility of disclosure" are not explained. In *Danfoss*[147] the introduction of evidence concerning the cost of component materials was resisted by the appellant. Said the Board:

> It is clearly the intent of Parliament that such evidence be made available to the Board . . . and that it not be made public in such a manner as to be available for the use of a business competitor or rival. This enactment is a departure from the general system of the law; it deprives an adversary, in part, of the knowledge of what is being used against him.
>
> . . . before legislation of such clarity [*Tariff Board Act* and *Anti-dumping Act*] the Board deems itself . . . bound to preserve and protect the confidential evidence from becoming available for the use, prohibited by the law, of competitors or rivals.

But the Board did not consider any implications of "a departure from the general system of the law"; what corollary protection, if any, is due the party not privy to the confidential information?

Paragraph 29(*d*) of the *Anti-dumping Act* copied the confidentiality formula of subsection 5(10) of the *Tariff Board Act*. The Anti-dumping Tribunal's 1974 Rules of Procedure, drawn up after and partly in response to the *Magnasonic*[148] decision, provide for the treatment of confidential information[149] and *in camera* hearings[150]. By contrast, the Tariff Board Guide only mentions that hearing transcripts that may contain confidential information cannot be examined by the public. What was said in *Magnasonic* about the proper handling of confidential evidence,[151] although directed at the Anti-dumping Tribunal, has clear relevance to the Board. *Magnasonic* was echoed in the more recent *Sarco* decision; in that case, Heald J. concluded "that the Tribunal did not conduct the inquiry required by the statute since it acted on information not disclosed to the parties with the result that the applicant was given no opportunity to respond to that information".[152]

Magnasonic and *Sarco* raise issues that apparently the Board has yet to answer. Is it the Board's responsibility to identify confidential

material when it is first introduced, or is that the responsibility of the person filing a document? When the Board has relied on confidential information in reaching its decision, how should it explain the decision in the written public declaration? Finally, and of most importance, what are the Board's responsibilities under the *audi alteram partem* rule? By what procedures can and should the Board bring confidential information to the attention of the other side while respecting confidentiality? These questions must be dealt with more definitively if the Board wishes to avoid its own *Magnasonic*.

3. Gathering of Evidence by the Board Itself

Subsection 5(9) of the *Tariff Board Act* allows the Board to "obtain [and use] information that in its judgement is authentic". The Board maintains that all its decisions are based on the record.[153] However, there appear to be at least two examples of exceptions to this practice. The first was the *Accessories Machinery*[154] appeals, "class or kind" cases. The issue was whether ten per cent or more of the normal Canadian consumption of truck cranes, in the capacities under appeal, was made or produced in Canada. To answer this question, information the Board characterized as confidential was required in addition to that supplied at the hearing. Acting under subsection 5(9), the Board obtained the additional information itself, although the majority decision commented that "normally, in these circumstances, the Board would return an appeal for re-determination on the basis of the information necessary to give effect to the criteria set out in the Board's declaration". One member (Corcoran) gave a strong dissent. In his view, subsection 5(9) allowed the Board to test the validity of confidential information received, but did not authorize the Board to seek or receive information after the close of the hearing of an appeal:

> In my view, the Board is not authorized to conduct an investigation on its own, without concurrence of the parties to an appeal and after the close of the hearing, in order to gather new evidence. The Board, in its appeal function, is not an administrative nor an investigative body.

Notwithstanding this dissent, the Board reached a decision in light of confidential information obtained after the hearing and not disclosed to parties.

The second case, *Frito-Lay*,[155] concerned staff involvement in appeals as well as the problem of information sources. The record in the Federal Court of Appeal contains a note from the then Chairman of the Tariff Board to the other two members of the Board panel, referring them to a two-volume briefing concerning a related reference[156] prepared by (or, more probably, for) the Board member presiding over that reference. The parties to the appeal were not made aware of the briefing; indeed, they were warned not to refer themselves to the reference.[157] Moreover, it was in that very decision that the Board insisted that "as a tribunal of fact, it must consider the evidence adduced at the hearing".[158]

4. Withdrawals

As was mentioned above,[159] no formal decision is issued when an appeal is withdrawn. But perhaps the Board should comply with the decision in *McCambridge v. The Queen*.[160] In this case, the Federal Court of Appeal ruled that section 7 of the *Tax Review Board Act*,[161] which imposes a duty to "hear and dispose of appeals", holds true also for applications that are "withdrawn", since nothing in the Act or regulations provides for a withdrawal procedure. True, the wording of the *Tariff Board Act* is quite different. There is no reference in section 4 to any duties of the Board respecting appeals. The relevant sections in other Acts empowering the Board to hear appeals also remain conveniently silent. However, subsection 3(8) requires that at least three members exercise *all* the powers of the Board in relation to appeals.[162] The Tariff Board considers this subsection does not apply to withdrawals, as the Board merely "forgets" about such cases rather than dismissing them. But subsection 5(2) of the *Tariff Board Act* requires the Board to "give reasonable opportunity to persons who may not have been summoned to appear . . . on any matter relevant" to an appeal. Is this provision respected if no hearing is held, or if, as is the case with "post-gazetting" withdrawals, the Board is determined in advance to "dispose" of the case as the applicant requests, whatever the argument of intervenors might be?

5. Third Parties

Parke, Davis[163] held that in an appeal before the Tariff Board only the importer and the Deputy Minister had standing; Thorson P. thought that, although the *Tariff Board Act* was no longer divided into two parts, the distinction between the inquiry function and the appellate function continued to exist, and that it was "astounding" to suggest that third parties had a right to be heard in a private dispute between the importer and the Crown. Although *Parke, Davis* was decided in 1953, Thorson P. was considering the statute as it stood in 1949. The Act was amended in 1950, and most of the Board's inquiry features, including the rights of third parties, were explicitly extended to the appellate function.[164] In the same year a similar amendment with respect to intervenants was made to the *Customs Act*,[165] and, in 1951, to the *Excise Tax Act*.[166] Finally, both the *Anti-dumping Act* and the *Petroleum Administration Act* give interested parties the right to be heard. Accordingly third parties have full rights before the contemporary Board in all aspects of its jurisdiction.[167]

6. Conclusions

Two general observations may be made about the Tariff Board's procedure. First, it is simple and straightforward; few procedural questions arise in connection with economic inquiries, and those associated with the appellate function have nothing like the complexity of, for example, procedural matters before the Anti-dumping Tribunal. Second, and as a related matter, the Board's procedure is informal, without comprehensive and mandatory rules. In procedural respects, the Tariff Board appears to depart from the quasi-judicial norm and conforms more closely to some administrative model.

Indeed, the Tariff Board has never promulgated rules of practice as subsection 5(12) of the *Tariff Board Act* empowers it to do. The Guide is informal and "may assist parties appearing before the Tariff Board".[168] The only compulsory procedural rules are to be found in the five Acts that give the Board its powers; they remain very superficial and are far from constituting a comprehensive set of procedural rules.[169]

The Board considers that formal rules might pose more problems than they would solve. The Board has existed for 50 years and has managed to please its clientele without rules. The adoption of rules was considered during Me Audette's chairmanship, but it was decided instead to issue a Guide, written in an informal language. The absence of rules helps keep proceedings informal and makes the unassisted lay applicant more comfortable in presenting his case. The Board's guidelines are complied with in almost all cases. This may be because the Tariff Board deals with a specific clientele which shows respect for the Board. Many appellants are represented by customs specialists who know the ropes and have an interest in maintaining a cordial relationship with the tribunal.

On the other hand, it is a trifle curious that the Board is left wholly free to determine in important respects how appellants or applicants are to proceed. For example, section 59 of the *Excise Tax Act* is silent as to how a "doubt or difference" comes before the Board; and so the Board has informally decided how that is to happen. What is the legal significance of an informal Guide, employing on almost every occasion the word "should"? Reliance on an instrument of the sort may create some difficulties. Its status may be uncertain in the eyes of parties. Must they conform to the Guide? What will be the consequences of not conforming? It seems certain that no appellant should be prejudiced by failure to respect such guidelines. To remove any uncertainties that may exist, and to ensure that the best and clearest mechanisms exist, it may be wise to establish precise procedures by way of statute or regulations.

By contrast, the Anti-dumping Tribunal has formal rules of procedure approved by the Governor in Council under subsection 25(1) of the *Anti-dumping Act*.[170] Is the Tribunal's position preferable to the Board's in this respect? In a study of the Tribunal we pointed out[171] that in a sense the Rules of Procedure had been forced on the Tribunal by the Federal Court of Appeal's decision in the *Magnasonic* case, which emphasized that the Tribunal was a "court of record" and was accordingly a quasi-judicial body with all the obligations flowing therefrom. We suggested[172] that quasi-judicial proceedings that scrupulously respect natural justice may not be the best way of approaching anti-dumping and similar work, and that other models merit investigation. In fact, we criticized the Anti-dumping Tribunal for being excessively formal and judicial. A "Guide" may represent part of an alternative model, that captures the best balance between formality and informality. "Rules" of a sort exist to expedite efficient proceedings and guide participants; but adherence to the

"rules" is not an end in itself, and the Board has wide discretion over how proceedings are conducted. Thus, Tariff Board's operations suggest a somewhat different style. There are almost certainly benefits to this style; but what might be the costs?

One of the Anti-dumping Tribunal's most important post-*Magnasonic* procedural innovations was the introduction of preliminary sittings. The purpose of these sittings is to consider the procedure to be followed at the hearing; to exchange briefs, documents and exhibits proposed to be submitted at the hearing; to consider any confidentiality problems; and generally to arrange for the expeditious presentation of evidence and disposition of the inquiry. Another very important post-*Magnasonic* change, helped along later by *Sarco*, is the method of dealing with confidential information. The essence of the Tribunal's method is to make confidential briefs, documents and exhibits available only to counsel who are appearing for parties represented at the hearings, and those counsel are required to give an undertaking not to reveal confidential information to their clients. Confidential material made available must be returned by counsel at the conclusion of the hearings. When confidential information will be given in evidence, the Tribunal goes behind closed doors, excluding everyone except the various counsel. These methods are appropriate to a quasi-judicial body.

It is doubtful whether the Tariff Board would gain anything by institution of preliminary sittings. A typical appeal to the Board, for the most part, is not so complex that efficiency suggests more than one sitting — quite the contrary. Much more can be said for the Board imitating the Tribunal's more formal approach to confidential evidence and information; otherwise, as we have already suggested, it is only a matter of time until the Board runs afoul of a new version of *Magnasonic* or *Sarco*.

The interesting point is that the Tariff Board, when exercising its appellate function, is much more obviously a quasi-judicial body than the Anti-dumping Tribunal. Yet the Board's procedure is less complex and more informal than that of the Tribunal. In this way the Board may run some risks of incurring judicial reviews, but its sensible approach probably facilitates the process, and makes it a much more effective organization.

V

Appeals: Analysis of Board Decisions

A. INTRODUCTION

The Tariff Board has heard close to 1,500 appeals, over the almost fifty years of its history. The range of products considered, for one purpose or another, is staggering, from cookie jars[173] to used ships,[174] Granola Bars[175] to air-borne web pulp dryers and parts thereof.[176] Our discussion of the Board's jurisdiction (Chapter III) showed how such products come before the Board, the kind of decisions about them the Board must make, and how the Board has been treated by the courts. In this chapter we focus on how the Board decides the questions before it. A comprehensive analysis of the Board's "jurisprudence" is not intended; that would require a separate and substantial volume. What may be possible is to give the "flavour" of the "cases". What themes recur? What is the Board's attitude and approach to questions raised in appeals? What, generally, is the Board's reasoning process, and how appropriate and adequate is it?

B. JURISDICTION OF THE TARIFF BOARD: THE BOARD'S VIEW

Chapter III contained a detailed account of the Tariff Board's jurisdiction, mostly as set forth in the relevant statutes and in decisions of the courts. What kind of jurisdictional problems come before

the Board itself, and how does the Board, in the front-line, deal with these problems?

1. Value for Duty

The major issue confronted by the Board is the nature of a "decision" under section 47 of the *Customs Act*. In *Tropic-Cal*[177] the appellant attacked the value for duty placed on his sun glasses by the Deputy Minister. The respondent submitted that there was no decision of the Deputy Minister; the appeal, said the respondent, was based on a letter written by an Assistant Deputy Minister which was nothing more than a courtesy letter. Said the Board:

> It is only under section 46 of the *Customs Act* that authority is given to the Deputy Minister to make a decision on the valuation for duty of imported goods. Nowhere else in the Act is such authority given to the Deputy Minister. This is not to say, of course, that the Deputy Minister cannot make decisions of a purely operational nature for the good administration of his department such as rulings, instructions, directives, or advice to the customs officers. But surely these directives or rulings are not what the legislator had in mind when using the expression "a decision" in subsection (1) of section 47. Otherwise any directive or ruling concerning the general operational administration of the Department which would have to do with valuation for duty would become subject to appeal to the Tariff Board.

The Board considered two of its previous decisions[178] and a decision of the High Court of Ontario;[179] all three decisions, in the view of the Board, emphasized the need for a "formal document". The Board continued:

> In the present case under appeal there is no such formal document signed by the Deputy Minister evidencing his alleged decision. The letter of the Assistant Deputy Minister . . . which is the basis for this appeal . . . is neither signed by the Deputy Minister nor for or on his behalf; it does not even purport to record a decision of the Deputy Minister.

The Board concluded it was without jurisdiction.

In *Bedos*,[180] the appellants argued against determinations of value for duty made by the Deputy Minister in accordance with a ministerial prescription; they said that the prescription should be reviewed by the Board since the Deputy Minister's decision was based on that prescription. The respondent's position was that there was no provision in the *Customs Act* for an appeal from the decision of the

Minister. The Board accepted the Deputy Minister's position. It said that "the Board is not empowered to review the material facts which the Minister had before him when he made his prescription . . .".

In a value for duty case, does the Tariff Board have jurisdiction not only to determine whether the Deputy Minister was right or wrong, but also to determine the value for duty of the specific goods imported? May the Board determine the value for duty at a figure other than that urged by the appellant and other than that assessed by the respondent? In *Nabisco Foods*[181] the Board decided that subsection 44(3) of the *Customs Act* ("the Board may make such order or finding as the nature of the matter may require, and . . . may declare . . . (b) the value for duty . . .") gave it the power to declare whatever value for duty it finds to be proper in the circumstances, but rejected the argument that the Deputy Minister may plead for a betterment of the Crown's position.

> To allow the respondent to do this would be in conflict with both law and equity; it would be tantamount to giving him a right of appeal from his own decision which Parliament has not conferred upon him; it would further allow him to plead his own negligence or wrongful act for the betterment of his position to the detriment of the appellant taxpayer; it would inject into every appeal to the Board by a taxpayer an element of speculative adventure never intended by Parliament. . . . The Board's declaration relates to the goods in issue but it cannot thereby affect the acquired rights of the appellant taxpayer as between himself and the respondent in relation to the specific goods which are the subject of the decision from which this appeal is taken.
>
> . . . .
>
> The Board, therefore, has proceeded to consider this appeal upon all the evidence, including that to which the appellant took objection; this consideration it has undertaken subject to the reservation that were it to find a value for duty of the goods in excess of that decided by the respondent in the decision from which appeal is taken, such a finding would not confer upon the respondent the right to levy upon the appellant's imported goods, in issue in this appeal, any customs duties in excess of those payable under his original decision.

The Deputy Minister may, of course, alter his decision by way of a re-determination or re-appraisal under the *Customs Act*. The Board may not order the Deputy Minister not to re-appraise the value for duty of goods.[182]

Jurisdictional questions about value for duty are highly technical and complex. What is a "decision"? Is a ministerial prescription reviewable? Does the Board's jurisdiction extend to determining the value for duty of specific goods? Answers to questions of this kind

require considerable legal skill. Inevitably, in facing such problems, the Board will develop an informal system of precedent. It will, willy-nilly, be pushed into a court-like stance.

2. Reference by the Deputy Minister

Appeal No. 1025 (April 29, 1974) was a reference by the Deputy Minister under section 49 of the *Customs Act*. The Deputy Minister asked the Board's opinion about the appropriate trade level to be used under provisions of section 36 of the *Customs Act* for establishing the market value of tapered roller bearings manufactured in Japan. There were six intervenants.

Counsel for the intervenant-importer submitted that the Board's jurisdiction under section 49 is restricted in the sense that the Board must limit itself to the question put by the Deputy Minister including the Deputy Minister's statement of facts. This submission was an attempt to exclude participation by Canadian intervenants who wished to present additional and contrary facts for the Board's attention. The Board did not accept this argument:

> . . . the Board ruled that evidence on facts additional to or different from the facts presented to the Board by the Deputy Minister in his "statement of facts" can be received by the Board. In so ruling, the Board pointed out that subsection (2) of section 49 of the *Customs Act* states clearly that for the purposes of sections 47 and 48 reference under section 49 shall be deemed to be an appeal. Subsection (2) of section 47 provides that notice of a hearing of an appeal under subsection (1) of that section shall be published in the *Canada Gazette* at least twenty-one days prior to the day of the hearing, and any person who, on or before that day, enters an appearance with the secretary of the Tariff Board may be heard on the appeal. Any person may thus present to the Board additional or indeed different evidence from that set out in the "statement of facts".
>
> Subsection (13) of section 5 of the *Tariff Board Act* provides that section 5, except subsections (3) and (7), applies in respect of an appeal to the Board pursuant to any other Act or regulations thereunder as if the appeal were an inquiry within the meaning of this Act. The Act itself does not in effect restrict the evidence which can be submitted to the Board with respect to a reference or in an appeal provided such evidence is deemed by the Board to be relevant. However, the Board pointed out, nowhere in the relevant Acts is the Deputy Minister authorized to restrict or limit in any way the evidence heard by the Board on an inquiry or on an appeal.

> Thus under both the *Tariff Board Act* and the *Customs Act*, the Board is bound to hear and receive all relevant evidence.

The Board felt reinforced in its ruling by considerations of natural justice and equity, and by its desire to reach a correct opinion.[183]

3. *Excise Tax Act*

The substantial *Excise Tax Act* jurisdictional point before the Board has been the meaning and limits of subsection 57(1) of the Act, now subsection 59(1). In the *Pedwell Lumber* and *Barwood Flooring* cases[184] the appellants applied under the section for a refund of taxes and penalties paid under the assessment levied. The particular points in issue were: (1) the application of a discount to a sale price in the computation of the tax to be paid; (2) the period of time during which the discount may have been applicable; (3) the fairness of certain prices — in sales to affiliated companies — for purposes of computation of the tax to be paid; and (4) the correctness of the imposition of a penalty.

On the issue of fairness of sale price, the Board concluded easily that as a result of section 37[185] of the *Excise Tax Act* it was without jurisdiction. With respect to the other issues, the Board relied heavily on the Supreme Court of Canada's decision in *Goodyear Tire et al. v. T. Eaton Company et al.*;[186] the Board considered that the *Goodyear* case stood for the proposition that "the Board's jurisdiction is limited to adjudication upon a difference or doubt 'as to whether any or what rate of tax is payable on any article under this Act' where there is no previous decision by any competent tribunal binding throughout Canada." Said the Board:

> The rate it [the Board] may determine is, under subsection (1) of section 57 of the Act, "what rate of tax is payable on any article under this Act"; the Board, to determine the rate, must find provision for it under the Act; it would exceed its jurisdiction were it to enter into irrelevant mathematical calculations in areas such as price determinations through the application of discounts with their immeasurable possibilities of rates by making percentages of varied figures in relation to each other.

The Board therefore concluded it was without jurisdiction on the remaining three issues. It further concluded that subsection 57(1) did not permit it in any circumstances to order a refund.

A similar case was *Victoria Wholesale Souvenirs Limited*.[187] The applicant under subsection 59(1) of the *Excise Tax Act* asked for a declaration that sales tax was not payable on ashtrays it sold. The applicant bought ashtrays, affixed a decal, and resold them as souvenirs. The Deputy Minister ruled that the applicant was required to apply for a manufacturer's sales tax licence and to account for sales tax on the ashtrays, since the company was to be considered for purposes of the *Excise Tax Act* as a manufacturer or producer of ashtrays. The Tariff Board agreed with counsel for the Deputy Minister that the issue in the case was whether the applicant was a manufacturer or producer, and that what was called for was a declaration as to liability for tax. Subsection 29(1) limits the Board's jurisdiction to a declaration as to "what rate of tax is payable on any article", and any other kind of declaration would go beyond the Board's jurisdiction. The application was dismissed for lack of jurisdiction.

In *Children's Apparel*,[188] another application under the then section 57 of the *Excise Tax Act*, the question was whether plastic hangers were "partly manufactured goods" as defined in the Act. Subsection 30(2) of the Act provided that in most circumstances sales tax was not payable on partly manufactured goods. Paragraph 29(1)(*d*) provided in part that "the Minister is the sole judge as to whether or not goods are 'partly manufactured goods' within the meaning of this section . . ." The Board made clear that nothing in section 57 overrode section 29, and that it was without jurisdiction.

In the *Rexall* case[189] the appellant claimed a refund of sales tax paid on articles found to be defective. The Board considered that the question of a refund was not a question of "whether any or what rate of tax is payable" and that the Board's power to declare an article exempt from tax did not give it authority to order a refund. The appellant also claimed that in the circumstances a sale had not taken place; that, said the Board, deprived the Board of jurisdiction, "since a sale is implicit in order to give the Board jurisdiction under the *Excise Tax Act*".

These decisions by the Board are representative of a number of cases in which the Board has made clear its very limited view of the Board's jurisdiction under the *Excise Tax Act*. The Act itself, and decisions of the courts interpreting the Act (particularly the *Goodyear* decision), restrict the Board to deciding the rate of tax, and in particular prevent it from inquiring into liability for tax.

4. Anti-dumping

The anti-dumping jurisdiction of the Tariff Board is rarely invoked. Two cases show the nature of this jurisdiction. In *International Metal Fabricators*[190] the appellant contended that the respondent erred in appraising, under paragraph 17(1)(*b*) of the *Anti-dumping Act*, the normal value of electric can openers. Both parties agreed that normal value had to be determined under subsection 9(5).[191] The Deputy Minister appraised the normal value of the goods in question by applying the provisions of paragraph 9(5)(*b*) rather than those of 9(5)(*a*). The appellant contended in part that paragraph (*a*) was the applicable paragraph. The Board stated that it has "to consider its appellate jurisdiction over the decision of an administrative official in exercising an option given to him by Parliament in the administration of the *Anti-dumping Act*". In a lengthy passage the Board gave its views:

> Subsection 19(1) gives an unqualified right of appeal to the Tariff Board from a decision of the respondent made pursuant to subsection 18(1). Subsection 17(1) deals with the respondent's final determination of dumping by, inter alia, "appraising the normal value" of goods; it further enacts specifically that, "subject to subsection 19(1)", such appraisal and final determination shall be final and conclusive. Subsection 2(1) enacts that normal value has the meaning given to that expression by section 9, under the provisions of subsection (5) whereof the respondent made the contentious option, appraisal and determination.
>
> Nowhere in the Act is the respondent's option under subsection 9(5) enacted to be final and conclusive. The respondent's final determination of dumping, involving the appraisal of normal value under section 9, is said to be final and conclusive, but this finality and conclusiveness is explicitly made "subject to subsection 19(1)".
>
> . . . .
>
> . . . the Board views this right of appeal as being intended by Parliament to be an effective right involving the Board's right and obligation to examine the respondent's exercise of his option without being bound by his choice or determination. This option is but one of a series of steps enacted by Parliament to be followed by the respondent in making his final determination.
>
> It is true that subsection 9(5) gives the respondent the option between two methods; on this score the Board should not arbitrarily substitute its option for his; equally is the respondent bound not to exercise his option fancifully or arbitrarily; nothing in subsection 9(5), including the word "at the option of the Deputy Minister", removes the exercise of this option from the ambit of the words "a decision of the Deputy Minister made pursuant to subsection 17(1)" in subsection 19(1) so as to

prevent the Board from hearing the appellant and the intervenants on this particular issue or from adjudicating upon the contested option.

Accordingly, the Board considered it had the necessary jurisdiction, although it then decided that the respondent's choice was a reasonable one. The appeal was, however, allowed in part on other grounds.

In the six Shoe appeals,[192] the appellants attacked ministerial prescriptions made under section 11 of the *Anti-dumping Act*[193] on the basis that the Minister exceeded the powers delegated to him by the statute in that the conditions precedent to the making of the prescriptions did not exist; that the Minister did not prescribe a manner of determining value for duty or normal value but rather fixed these values; and that the prescriptions were arbitrary (because their application allegedly results in the determination of a normal value higher than the export price and a value for duty higher than the fair market value), unreasonable (because the percentage rate of the advance over the export price does not reflect the margin of dumping of the goods if any exists) and discriminatory (because they are applicable whether the goods are dumped or not and whatever the margin of dumping may be). The Board considered that it had jurisdiction to consider the first two grounds of attack; it was able to inquire "as to whether the Minister had the authority to make prescriptions and as to whether in making the prescriptions in issue he was *intra vires* of that authority". Following consideration, the Board decided that the Minister had acted *intra vires*, and then declined to consider the last ground of attack by the appellants on the basis that the prescriptions "were made by the Minister under the delegated powers to legislate . . .".

5. Some Conclusions on the Board's Approach to Jurisdiction

No clear theme emerges from a review of Tariff Board decisions about questions of jurisdiction. Some cases display caution. There must be a *decision* of the Deputy Minister before there can be an appeal of value for duty. Jurisdiction under the *Excise Tax Act* does not extend to ordering refunds, deciding who is a manufacturer or producer (i.e., who is liable for tax), or what are "partly manufactured goods"; it is restricted to whether any or what rate of tax is payable.

On the other hand, some decisions suggest a measure of boldness. In the *Bearings* case the Board accepted an important role for intervenants. The Board considers that it has the power to fix value for duty. A wide appeal to the Board under subsection 19(1) of the *Anti-dumping Act* was described in *International Metal Fabricators*. The Board believes it may inquire into whether anti-dumping ministerial prescriptions are *intra vires*.

What is most striking is the legal complexity of the jurisdictional questions the Board must decide. Doubt must arise about the competence of a largely non-lawyer Board, without in-house legal counsel, to resolve such problems. One solution may be to dispel the statutory murkiness that creates jurisdictional doubt. Authority for the Board's activity comes from a variety of complex sources. It is jig-saw like, and to some extent the product of happenstance. It is not the Board's fault that it deals with difficult and diverse matters on the margin of its competence.

C. RECENT BOARD DECISIONS

The Board has a substantial history. To some extent, an appreciation of its appeal activity requires examination of a long chain of cases. But perhaps, as a preliminary measure, a quick look at a sample of recent cases will indicate the nature of the Board's appellate activity.

1. Classification: Lobsters or Crustaceans?

Appeal No. 1229[194] was pursuant to section 47 of the *Customs Act* from a decision of the Deputy Minister of National Revenue for Customs and Excise that frozen rock lobster tails, frozen lobster meat and cooked lobster meat, imported from Cuba, are classified in tariff item 12700-1:

> 12700-1 Crustaceans, fresh, n.o.p.; crustaceans, prepared or preserved, n.o.p.
>
> *Crustacés frais, n.d.; crustacés préparés ou conservés, n.d.*

The appellant claimed that the goods should have been classified under tariff item 12800-1:

12800-1 Lobsters or lobster meat, fresh or boiled

Homard ou chair de homard, frais ou bouillis

The principal item in question was frozen raw lobster tails, mainly used by steak houses for the steak and lobster plates known as "surf and turf".

The Board summed up the appellant's evidence this way:

> The evidence as to the meaning of the word lobster, according to counsel, is that the common or ordinary usage, as well as the terminology of the trade, coincide with the technical information supplied by the expert witness Dr. Carefoot. The professional opinion of this highly qualified witness, both from a biological and taxonomical point of view is that the goods in issue are lobsters. He had supported that position with the evidence of other experts in the same field and by reference to numerous other authorities. The evidence of Dr. Carefoot that the goods in issue imported from Cuba are lobsters stands uncontroverted, said counsel.
>
> Independent witnesses had testified that the goods were known and sold in the trade as lobster tails. They are offered as such in fish markets and sold as such in restaurants, or indeed just lobster, without complaint from either consumer or authorities. Even the purist Chef Paul, knowing that the proper word in France for lobster from Cuba is *langouste* felt it necessary to use the words *queues de homard* for his French Canadian customers because the word *langouste* requires explanation.

The appellant emphasized that the tariff item under which the respondent had classified the goods refers to crustaceans, n.o.p. ("not otherwise provided"), a general term, and the appropriate rule of construction is that if one finds a more specific item to describe the goods, then that item applies.

The appellant then turned to the French version of the tariff item. In its decision the Board described this part of the appellant's argument as follows:

> Dealing with the French wording of tariff item 12800-1 — *Homard ou chair de homard, frais ou bouillis* — and with the respondent's position that *homard* and *langouste* are treated differently in the French dictionaries, counsel argued that *langouste* though different from *homard* is still a lobster. Counsel held that the word *homard* as used in the French version of the tariff would include the spiny lobsters in issue. While the use of the word *homard* in the French version creates confusion, the word lobster in the English version does not create confusion in anyone's mind. Where confusion exists in the French version, then the

> construction to be put on the Statute is "the version thereof that, according to the true spirit, intent and meaning of the enactment, best ensures the attainment of its objects," said counsel, quoting from the *Official Languages Act*, paragraph 8(2)(*d*). There is no question that the English version clearly covers the goods in issue, he said.

Finally, the appellant argued that to interpret the tariff items in the manner of the Deputy Minister — to give only *homaridae* the benefit of free entry under 12800-1 — would mean "that those lobsters which are most identical to (and most competitive with) the Canadian clawed lobster would be the only ones entitled to free entry. This is hardly consistent . . . with what the respondent sees as the true spirit and intent of the *Act* which, according to him, is the protection of the home producer".

The Deputy Minister's view was that the words "lobster" and *homard* refer solely to members of the *homaridae* family:

> He submitted that to the average Canadian, the word "lobster" without any qualification, refers to an animal of the *homaridae* family. In Canada, generally, said counsel in his brief, "lobster" and *homard* are commonly and widely known animals of the sea, not of the type imported by the appellant and it must be assumed that Parliament intended a meaning for "lobster" and *homard* such as would be given by ordinary persons, not scientists or those in the fish trade.

The Deputy Minister produced his own clutch of dictionary and encyclopaedia entries, particularly emphasizing French language dictionaries which made clear that *homard* refers only to the *homaridae* family.

In its decision, the Board agreed that the English word "lobster" correctly described Cuban rock lobster, from both technical and common usage perspectives. But *homard* does not include *langouste*; there is a difference in the French and English versions of tariff item 12800-1. Subsection 8(1) of the *Official Languages Act*[195] provided that both language versions of a statute are equally authentic, and that "where it is alleged or appears that the two versions of the enactment differ in their meaning, regard shall be had to both its versions . . ." Said the decision:

> . . . the Board concludes that Parliament, in using the word *homard* in the French version of the tariff item 12800-1, clearly intended that item to apply to the clawed species of lobster. The word lobster, as it appears in the English version of the tariff item, cannot therefore be construed to include species other than *homaridae*, the clawed lobster.

The case of the Cuban lobsters is reasonably typical of the Board's approach to the classification problem. Classification is seen

as a matter of *definition*; what is the meaning of the words in the tariff item? The struggle likely becomes one between dictionaries, expert testimony, trade usage, common parlance. It becomes a matter of adjudicating on the merits of encyclopaedias, deciding whether the man on the street prevails over the expert, comparing the nuances of French and English, considering whose view of the lobster is the most relevant (that of the zoologist, the chef, the gourmet, the gourmand)?

2. Classification: Made in Canada or Not?

Appeal No. 1317,[196] again under section 47 of the *Customs Act*, was from a decision of the Deputy Minister to classify certain steel plate under tariff item 38100-1:

> 38100-1 Plate of iron or steel, not further manufactured than hot- or cold-rolled, and whether or not coated, or with rolled surface pattern

The appellant claimed that the correct tariff item was 43877-1:

> 43877-1 materials, of a class or kind not made in Canada, for use in the manufacture of parts, and accessories and parts thereof, except tires and tubes, for passenger automobiles, buses, motor trucks, ambulances or hearses, or chassis therefor

The appellant's argument was that the steel plate in question, used in the fabrication of frames for heavy-duty off-highway trucks of capacities ranging up to 200 tons, was of a class or kind not made in Canada. The appellant's essential point was that no steel was made in Canada with precisely the same qualities — and in particular the chemical composition — as the imported steel. Witness for an intervenant, Canadian Heat Treaters Limited, testified that his company produced steel of 100,000 pounds per square inch, used by at least one company in manufacturing box frames for heavy dump trucks. Witness for another intervenant, Steel Company of Canada, testified that Canadian Heat Treaters steel was at least as "weldable" as the appellant's steel.

The appellant returned to the attack by arguing that "class or kind" must be considered in terms of end-use when dealing with end-use tariff items. The end-use of the imported steel was truck frames; the particular demand on frames is such, said the appellant, that only

the appellant's imported steel was appropriate. He added that "the criterion for made in Canada cases is not willingness to make or sell but the fact that there has been Canadian production. An offer is not production." Finally, the appellant addressed "policy":

> . . . it would be an economic absurdity for the *Customs Tariff* to be so construed that parts made from this steel plate can enter Canada free of duty but that the plate itself when imported to make the parts in Canada be held dutiable, when in fact such plate is not made in Canada and no other plate with the same essential characteristics for the end-use in question is made in Canada.

The Deputy Minister submitted that the class or kind of steel involved in this appeal was simply steel having 100,000 pounds per square inch yield-strength. Different chemical compositions that had been discussed in the appeal were irrelevant to the question of class or kind:

> Both of the steels in issue, counsel said, have the same classification in the trade as high yield-strength steels; both have the same properties that are set out in the standards; both are used in the manufacture of heavy duty trucks of 170 tons and finally there is no real reason, as shown in the evidence, for the appellant to prefer the imported steel to the steel manufactured in Canada. They are, he said, "similar goods" and are suitable for the same purpose.

The Board did not consider the different chemical composition of the imported steel as relevant. It accepted evidence to the effect that neither steel is of superior quality to the other or has better welding qualities than the other provided that the appropriate welding procedures are employed. The Board concluded, in dismissing the appeal:

> . . . the imported plate in issue and the domestic plate known as CHT-1000 both meet the industrial standard of high yield-strength quenched and tempered alloy steel plate suitable for welding; moreover, the Board is satisfied that both steels are used in the manufacture of frames for heavy-duty off-highway dump trucks of similar capacities. The steel plate in issue is, therefore, not a material of a class or kind not made in Canada within the meaning of tariff item 43877-1.

In this appeal the Board's approach to the "class or kind" question rejects precise and detailed comparison of physical characteristics — for, example, chemical composition of the steel — in favour of an examination of suitability for end-use. If steel is manufactured in Canada suitable for the same end-use as the imported steel, then the imported steel is of a class or kind made in Canada. With this approach, the Board avoids the kind of difficulties created

in the anti-dumping context by a view of "like goods" that relies on characteristic comparison and attributes only very limited significance to cross-elasticity of demand and functional interchangeability.[197]

What are the policy implications of a wide view of the "class or kind" question? Such a view favours Canadian producers, for it cuts back substantially on what may be accommodated in the "not made in Canada" category. It implements a protectionist policy; although, of course, there is nothing to say that this is the Tariff Board's intention.

3. Value for Duty: When is a Commission Not a Commission?

Appeal No. 1330[198] under section 47 of the *Customs Act* raised the question of the value for duty of radios, tape recorders and speakers imported from Hong Kong and Japan. The issue before the Board was whether an eight per cent commission paid to a Hong Kong purchasing agent by the appellant was to be included in calculating the amount for which the goods were sold under subsection 41(1) of the Act, or whether the commission was to be considered the money value of a special arrangement under subsection 42(2) of the Act;[199] or whether the commission was to be regarded as simply a commission, to be disregarded in calculation of value for duty.

The crux of the problem was the nature of the transactions between Magnasonic and the Hong Kong company (Soundesign). The normal documentary procedure, put simply, was for Magnasonic to indicate to Soundesign its desire to purchase certain goods; Soundesign to issue a purchase order to a local manufacturer; and Soundesign to complete a sales contract showing Magnasonic as the purchaser and Soundesign as the vendor. In letters of credit and export documentation Soundesign was shown as the vendor.

The appellant argued that, with respect to subsection 41(1) of the *Customs Act*, Soundesign "had at no time taken title to the goods at issue and could not therefore be construed to be the seller in the sales transaction referred to in that section of the Act (. . . value for duty shall be the amount for which the goods were sold . . .)". Said the appellant's counsel:

> While the documents for the individual transactions listed Soundesign as the vendor, the key phrase in the printed sales contract issued by Soundesign H K [Hong Kong] to Magnasonic specifically making that contract subject to any other agreement between the parties, had the effect of bringing into play the general agreement under which Soundesign H K was clearly a buying agent for Magnasonic. . . . all the manufacturers of the goods were at arm's length to Soundesign Hong Kong, . . . the latter had no manufacturing or warehousing facilities in the Far East . . . the company never took possession of the goods . . . the documentation arrangements were simply for convenience.

Concerning subsection 42(2), the appellant argued that the agreement between the appellant and the Hong Kong company was not a "special arrangement", but rather "a necessary cost of doing business".

The Deputy Minister argued that Magnasonic "did not exercise the control over Soundesign which would be normal in an agent-principal relationship":

> . . . Soundesign initiated the process of model choice and developed the specifications, Magnasonic had no contact whatsoever with the manufacturers, Magnasonic's purchase order was subject to acceptance by the agent, the latter both chose and negotiated with the local manufacturer, and claims against that manufacturer had to be made through Soundesign. All the documentation indicated a vendor-purchaser relationship between Soundesign and Magnasonic. Futhermore, Soundesign's involvement in the release of the letter of credit funds indicated that the company acted as the conduit of the title to the goods since only their production of the required documents could ensure completion of the transaction.

If subsection 41(1) did not apply, said the Deputy Minister, then the general agreement between the companies should be seen as a special arrangement falling under subsection 42(2):

> The Soundesign Companies were clearly "persons interested" in the sense of that section, it had been established that Soundesign had been unable to sell directly in Canada, this general agreement with Magnasonic was the only one of its kind the company had in effect and the agreement was a special arrangement for the Canadian market designed to lower the value for duty of Soundesign brand goods. . . . the 8 per cent commission should be taken as the money value of this special arrangement.

In its decision the Tariff Board paid close attention to its ruling in the *Woodward Stores* case:[200]

> The *Woodward* case established quite clearly that the business practice whereby an agent becomes an exporter of goods for shipping and customs purposes by for example, being shown on the various shipping documents and M-A invoices as the vendor or seller, cannot in itself be

> taken as establishing that the agent concerned had title to the goods or was a principal in the transaction. Furthermore, the Woodward decision draws attention to the fact that importers' buying costs are not to be calculated in the value for duty. They are legitimate business expenditures which in the case, for example, of importations from the Far East, will be incurred either through the establishment of buying offices or through the payment of agents' fees. Also, in analyzing the intent of section 42(2) in that appeal, the Tariff Board expressed the view that the purpose of that subsection was to deal with any special arrangement which would have the effect of reducing the true value for duty of goods for export.

The Board, following the *Woodward* approach, concluded that the export documents which list Soundesign H K as the vendor are not to be regarded as evidence that a seller-buyer relationship existed between the two companies.

> The manufacturer delivered these goods in all instances direct to the shipping lines in accordance with his f.o.b. contract. At that point the purchaser, Magnasonic Canada Ltd., assumed responsibility for freight and insurance charges and took title to the goods. Soundesign H K's involvement in the release of funds under the letter of credit issued before each transaction constituted a normal business practice used extensively in international trade and cannot in the Board's view be interpreted as indicating a transfer of title to Soundesign, even momentarily.

Accordingly, the eight per cent commission is not included in the value for duty of the goods. As for the "special arrangement" argument of the Deputy Minister, this too was rejected on the grounds that only a normal agent-principal relationship existed, and that the eight per cent was an ordinary importer's expense.

Magnasonic shows the complexity of valuation for duty. Grasp of the practice and law of international trade is necessary; the Board must possess a high level of expertise.

4. Federal Sales Tax: Mats

In *Northwest Rubber Mats*,[201] the applicant referred to subsection 59(1) of the *Excise Tax Act* and asked for a declaration as to the rate of tax payable on vulcanized rubber flooring or that the flooring was exempt from tax imposed by section 27 of the Act on all goods produced or manufactured in Canada. The applicant argued that

section 6 of Part I of schedule V applied.[202] It further submitted that when the goods in question are used in barns by dairy farmers tariff item 40924-1 applies, and that the goods are therefore exempt from sales tax under section 1, Part VII of Schedule III of the Act, which provides for the exemption from sales tax of goods enumerated in certain tariff items, including 40924-1.

The Deputy Minister argued that the product was not yardage flooring, did not have a hard surface and was not for permanent bonding to floors within the meaning of section 6 of Part I of Schedule V; and that the product did not fall within tariff item 40924-1, but rather 61900-1, which refers to "rubber mats or matting . . .".

The Board heard evidence that "tiles" are small squares normally glued in place, rather than nailed or set with pins; and that yardage flooring is manufactured in standard widths and is sold by the yard. One expert witness called by the respondent said the applicant's product was best described as a mat. On this issue, the Board concluded "that the goods in issue are not floor tiles, are not yardage flooring and are not generally for permanent bonding to floors within the meaning of section 6". The Board then rejected the argument on tariff item 40924-1; the goods were seldom used in milking parlours, and could not be brought within the general words "all other agricultural implements or agricultural machinery, n.o.p." in that tariff item.

5. Conclusion

These recent examples of the Board's work suggest the kind of problems that come before the modern Board, and the general approach taken. Most commonly the Board is required to classify — to decide what a product *is*. The classification may be of a relatively straightforward sort, or may involve such questions as whether a product is of a class or kind made in Canada, or of a product's federal sales tax status under the *Excise Tax Act*. Valuation problems although less common, are important.

D. BOARD DECISIONS IN GENERAL

1. Classification: Tackling the Impossible

The Board's single biggest activity is classification, largely under the *Customs Act*, but also under the *Excise Tax Act*. We have already dipped into those waters in Chapter III. Now, from a different perspective, we describe some of the recurring classification difficulties that confront the Board. For the moment, we put aside wider criticisms, and consider the Board's particular approach over time to quite specific problems.

(a) definition: uninformed frequenters of camera supply stores

Definition is the basis of classification. Does the definition of "table ware" encompass "Toby" jugs?[203] Is meat extract "meat"?[204]

What is the "correct" definitional approach to the *Customs Tariff*? The Board appears to have followed a steady course on this question. In 1950 it was called upon to consider whether processed castor oils were "castor oil".[205] The evidence of "various technicians" was that processed castor oils were not "castor oil" but "entirely different substances". But the Board said (with a dissenting opinion):

> . . . our view is that the Customs Tariff was not enacted primarily for use by technicians nor for interpretation solely by technicians; indeed, on the contrary, it must be assumed that in devising tariff items, Parliament had at least equally in mind those highly-interested persons embraced within the phrase "the trade" — and the evidence clearly establishes that *in the trade* the term "castor oil" (or "castor") is generally accepted, perhaps loosely, as meaning and including not only the oil of the castor bean in its raw or crude state but also dehydrated castor oil.

In one of the *Ryder* cases[206] the Board said of the tariff item under consideration that "when Parliament enacted this item in the *Customs Tariff*, it must be assumed that in using the language it did, Parliament intended that the words in the item be given their normal or usual meaning unless the usage in the particular trade otherwise required".

In *Carl Zeiss*[207] the Board decided that an electronic flash was not a "flash gun", and gave a particularly full account of its approach to definition:

> In the Board's view a proper approach to the meaning to be applied in the trade is the consideration of evidence of knowledgeable people in the trade and not the views held by the man in the street who may purchase goods in camera supply stores . . .
>
> Whilst the Board, in determining the meaning to be applied to words in the *Customs Tariff*, agrees that a too technical or strict interpretation is to be avoided on the basis that Parliament intended the words to have their ordinary meaning in the trade, nevertheless the Board must follow the accepted rules of interpretation.
>
> The Exchequer Court of Canada, in *His Majesty the King v Planters Nut and Chocolate Company Limited* (1951) 1 T.B.R. 271, refused to give effect to the evidence of a botanist as against the evidence of those knowledgeable in the trade as to the meaning to be applied to the word "peanut". This is illustrative of the proper rule. The Court held that Parliament had intended the words then in issue to be taken in their ordinary meaning in the trade and not in the narrow and technical view of a professional botanist. Similarly, the Board in this case is taking the ordinary meaning of the words as they are known to those knowledgeable in the trade as against the views of the uninformed frequenters of camera supply stores.
>
> In an issue relating to the interpretation of a statute such as the *Customs Tariff*, neither the technical usage of a particular science or art nor the use current among the uninformed should prevail over the commercial or trade usage common among those informed persons conversant with the subject matter.

Technical meaning is flatly rejected. "Usual meaning" is likewise not considered relevant — despite an occasional genuflection in its direction. What counts is the view of "knowledgeable people in the trade" of the "ordinary meaning in the trade".

(b) technological progress: hollow-ware, radio cabinets, and popcorn containers

The intention of Parliament does not help much with problems created by technological development. In *Canadian Housewares*[208] the question was whether such articles as dust pans and cake covers were "Hollow-ware". Said the Board:

> Whatever the legislators may have had in mind as to its meaning when they first inserted the word "Hollow-ware" in the Tariff (apparently

> in 1897) is now more or less beside the point. With the progress of technology, the language of the schedule has acquired new shades of meaning, and interpretation has had to take cognizance of these and to appraise them as to significance.

In this case, the Board referred to "precedents established and confirmed in departmental practice through the years, noticeably widening the scope of the items enumerating various kinds of 'Hollow-ware' . . ." The clear suggestion is that National Revenue is in the forefront of a process, to be regarded as legitimate, of reinterpreting tariff items as demanded by new technology.

The question of "change in form and function" arose in *F. Walter Perkin*.[209] The classification question was whether a plastic radio cabinet was radio apparatus or furniture. In 1937 the Board had decided that a wooden radio cabinet was furniture, and the respondent now argued that the matter was *res judicata*. The Board rejected that argument, although it is not clear whether it rejected the doctrine of *res judicata* or simply felt that a decision about wooden cabinets was irrelevant to the consideration of plastic cabinets. It then asked: "Apart altogether from the matter of its component material, does the term 'radio cabinet' connote the same article of commerce in 1951 as it did in 1937?" The answer:

> In the latter year . . . the radio industry had to draw on the supplies and facilities of other industries (e.g. the furniture industry) to complete its product. Today specifications for the assembly of the main parts of a radio are more exacting. Furthermore, the radio has migrated in use from the home into other fields — such as the automobile, and indeed outdoors, where in many instances a casing or cabinet of wood would be unsuitable or even useless.

The Board concluded that "so great have been the changes in form and function, we may say that the 'radio cabinet' in favour in 1937 and the one in use today are different". The Board decided that the cabinets before it were "radio apparatus".

A similar issue arose in the *Essex Hybrid Seed* case.[210] The question was whether polyethylene popcorn containers could be classified as "usual coverings" under a tariff item enacted when polyethylene bags were unknown. Why not?

> Even if at the time of this enactment civilization was as yet unaware of the blessings of polyethylene wrappings, the language of the tariff item is sufficiently general to encompass those coverings which were then usual and those which thereafter became usual. In the language of section 10 of the *Interpretation Act* "the law shall be considered as always speaking, and whenever any matter or thing is expressed in the present tense, the same shall be applied to the circumstances as they

> arise, so that effect might be given to each Act and every part thereof, according to its spirit, true intent and meaning". To follow this principle the Board must consider tariff item 710(a) in the light of present day circumstances and consider it to be still speaking; by so doing it must accept the polyethylene coverings now usual for this purpose as being encompassed within the item.

For Hollow-ware and popcorn containers, the tariff item is still speaking; but it seems silent on radio cabinets.

(c) class or kind

We looked at the controversial and complex "class or kind" issue in Chapter III. We saw what the courts have said on this question, and, by implication, the approach of the Board. An additional reference demonstrates the nuances of the problem.

In *Lyman Tube & Bearings*[211] the Board made this general pronouncement:

> It is generally conceded that, in using the words "class or kind", the legislature had in mind two principal purposes: on the one hand, to give protection to Canadian producers with respect to the things actually made in Canada in substantial quantities and, on the other to relieve domestic users, who in this case are also Canadian manufacturers, from the burden of paying a protective rate of duty on things that are not actually made in Canada.

Eastern Car Company[212] shows these considerations at work as well as most cases. The appellant argued that a car-wheel boring machine, designed aroung a rotating spindle, was of a class or kind not made in Canada; the respondent disagreed, pointing out that a Canadian machine served the same purpose, although it operated on the vertical lathe principle. A majority of the Board agreed with the appellant: "We are of opinion that the construction of these machines follows fundamentally different mechanical principles, despite the fact that they have many things in common — such as one-man operation, electronically controlled pushbutton operation, and an efficient system for handling the wheels." W. W. Buchanan dissented. He observed that the appellant's machine supplied a "very substantial" share of the Canadian market for machines of this type, and considered that there was no material difference between the machines in issue. If it is true that the imported machines were substitutable for the Canadian produced machines, the Board's decision must be

regarded as the result of an over-literal approach; the protection intended by the legislature was denied Canadian industry.

What is the relevant time period in considering the "class or kind" question? In *Lyman Tube* the Board stated that "regard should be had to domestic consumption and production during some period — prior to the date of entry — that is reasonable in all the circumstances". Regard for future possible production was clearly excluded:

> . . . it is not only impracticable but also contrary to the provisions of the *Customs Tariff*, to have regard to domestic production subsequent to the date of entry. Section 6, subsection (10), provides that "goods shall not be deemed to be of a class or kind made or produced in Canada unless so made or produced in substantial quantities". It is the clear meaning of these words that goods not actually made in Canada in substantial quantities may not be deemed to be so made — even though it may be expected that they will be so made at some subsequent time.[213]

The words of the last sentence were repeated almost exactly in the 1960 *Accessories Machinery* case.[214]

Clearly a literal or mechanical approach to the "class or kind" issue — the approach suggested by *Eastern Car* — is unlikely to respect any particular legislative intention or policy, be it what was said in *Lyman Tube* or anything else. The key question is one of competition and substitutability; only the answer to that question will tell the Board whether protection is needed, and the answer will not be found in a literal approach to the words of the tariff item. The Board might, however, feel precluded from any other approach when the tariff item in question is not an "end-use" item. The presence in the tariff of end-use items might be regarded as suggesting, by implication, that tariff items with no reference to end-use are not to be interpreted by reference to substitutability.[215] That is not a necessary interpretation; but it may be one adopted by the Board.

(d) commercial entities, parts, and what does "manufactured" mean?

The Board's classification jurisdiction is replete with subtle definitions and distinctions. For example, what is a "commercial entity"? In the first *Accessories Machinery* case[216] the respondent had classified separately three components of an imported truck crane, and the appellant argued that what was imported was a commercial entity

that should be simply classified as "machinery". The Board emphasized that "The appellant testified that this truck crane was designed, manufactured and sold as an entity, and technical witnesses for the Crown agreed that the carrier portion was undoubtedly designed, engineered and built for the particular application as a crane mounting". One commercial entity, decided the Board.

What does "manufactured" mean? In *Toronto Salt Works*[217] the Board had to decide whether a fertilizer was manufactured or unmanufactured. The appellant's picturesque argument was that the fertilizer was not manufactured but "merely occurred, and inevitably, in the activated-sludge process of sewage disposal in Chicago". The Board disagreed, concluding that the fertilizer "must be regarded as the result of a conscious and deliberate decision as regards one step in the chain of the processes involved in the disposal of raw sewage and hence must be classified for customs purposes as a manufactured fertilizer".

And what, for that matter, is a "part"? In one of the *Ryder* cases[218] the appellant contended that tires for trucks were "parts" of such trucks and were entitled to the same tariff treatment as the trucks themselves. The Crown argued that since the tires could be used on other kinds of vehicles they could not be classified as parts of a truck but should be classified according to their component part of chief value. The Board first decided that the phrase "parts thereof" was synonymous with "parts therefore". "Only by such construction," said the Board, "could a replacement part for, e.g., machinery, be admitted at the rate of duty applicable to the machinery itself — as was the obvious intent of Parliament it should be". The Board recognized, of course, that an *eo nomine* provision would always take precedence over a general provision for "parts"; it took the view, however, that any parts provision followed by "n.o.p." (not otherwise provided for) would not supersede "a completely unqualified and unambiguous *eo nomine* description". Tires were parts, concluded the Board (with a dissent).

(e) Some conclusions on classification: a policy gavotte

The Board uneasily shifts back and forth between reference to legislative intent (and thereby policy), and a somewhat literal and mechanical approach to the classification question. With respect to

definition, reference to the intention of Parliament produces a "normal and usual meaning in the trade" approach. Faced with the effects of technological development, the Board backs off in one case ("whatever the legislators may have had in mind . . . is now more or less beside the point") but finds the obsolete tariff item "still speaking" in another. In considering "class or kind", the Board is prepared to focus clearly on the concept's purpose (*Lyman Tube*), but in particular cases may find it all too easy not to apply such considerations.

2. Value for Duty

The "value for duty" work of the Tariff Board is the most complex of the Board's activities.

Singer Manufacturing[219] described the "general scheme of Canadian customs legislation":

> . . . the primary basis of customs valuation has been the fair market value of like goods when sold for home consumption in the country of export to purchasers comparable to the Canadian importer; that is to say, the primary basis of customs valuation has been the price at which the exporter would normally have sold the goods to the importer if the importer were conducting his business in the exporter's home market. When evidential sales under appropriate conditions could be discovered, the value for duty has been determined directly from the prices paid in such transactions. In the absence of such sales, various methods have been provided from time to time which, for the most part, might reasonably be expected to yield approximately the same values for duty as would have been derived from sales under such conditions, had they occurred.

The *Singer* case itself suggests how complex this procedure may be. For the vacuum cleaners in question the Board had before it the actual unit price paid; confidential evidence from the vendor, primarily about production costs, that indicated higher values; even higher prices initially calculated by the Deputy Minister; and a new calculation by the Deputy Minister which produced the highest price of all and was presented for the first time at the Board hearing. After deciding, in keeping with an earlier decision,[220] that it would not permit the respondent to levy upon the imported goods customs duties in excess of those payable under the Deputy Minister's original decision, the Board produced yet another set of figures as what it

regarded as the true value for duty. In an earlier vacuum cleaner case,[221] the issue was whether the imported goods should be valued for duty under subsection (1), (2), or (3) of what was then section 35 of the *Customs Act*.[222] There was early agreement that subsection 35(1) was inapplicable, for there were no "comparable conditions of sale". The Crown then contended that subsection 35(2) applied, rather than subsection 35(3), and the Board took the view that the onus was on the appellant to show that subsection 35(2) was not applicable. Said the Board:

> It is not, in our view, sufficient to say that, since a precise valuation cannot in a given set of circumstances be ascertained under subsection (1), a "nearest ascertainable equivalent" thereto is equally impossible of determination. It is well to emphasize in this connection that, granted that a certain transaction cannot be appraised under subsection (1), neither the appraiser nor the importer has a choice between subsection (2) and subsection (3). These three subsections of the Section are not alternatives, to be elected at will; they are, rather, the successive steps in the procedure and process of valuating.

The Board decided that subsection (2) did not fail in this case, but considered that the respondent's actual determination under that subsection was incorrect. A further hearing on this issue was directed; it was never held, as the parties, showing excellent sense, then settled the matter between themselves.

What are "such or the like goods" for the purpose of customs valuation? In *Rexair* a majority of the Board held that they were "goods sold for home consumption which are the same as those imported" although it admitted that "information relative to the value of similar goods could be helpful as a guide in the determination of value under subsection (2)". What about "like quantities"? This phrase appeared in subsection (3) of the new section 35 passed in 1955.[223] In a 1958 valuation for duty reference[224] the appellant argued that "like quantities" meant identical or virtually identical quantities, and that since the shipments imported were far larger than any shipments made within the country of export, valuation could not be made under subsection 35(3). The Board rejected this argument, regarding the key consideration to be price per unit. Said the Board:

> Counsel for the Department took the position that the phrase 'in like quantities' was intended to allow the value for duty to vary with quantity when the price for home consumption in the country of origin varies with quantity; and that the phrase has no application when such prices do not depend on quantity. With this view the Board agrees.

The somewhat more recent *Status Shoe* case[225] indicates once more the difficulty of the Board's valuation for duty work. Czechoslovakian men's work shoes and boots were in issue. By ministerial prescription it was decided that the values for duty would be determined "on the basis of the values of comparable boots and shoes of British origin". As a preliminary move, the appellant sought to introduce evidence before the Board concerning the manufacturing facilities in Czechoslovakia where the imported shoes were made:

> By the introduction of this evidence the appellant sought to determine the result were a British manufacturer to have the manufacturing facilities that are present in Czechoslovakia . . . It was urged that values based on British manufacturing facilities and production methods would exclude the Czechoslovakian shoes from the Canadian market because the appellant would have to import them as if they were made in the way the British make them, thus reducing the appellant to the competitive level of British manufacturers . . . It was further urged that had the footwear been made in Britain in the same circumstances in which the Czechoslovakian shoes were made, an entirely different series of values would have been obtained . . .

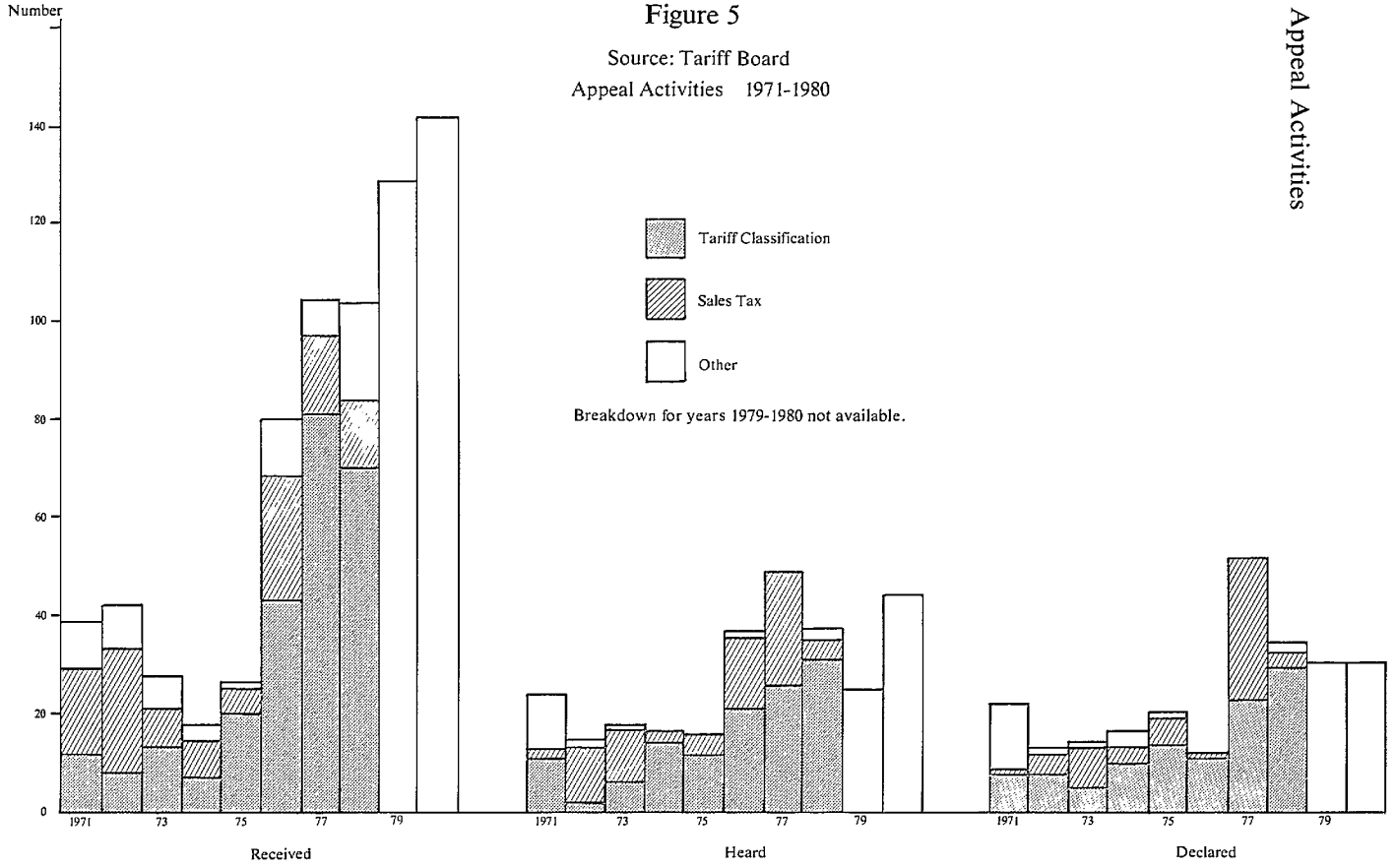
The Board ruled this evidence inadmissible, saying that "for the methods of production to become relevant it would be necessary to read the ministerial prescription as though it contained an additional qualifying clause for the British footwear such as: "and produced in comparable factories"." It then addressed the way in which the Deputy Minister applied the ministerial prescription; the Deputy Minister had taken the price at which comparable footwear was being sold in Britain and adjusted these prices for the differences between British footwear and the Czechoslovakian footwear. The Board, giving no explanation, stated that it regarded this procedure as proper. Finally, the Board considered whether the procedure had been carried out correctly. It considered the boots and shoes selected for comparison; how the adjustments were made; trade practices in the United Kingdom; and so on. After a detailed consideration of the evidence on these points it concluded that the respondent had not made a mistake in applying the ministerial prescription.

Value for duty determinations are of very substantial complexity, both commercial and legal. It is fair to ask whether the Tariff Board is strained to or beyond the limits of its competence by this part of its activities.

Figure 5

Source: Tariff Board

Appeal Activities 1971-1980



Breakdown for years 1979-1980 not available.

VI

References: The Economic Inquiry Function

A. INTRODUCTION: THE POLITICS AND ECONOMICS OF TARIFF MAKING

The rather eclectic nature of the Tariff Board's jurisdiction should by now be apparent. The *Tariff Board Act* itself, except on a very close reading, suggests only an economic inquiry function; the lengthy section 4, enumerating the duties of the Board, refers exclusively to its role as a permanent commission of inquiry into tariff policy matters. The entire Act contains only two brief references to the Board's appellate jurisdiction,[226] and both provisions are designed to modify the tribunal's inquiry procedures to accommodate the somewhat different procedural requirements of its appellate duties. The Act's emphasis on the Board's inquiry role reflects the fact that there have been both *ad hoc* and permanent "tariff commissions" in Canada, and that since the first years following Confederation, these commissions have all been fact-finding and recommendatory bodies with no appellate jurisdiction. Most of these commissions of inquiry were actually ministerial committees, usually comprising the Minister of Finance, the Minister of Customs, and the Minister of Inland Revenue, that travelled about the country in order to survey the state of public opinion on matters of tariff policy.[227] These committees possessed no status independent of government, as is now customarily implied by the term "commission".[228]

This tradition of executive control over the formulation of tariff policy was, as we observed in Chapter I, the primary reason for the

substantial political controversy which arose at the time of the Board's creation. The fear was expressed that the Board could and would usurp the right of Parliament to decide tariff policy and set tariffs. Mackenzie King said of the Board that ". . . it is in reality to be a price fixing board. It will indicate to the ministry of the day that a certain price is a fair price . . ."[229] While the government of R. B. Bennett denied King's charge, it is true that the Board's proponents had long argued that tariff policy should be formulated in accordance with "scientific principles", and thus insulated from the partisan competition of interest-group politics.[230]

This notion of a scientific or "value-free" solution to the design of tariff policy, or indeed any public policy, seems curious and antiquarian to contemporary students of the administrative process.[231] At least among the practitioners of economics and the other behavioural sciences, it is now common ground that no positive theory of social behaviour can supply categorical guidance on the objectives that individuals or political communities ought to pursue. The choice of an appropriate set of goals for tariff policy is a political issue, which can only be legitimately resolved through the political process. Economic analysis does, however, have a valuable role to play in tariff policy-making; it can provide concrete information to voters and their representatives on the probable economic consequences of alternative commercial policies. When economists evaluate the consequences of tariff or other commercial policies, they generally focus on two distinct types of economic effects: allocative effects, and distributive effects. For any national or international economy, there is a single or "optimal" allocation of productive resources within the economic community that will maximize its aggregate wealth. A specific tariff policy can thus be evaluated in terms of its net impact on the allocation of natural resources, labour and capital in the national economy; tariff induced deviations from the optimum or wealth-maximizing allocation are referred to as losses in "allocative efficiency".[232] Economic analysis may also focus on the distributional consequences of a particular tariff measure. Tariffs alter existing patterns of wealth or income distribution in rather subtle ways. A tariff on a product which is employed as an input in the production of a consumer good will transfer income from both the consumers and producers of the finished good to the domestic producers of the input. Moreover, the level of wages or number of persons employed in the protected industry will be higher as a result of the tariff. Thus, employees in tariff protected firms gain at the expense of consumers and the owners and employees of firms whose costs are increased as a result of the tariff.[233] Economists lack any neutral criteria for the

evaluation of distributive consequences. In fact, neoclassical economics assumes that interpersonal comparisons of utility or material welfare are not susceptible to any scientific calculus. The desirability of a transfer of income or wealth between individuals or groups is a normative issue, which can only be decided through some legitimate process of collective choice.

Consideration of the Board's research output indicates that analyses of the allocative and distributive effects of tariff issues have played a relatively minor role in shaping the content of the Board's recommendations. With a few notable exceptions, the Board's reference reports fail to address fundamental issues concerning the appropriate objectives of Canadian commercial policy, such as the long-run allocative consequences of tariff protection for a particular industry. Instead, the Board usually adopts an exclusively instrumental framework for its economic analysis; it often assumes that some indeterminate amount of protection from import competition is desirable and attempts to determine the level and form of protection which is best suited to the specific industry's economic environment. This instrumental focus in the Board's research cannot be attributed to any policy bias or lack of technical competence on the part of the Board's staff. It is merely a reflection of the fact that the reference function is only one component of an essentially political process in which non-economic considerations are often dominant. Indeed, most trade economists agree that, except in a few exceptional cases, the purely economic case for a protective tariff is exceptionally weak. They point out that export industries and all other industries which are *not* protected must compete with protected (import-competing) industries for limited supplies of productive resources. As protected industries expand behind the tariff shield, they bid away resources and intermediate goods from the non-protected industries. This relative contraction of the more efficient industries misallocates the economy's resources, and results in levels of income and growth which are lower than those attainable under free trade.[234] Yet, in spite of these economic objections to protection, the tariff has always been a central feature of Canadian commercial policy. Since Confederation, successive governments have employed tariff policy to preserve and strengthen Canadian political sovereignty. In the formative period of Canada's economic development the tariff was used to knit the nation's diverse regional markets into a cohesive east-west trading axis.[235] Because of the abundance of natural resources in Canada, its economic development was biased in the direction of primary goods production, such as agriculture and mining. The Canadian tariff has generally been employed as an offsetting force, designed to shift the

focus of production forward to higher levels of processing. Proponents of protection have argued that the tariff has been the only practicable method for diversifying Canada's economic base, and providing a broad range of employment opportunities for its labour force.[236]

The weight to be accorded these countervailing economic and social objectives must be determined through the political process; there is no "scientific" or value-neutral way to compare net losses in the rate of national income growth with gains in political independence and industrial diversity. It is precisely the political nature of the tariff-making process which suggests that the Tariff Board's research mandate might be expanded to include the explicit assessment of tariff policy objectives. In the concluding chapter of this study, we argue that the fairness and effectiveness of the commercial policy-making process would be significantly improved by the publication of concrete information on the actual distributive and allocative effects of the tariff and other protectionist measures. The legal and institutional options for achieving a broader role for the Board, a role in which its research would both inform the efforts of commercial policy-makers and sharpen the contours of public debate, are also addressed in the study's final chapter. The remainder of this chapter consists of an analysis of the inquiry process, and a discussion of the Board's research activity over the last twenty years.

B. INITIATION OF INQUIRIES

The Department of Finance is primarily responsible for formulating government policy and proposing legislation on tariff matters. Apart from the unusual cases of inquiries under section 16 of the *Customs Tariff* and inquiries into "other matters", when it is the Governor in Council who initiates the process, it is the Minister of Finance who directs the Board to make inquiry and report.[237] The direction by the Minister comes in a "letter of reference" which identifies the specific tariff items to be reviewed, and provides some brief indication of why the reference is being made. In most cases, the Minister's letter will authorize the Board to extend the scope of the reference to include additional tariff items that are relevant to the

commodities under review.[238] The letters invariably request that the Board provide recommendations for legislative or administrative action, including specific proposals for amendment of the *Customs Tariff*.

A survey of these letters of reference reveals that most tariff inquiries arise from sharply focussed conflicts between well organized industrial interests. Virtually all the letters state that "conflicting representations" have been made to the Minister on the appropriate level or form of tariff protection. For example, the Minister's letter in Reference 153 (bakers' yeast, 1978) stated:

> The Government has received representations to the effect that the Customs duty on live yeast classified under tariff item 3600-1 does not provide Canadian manufacturers of this product with an adequate level of tariff protection. Representations have also been received that there should be no increase in the duty on live yeast.[239]

The office of the Minister of Finance is the focal point for lobbying on tariff matters. The lobbying efforts of a particular group seeking some modification in the tariff structure lead to resistance in the form of countervailing submissions from the beneficiaries of the existing tariff.[240] The Minister will often have received letters, over a period of several years, from manufacturers, importers and exporters, trade associations, ministerial and parliamentary colleagues who have themselves received representations, and even from the occasional irate non-commercial consumer. The Department of Finance has a small staff of commercial policy experts who often assess submissions on tariff issues and make recommendations to the Minister. One important factor in the Minister's decision to initiate an inquiry is whether the resolution of a contested issue requires an extensive factual investigation. The Department's commercial policy staff lacks the specialized investigative and data gathering resources possessed by the Board. A brief analysis of the subject matter of inquiries conducted since 1960 highlights other factors which may have been influential in the selection of issues for reference to the Board.

C. REASONS FOR REFERENCES

The most frequent cause of organized demands for modification of tariff policies is a change in supply or demand conditions in a particular market. When the costs of production of Canadian

manufacturers rise because of increases in the prices of inputs, or when their foreign competitors costs fall as a result of technological advances, requests for increased tariff protection often result in a reference to the Board. Thus, in Reference 136 (live turkeys, 1965), Canadian turkey farmers argued that cost-cutting innovations by large scale poultry farmers in the United States had resulted in a serious deterioration in their competitive position vis-à-vis imports of live American turkeys. In Reference 143 (polyethylene, 1969), the Board found that Canadian manufacturers of polyethylene resin were rapidly losing their domestic market shares to American imports. The Board attributed their inability to meet the foreign competition to scale disadvantages and the higher cost of raw ethylene in Canada. In both references, the Board recommended upward revisions in tariff rates to offset the domestic industries' competitive handicaps.

Pressure for modifications in tariff structures may also arise when Canadian firms realize reductions in their production costs as a result of increases in scale and technical efficiency. The Canadian *Customs Tariff* contains a large number of exemptions from customs duties for Canadian producers who use imported goods as inputs in manufacturing and primary production activities; these exemptions are designed to permit the duty-free importation of machinery and semi-processed goods when the imported products are utilized by Canadian firms in some designated productive activity.[241] These "end-use" exemptions are generally intended to remove the burden of protective duties when it is improbable that specialized machinery or intermediate goods can be economically produced by Canadian firms. The factors which preclude efficient production in Canada, such as market size and technological capability, may however decline in significance as the domestic market expands and new technologies are adapted to Canadian conditions. When market conditions evolve in directions that are conducive to the development of domestic production, existing firms and potential entrants may lobby for repeal of "end-use" exemptions on the ground that tariff protection is now required to encourage the growth of the "infant industry". Approximately fifty percent of the references surveyed concerned the efficacy of particular end-use exemptions.

In Reference 130 (mining and oil exploration machinery, 1962), Canadian machinery manufacturers sought the repeal of an exemption for machinery and equipment used in the mining, oil, and gas industries. The Machinery and Equipment Manufacturers' Association asserted that a ten percent rate of duty on such machinery and equipment would enable domestic manufacturers to achieve volumes of

output sufficient to realize the efficiencies of American producers. The Canadian Petroleum Association, a trade association representing the oil and gas industries, did not oppose the proposals for repeal of the end use exemption for drilling and pumping machinery. The Association did, however, argue that the new tariff duties should not apply to machinery and equipment not actually available from domestic manufacturers at the time of their importation. The Board's recommendations in Reference 130 partially reflected this compromise position; it recommended that the proposed tariffs on mining and drilling machinery not be applied to machinery or equipment "of a class or kind not made in Canada". It should be noted that this was a significant victory for the machinery manufacturers. The regulations promulgated under section 6 of the *Customs Tariff* require an importer to establish that less than ten percent of domestic demand for a particular product is being met by Canadian manufacturers before the product can be deemed to be "of a class or kind not made in Canada".[242] Thus, the "not made" exemption from duty is automatically withdrawn as soon as the infant industry attains the capacity to satisfy as little as ten percent of domestic consumption. Reference 133 (printing machinery and equipment, 1966) concerned an exemption for imports of printing presses and related machinery when purchased for use by commercial publishers. Canadian manufacturers of printing machinery argued that the end-use exemption had impeded the industry's growth, and that with the aid of substantial tariff protection the fledgling industry could effectively compete with American imports. The Board recommended that the end-use exemption be replaced by a "not made in Canada" exemption. In Reference 132 (wire, 1965), the Board declined to recommend the repeal of an exemption from duty for wire imported for use in the manufacture of fence, netting and other wire products. The Board found that Canadian wire producers did not require tariff protection to meet the competition from American imports. It attributed the recent decline in the market shares of the Canadian producers to their failure to anticipate rapid increases in the domestic demand for wire products.

Organized pressure for modification of the tariff structure often arises from changes in the interpretation of the *Customs Tariff*, or from alterations in other government programs of a regulatory or promotional nature.[243] The Board itself is an important source of commercial policy change; its decisions in appeals on classification and other tariff issues often generate political pressure for the initiation of inquiries. A series of appellate decisions which alter the established interpretation of a particular tariff item may often lead to organized pressure for amendment of the *Customs Tariff*. The

Minister may respond by directing the Board to examine the substantive policies underlying the controversial tariff items. In Reference 137 (machinery for fresh fruit and vegetables, 1966), representatives of Canadian fruit and vegetable packers indicated that, while at one time all the separate pieces of machinery used in grading and packing had been classified under tariff item 40920-7, in recent years a narrow interpretation had been placed on the words "grading machines". This narrower construction of the tariff item by National Revenue had been upheld by the Board in three appeals decided in the year preceding the Minister's reference.[244] The narrowing of tariff item 40920-7 had resulted in the application of higher rates of duty to some units of grading machinery. The Canadian packers proposed that tariff item 40920-7 be amended to cover all units of machinery and equipment customarily included in a modern grading and packing plant. This proposal was not opposed by domestic manufacturers of grading and packaging machinery; they indicated that most of the machines were highly specialized, and required in such limited quantities that production for the Canadian market was not economically feasible. The Board recommended the introduction of a new tariff item to provide duty-free entry for a broadly defined class of grading and packaging machinery.

Reference 153 (bakers' yeast) reveals a complex web of relationships between the Board's inquiry function, its appellate jurisdiction, and the decisions of related commercial policy institutions.[245] In 1971, Bowes Company Limited, the principal Canadian importer of bakers' yeast, appealed a decision of National Revenue on the appropriate classification of yeast to the Tariff Board.[246] National Revenue had classified a large quantity of bagged bakers' yeast under tariff item 3600-1, covering "compressed yeast in packages of not less than fifty pounds"; Bowes argued that the imported product should have been admitted under item 3805-1, "yeast, n.o.p.", which attracted a lower rate of duty. The Board upheld the importer's appeal, and Standard Brands, a domestic producer that had intervened in the appeal, appealed the Board's ruling to the Federal Court of Appeal. On December 14, 1971, this appeal was dismissed. The domestic producers continued to make representations to the Department of Finance, stressing their urgent need for increases in protective duties. While the federal budget of May 8, 1972 did provide for a small increase in the level of protection on yeast products, the Canadian producers continued their lobbying efforts. In October, 1974, the Minister initiated Reference 153, directing the Board to undertake a comprehensive review of the tariff items pertaining to yeast used by commercial bakers. Shortly after the Board's public hearing in

Reference 153, the Canadian producers made an official complaint to National Revenue, alleging injurious dumping of large quantities of bakers' yeast into the Canadian market by Anheuser-Busch, an American yeast manufacturer.[247] Following the Deputy Minister of National Revenue's preliminary determination of dumping, the Anti-dumping Tribunal considered much of the same evidence as the Board had heard in connection with its reference, although the Board did not explicitly discuss the possibility of unfair price competition as a contributing factor to the loss of market share by the domestic producers. The Tribunal ultimately concluded that the dumping had not caused, and was unlikely to cause, substantial injury to the Canadian industry, and dismissed the complaint. The Board's summary of its findings in Reference 153 did, however, refer to the dumping investigation:

> In the Board's view, given the present apparently buoyant state of the industry, its improved competitive position and the relatively low level of import penetration, there appears to be no justification for a tariff increase . . . At the same time, however, in the light of established dumping in the Canadian market by the principal foreign supplier, and the likelihood that a productivity gap persists between Canadian and American producers, the Board is equally disinclined to recommend a lowering of the tariff at this time.[248]

In fact, the Board recommended no change in the tariff rate, but proposed a change in the nomenclature of the tariff item designed to eliminate the ambiguity which had given rise to the original appeal in 1971. The web of legal and political manoeuvres surrounding the yeast reference illustrates the strategic options available to domestic producers seeking protection from import competition. A domestic firm or trade association may intervene in an appeal to the Tariff Board, and if unsuccessful, take an appeal to the courts. If this strategy fails, the firm or association may lobby the Minister of Finance for the initiation of a reference, in the hope that favourable proposals for legislative amendment will ensue. Alternatively, or at the same time, the domestic interests may seek redress from the Anti-dumping Tribunal, or lobby the Minister of Industry, Trade and Commerce for the imposition of import quotas.[249]

An even more complex web surrounded Reference 154 (edible oil products, 1978). In the 1969 Tariff Board Appeals (907, 908 and 909) by Hunt Foods Corporation and others, the Board held that in order to qualify for entry under tariff item 1305-1, imposing a one cent per pound duty, an edible oil had to be at least partly of animal origin (i.e. the oil could not be wholly composed of vegetable oils).[250] On an appeal from this ruling, the Exchequer Court interpreted the phrase

"lard compound and similar substances" in item 1305-1 as referring, not to the source or origin of the oil product, but to its physical characteristics and end-use.[251] Following the Exchequer Court decision overturning the Board's ruling, large volumes of vegetable oil products in liquid form were imported under item 1305-1. These large shipments of imports led to vigorous protests to the Minister of Finance by domestic producers of edible oils. In December, 1974, the Minister of Finance directed the Tariff Board to conduct an inquiry in regard to vegetable oil products.

His letter to the Board, said in part:

> As a result of the decision of the Exchequer Court . . . certain vegetable oil products such as vegetable oil shortenings were reclassified under tariff item 1305-1 at a rate of Customs duty of one cent per pound British Preferential and Most-Favoured Nation. They were previously dutiable at higher rates. The Government has received representations to the effect that the lower rate of duty which now applies to the products does not provide Canadian manufacturers with an adequate level of tariff protection. Representations have also been received requesting that the duty remain at the present level.[252]

Shortly after the initiation of Reference 154, the Department of National Revenue "re-examined" its interpretation of the Exchequer Court holding, and concluded that the liquid oil imports were not "similar substances" under the Court's construction of item 1305-1, primarily because of their lack of plasticity. Acting under section 46 of the *Customs Act*, National Revenue reclassified the imports under tariff item 27740-1 which imposed an *ad valorem* rate of 17.5 percent (the *ad valorem* equivalent of the specific duty imposed under item 1305-1 was 2.5 percent).[253] This reclassification led to three appeals to the Tariff Board (1241, 1264, and 1272); the Board upheld National Revenue's reclassification decision, and ruled that the liquid oil products were properly classified under item 27740-1. The Board published its decisions on these appeals on April 10, 1978; the following September it released its report on Reference 154 which recommended the repeal of item 1305-1, and the imposition of a 17.5 per cent duty on all edible oil products, regardless of their specific physical characteristics.

Within the context of the existing commercial policy-making process, a reference to the Tariff Board appears to be seen by domestic producers as merely one specific strategy for securing protection from import competition. Reference 154 illustrates that a reference to the Board may be made to serve, in a sense, as an unofficial appeal from a decision of the Federal Court. In

Reference 154, counsel for the domestic producers stated that "the focal point of your terms of reference, in our understanding, is the reclassification of certain vegetable oil products as a result of an Exchequer Court decision. . ."[254] He went on to discuss the "harmful effects" of the decision on the industry, and the "aberrations" it created in the treatment of very similar classes of imports.[255] Perhaps the more important point is that a reference may serve as a substitute for a right denied to domestic producers — the right to initiate an appeal to the Board from a decision of National Revenue in respect of competing imports. If domestic firms possessed the right to initiate appeals in such circumstances, some of the issues and the disputes that have led to the initiation of references might have been resolved within the much narrower and sharply focussed context of an appeal to the Board. This should not be taken to suggest that appeals and references are even close functional substitutes; only a very small number of the disputes underlying references could have been appropriately resolved within the framework of an appeal. Rather, the strategic or political substitutability between appeals and references suggests a larger question concerning the appropriate allocation of the Board's research activities.

This survey of the reasons for the initiation of references indicates that the Board's institutional role in the tariff-making process has sharply limited the potential contribution of its economic expertise. The Board's role in policy-making is defined by the Minister of Finance, who controls the Board's research agenda and defines the scope of its inquiry function. Because of the pluralist nature of Parliamentary politics, the Minister's commercial policy initiatives are shaped by the lobbying efforts of highly concentrated industrial interests with large stakes in tariff issues. The views of interest groups that generally oppose protectionist measures are accorded little weight in determining the subject matter and scope of the Board's research activities. This is attributable to the fact that the members of consumer groups are very numerous and possess relatively small individual stakes in tariff issues.[256] Under these circumstances the costs of organizing an effective political lobby prevent, or at least severely inhibit, attempts at collective action by consumer groups. These political dynamics are evident in the nature of the issues and the identity of the parties represented in Tariff Board inquiries. The only effective consumer participants in the reference process are consumers who purchase large quantities of the protected commodity as inputs in the production of other intermediate or final products. These "consumer-producers" possess large pecuniary stakes and strong trade associations which make them formidable political

opponents for tariff-protected industries. Within this political environment, the Board's resources have been devoted primarily to evaluating requests for greater tariff protection. Even though the Board's reference function is only recommendatory, the Board has usually been employed to "adjudicate" disputes between well organized interests. It should be noted that this "dispute resolution" role for the Board is perfectly rational from the perspective of the Minister; it permits the Government to transfer the political conflict to an impartial forum in the hope that an acceptable compromise will be found. This characterization of the Board's role raises two general questions about the reference function. Is this essentially adjudicatory role incompatible with the Board's research activities? This is, of course, a question about the appropriate allocation of the Board's resources. We believe that close scrutiny of the Board's inquiry function demonstrates that economic analysis is often of limited utility in resolving narrow disputes about the "appropriate level" of tariff rates. The second question concerns the adequacy of the initiatory mechanism for references. The mechanism creates a bias in the evolution of tariff policy. Only groups with concentrated stakes and substantial resources are likely to make cogent and credible demands for the reform of the tariff structure. This means that, unless there is a conflict between well organized economic interests, certain features of the tariff structure which require evaluation, especially those features which most directly affect ultimate consumers, will be ignored. The appropriate solution for this fundamental incompatibility between the Board's research and "dispute resolution" roles will be discussed in the final chapter of this study.

D. THE PRE-HEARING PROCESS

The scope and subject matter of any research project is determined primarily by its purposes or objectives. In the vast majority of references, the Minister's letters do not provide any coherent account of the aims or objectives of the inquiry. Rather, the letters merely state that demands for higher tariff protection or the withdrawal of existing exemptions have been made by industry representatives; the letters also often indicate that representations opposing these demands have been received by the Department. The letters then direct

the Board to study the specific tariff items which define the commodities produced or purchased by the relevant industries and to report its findings and recommendations to the Minister. While the letters do not appear to limit the range of issues which the Board might include in its research agenda, it is likely that the nature of the disputes which give rise to most references have the effect of circumscribing the scope of the issues addressed by the Board. Since most inquiries are intended to deal with sharply focussed conflicts over the appropriate degree of protection for a specific industry, broader questions, such as the allocative and distributive effects of protection and the efficacy of alternative methods of promoting industrial development, are excluded from the Board's analysis.

There have, however, been several recent references in which the Board has adopted a more expansive conception of its research function. For example, in Reference No. 155 (exemption from duties for certain institutions and goods) the Board's "notice of inquiry" identified the following two "related questions" for public consideration:

> whether the tariff item as currently worded was an appropriate instrument for the purpose apparently originally intended, i.e. the granting of relief from duties otherwise imposed by the *Customs Tariff* as a means of aiding certain worthy purposes;
>
> whether the tariff item had become an anachronism for some or all of the beneficiaries in the changed circumstances of today, when public funding and transfer payments amongst different levels of government play a greatly increased role in the financing of hospitals, museums, universities and other such institutions.[257]

The Board's notice also mentioned its intention to consider other programs and methods for achieving the objectives of tariff item 69605-1, which provides an exemption from duty for goods imported by charitable, religious and educational institutions. Another broadly gauged reference was Reference 150 (computers and related telecommunications equipment); the computer reference report is a comprehensive and detailed analysis of the entire electronic data processing industry. The Board's report is a first-rate piece of research which meticulously sets out the costs and benefits of employing a protective tariff to encourage the development of a computer manufacturing industry in Canada. The Board concluded that a tariff would not materially assist the domestic producers, and would impose an unjustified burden on the users of computers and related equipment; it recommended free entry for virtually all the products under review.[258]

Why was the Board successful, in these few references, in framing a comprehensive research strategy that permitted it to address more fundamental issues of tariff policy? One explanation is that both references encompassed an extremely broad range of products and industries. For example, in Reference 155 the Board received sixty-one briefs and submissions, and thirty-one organizations and institutions were represented at the public hearing.[259] Perhaps the most significant feature of both these references was the relatively even balance in the pecuniary stakes and resources of the participants. For example, in Reference 150, the domestic manufacturers' requests for tariff protection were opposed by a large and well-represented coalition of buyers and lessees of data processing equipment. Similarly, in Reference 155, the domestic producers' attack on the "worthy purposes" exemption was countered by strong opposition from public hospitals and universities, the principal beneficiaries of the exemption. An examination of the transcript of the hearings in Reference 155 indicates that the Board's expansive view of its research functions did not please all the participants. Counsel for one of the participants asserted:

> . . . it is no part of the purpose or the mandate of the Tariff Board in a proceeding of this kind relating to a specific tariff item and the purposes which Parliament has seen fit to adopt in relation to that tariff item, to take upon itself the task of instructing or recommending to the government how the purposes of that tariff item should be carried on by means of policies outside the tariff and I mean specifically the financing of institutions such as the universities and those institutions which are now the beneficiaries of this item.[260]

The Chairman of the Board replied that "we think it is incumbent upon us at the end of this exercise to be able to explain to the Minister and to Parliament just what seem to be the problems and this requires a broader look at the context".[261] This exchange serves to underline the point that the interest-group conflicts which animate references to the Board also exert a strong influence on the Board's conception of its research role.

After the substantive issues have been broadly defined, and the relevant commodities identified, the Board's staff prepares a "notice of inquiry" for publication in the *Canada Gazette* and in newspapers throughout Canada. These public notices generally provide a brief description of the subject matter of the inquiry, and the kinds of issues which the Board intends to address in its research. The notices also invite comments and submissions on the scope and content of the reference. After the notices are published, the Board's investigation begins in earnest. In virtually all the references we surveyed,

much of the information required for an adequate economic analysis was not available in published form. Therefore, the Board's staff must secure the required data from private sources, or from industry surveys and interviews. More than fifty per cent of the Board's time in the typical reference, from initiation to completion of the report, is devoted to gathering data and assembling it into usable form.[262] A brief summary of the types of data required for a typical reference indicates the magnitude and complexity of the Board's investigative task.

Every reference requires, at a minimum, a comprehensive analysis of the basic demand and supply conditions which characterize the market for the industry's products. Demand for the product or products under review is estimated by simply adding imports to "shipments" or domestic production and deducting exports. This is far more difficult than it sounds because Statistics Canada collects and publishes data on domestic production under a classification system which employs broad industry categories; import and export data are gathered under much narrower product categories. Thus, aggregate data on domestic production may include many products which are outside the scope of the reference. For example, in Reference 149 (pleasure craft) statistical data on the pleasure craft industry were virtually non-existent. Statistics Canada included this industry in the broader "Boatbuilding and Repair Industry" under its standard industrial classification system; this class included all boats or ships of less than five ton displacement weight. Since the "Boatbuilding and Repair Industry" class obviously included many vessels which were not used for recreation, the Board's staff was compelled to conduct a survey of industry members through questionnaires and interviews.[263]

The number of units of a product consumed during a particular year is only a crude proxy for consumer demand. In virtually all the references we surveyed, however, data on domestic consumption for one or a few years was the only demand-related data available to the Board. It should be emphasized that the Board's inability to obtain accurate estimates of market demand is a factor which substantially limits the reliability of its analyses. One of the primary objectives of most inquiries is to predict the effect of a particular tariff rate on the quantity of the product which will be demanded by consumers — the price elasticity of demand. One possible approach to the estimation of the sensitivity of demand to price changes would be to collect data on consumption and prices over a substantial number of years, in an attempt to identify cyclical changes and their causes. The Board's

staff lacks the time and resources to attempt this sort of investigation, and even if the resources and data were available, it is unlikely that the cost would justify the marginal gain in predictive accuracy. In several references, the Board's economists did collect data on the income and demographic characteristics of consumers in order to provide some factual basis for speculation on demand elasticities.[264] Many of the Board's reports explicitly state that its inability to measure demand elasticity is a major qualifying factor which must be taken into account in using its data and conclusions for policy formulation. For example, in Reference 149 the Board stated that its predictive analysis was subject to the following qualification:

> The higher prices of pleasure craft, as a result of the duties, might affect the volume of boats sold in Canada. In the case, for example, of pleasure craft of the type sold mainly to middle-to-low income buyers, the price elasticity of demand is probably somewhat above unity; that is, the effect of a given percentage change in price would be reflected in a somewhat greater percentage change in the number of units sold. Thus, although manufacturers, distributors and dealers may benefit from the higher unit prices, their total income from sales of some kinds of craft might be as high or higher in the absence of duties and with lower unit discounts and prices, because of the larger volume of sales which might well result from the lower prices.[265]

The Board emphasized that a basic assumption underlying its analysis was "that domestic production, imports and exports would remain unchanged if the duty were removed. This is unlikely to be the case and the assumption is, therefore, a good example of the inherent weakness of any such cost-benefit analysis."[266]

An assessment of the supply conditions in the domestic market for the product or products under review necessitates the collection of data on production and distribution costs. Since the purpose of the inquiry is to assess the cost efficiency of Canadian producers in relation to foreign suppliers, cost data is required both for Canadian firms and for their competitors in the principal countries of export. The Board usually confronts several difficult problems in obtaining reliable information on production and distribution costs. First, there is normally no published data on production and selling costs; therefore, virtually all the cost data must be obtained through questionnaire surveys and interviews. Second, many firms, especially small establishments, may have little accurate information on their own costs, either because they do not prepare cost analyses on any regular basis, or because they use highly idiosyncratic cost accounting methods.[267] Moreover, many large firms produce a broad range of products; a multi-product firm's costs for specific products may not be susceptible to accurate measurement because of the intractable

problem of allocating common and joint costs among many distinct products. Usually the industry members will assist the Board's staff in collecting cost data. There have, however, been a few references in which domestic producers have failed to cooperate in the Board's investigation. For example, in Reference 140 (greenhouse vegetables) the Board requested the domestic producers to supply information in regard to their costs, profits, weekly shipments and production methods. The Board's report criticized the producers for their failure to comply with the Board's requests:

> The failure of the producers to supply nearly all of this information after repeated requests led to additional research work, with consequent delay, in obtaining the information from other sources. From these other sources the Board received the measure of cooperation it had originally expected from the producers, particularly as it understood the producers to be anxious for a report at an early date.[268]

The failure of the domestic producers to supply the data requested by the Board in Reference 140 is even more curious than might at first appear, since their lobbying efforts were the primary reason for the initiation of the inquiry. Some firms may be reluctant to disclose information regarding their costs and production methods because of the possibility that it may fall into the hands of their competitors. The Board's staff is highly sensitive to this widely shared anxiety over the safeguarding of proprietary information; all the Board's questionnaires are accompanied by assurances that confidential information will not be published in the Board's report. Subsection 5(10) of the *Tariff Board Act* provides that ". . . evidence or information shall not be made public in such a manner as to be available for the use of any business competitor or rival . . .", and subjects any person who violates the prohibition on disclosure to substantial criminal penalties. It is still possible that, in spite of these safeguards, some firms may refuse to disclose sensitive financial information. Under subsections 5(1) and 5(5) of the Act, the Board is authorized to compel the attendance of witnesses and the production of documentary evidence in aid of its inquiry function. The Board's Director of Research indicated that, during his more than five years with the Board, there had never been any occasion of an explicit refusal to provide data; he indicated that the Board's compulsory process powers are never used, but that their existence may deter uncooperative behaviour.[269]

One of the primary objectives of most inquiries is to assess the comparative cost efficiency of Canadian and foreign producers. This requires a comprehensive survey of historical data on production and distribution costs for both domestic and foreign firms; it also requires an investigation of the potential efficiencies available to domestic and

foreign producers, based on reasonable assumptions about the market and technological factors which will shape the industry's future development. The Board's staff usually attempts to secure engineering studies of the industry's production methods to provide an objective basis for evaluating the technical efficiency of domestic firms. In most references, however, current technical studies are unavailable, and the Board must rely on the opinions of engineers and accountants employed in the industry. The Board's dependence on the domestic industry for technical and financial data creates the risk of selective disclosure and biased interpretation. While the Board's staff usually attempts to verify information supplied by industry members, in many instances there are no independent sources of data available.

E. THE HEARING

Recently the Board has introduced several innovations in its hearing procedure. The Board's past practice had been to convene the public hearing shortly after the commencement of an inquiry. The hearing was employed to gather factual information and substantive proposals from industry members and other interested groups. Beginning with Reference 154 (edible oils), the Board altered its long-standing practice by convening the public hearing after the completion of its investigative work. The Board now distributes background papers containing the relevant data and analyses in advance of the hearing; the technical studies, with supporting data, are sent to all the firms and organizations which have given notice of their intention to make submissions at the hearing. The written submissions of the parties are collected in advance of the hearing, and made available to all participants. These procedural innovations have improved the quality of the briefs and oral submissions of participants. Advance disclosure of the Board's economic analysis and supporting data crystallizes the substantive issues, and permits the participants to focus their arguments and proposals on key policy problems. Moreover, the hearing provides an opportunity to check the accuracy of the Board's data and analysis by subjecting it to critical scrutiny by all interested parties. In Reference 155, the Chairman of the Board made this statement in her opening remarks:

> Usually public hearings in a Tariff Board Reference are the beginning of the exercise. In this particular case, we view them more as the

> culmination of the effort of the Tariff Board and of the participants to understand the issues and to get through the preliminary analysis of all of the information that we have and to identify a good deal of lack of information . . .[270]

Board hearings are informal and rather short in duration. Most hearings require only two or three days to complete; the vast majority of the participants submit written briefs, and limit their remarks to a summary statement of their opinions and proposals. Some participants also use the hearing to present arguments rebutting the submissions of other parties.

F. CRITERIA FOR RECOMMENDATIONS

We have seen that the Board's reference function primarily involves the resolution of disputes between well organized economic interests. This "adjudicatory role" is reflected not only in the types of issues addressed by the Board, but also in the criteria which the Board employs in formulating tariff policy recommendations. While the Board seldom articulates a general conceptual explanation of its reference role, a few of its reports reveal the kinds of substantive considerations which the Board takes into account in framing recommendations.

One argument often raised focusses on the "internal structure" of the *Customs Tariff*, or the appropriate relationship between specific tariff items. For example, in Reference 151 (glass fibres and filaments, 1977), Canadian tire manufacturers argued that since tariff rates on tires had been reduced (in 1973), materials used in the production of tires should be obtainable at the lowest possible cost if the Canadian tire industry was to maintain a competitive position in relation to imports. Thus, the tire makers argued that the tariff rate on glass fibres should be reduced to a level that would equalize the level of "effective protection" between inputs and finished goods.[271] The Board's report described the "tariff structure" argument in this way:

> In many briefs it was noted that the present tariff structure did not follow the "usual structure" of the Canadian tariff, in that the end-products using fibreglass as an input have a lower rate of protection

than the fibreglass materials themselves. Consequently, Canadian manufacturers of fibreglass reinforced plastic products believed themselves to be at a serious disadvantage against the U.S. producer who was able to purchase his raw materials at much lower prices. As an alternative to lower rates of duty on imports of fibreglass, several manufacturers suggested that the rates of duty on reinforced plastic products be raised.[272]

In Reference 154 (edible oils),[273] the Institute of Edible Oils, representing Canadian refiners and processors of vegetable oils, submitted that a recent Exchequer Court decision had resulted in a "warping of the tariff structure". The Court, on an appeal from the Tariff Board, had interpreted a particular tariff item in such a way that large quantities of vegetable oil in liquid form could now be imported under that item, rather than other items imposing much higher rates of duty.[274] The Institute's argument was that the Exchequer Court's reclassification brought the tariff rate of the processed oils below the rate applicable to the crude oils from which these products are manufactured. As counsel for the Institute somewhat picturesquely put it:

> I don't want to get too lurid in my examples, but imagine a house with a roof on it. If something goes wrong in the ground floor, it can cause difficulties for the activities normally carried out on the ground floor, but the second floor might not be seriously affected. However, if the roof is blown off, exposing the interior to the elements, the rain or snow will work its way down, and the whole structure will become uninhabitable. This is the level at which the Exchequer Court decision did its damage to the tariff structure.[275]

These arguments about the "internal logic" or equity of the tariff structure have generally been rejected by the Board. While the *Customs Tariff* usually does provide higher nominal rates for more finished goods relative to less finished goods, this distribution of protection merely reflects the fact that most Canadian producers of primary and semi-processed goods are as efficient as their foreign competitors. This point was made by the Board in Reference 151 when it dismissed the argument by fibreglass users that the rates of duty on fibreglass should be lower than the level of protection accorded to their products. The Board commented:

> However, a lower duty for the intermediate than for the end-product is not automatic, nor is its justification always self-evident. Whether or not lower fibreglass duties are warranted would depend on the amount of protection, in terms of higher Canadian prices, the user actually pays on fibreglass, its importance in his overall cost of production, the cost of protection on other material and non-material inputs, and the amount of protection received by the user on his output . . .[276]

Another argument often raised against requests for higher tariff rates is that the domestic industry is not "pricing up to" the existing tariff, and therefore there is no real necessity for higher protection. In some cases this argument has also been advanced to support proposals for lower tariff rates. Thus, in Reference 151, fibreglass users argued that rates on fibreglass should be reduced because of the domestic producers' failure to utilize the full level of available protection. The Board noted that frequent changes in market conditions may often explain intermittent departures from prices reflecting the full measure of protection available. The Board said:

> This would appear to be a reasonable approach if, at those rates of duty, Canadian production were, or would potentially be, profitable. However. . . the degree to which available protection is used varies from time to time and in some cases for some of its product results in unprofitable production. Therefore, to use the degree of tariff utilization as rate determinant would in such instances tend to lock in the unprofitable status and would discourage future expansion. Conversely, those products which would be very profitable to produce would be favoured in future expansion to the detriment of the other products.[277]

In other references, the Board has cited the industry's failure fully to utilize the existing level of protection as evidence indicating the need for a reduction in tariff rates. In Reference 149, where a decrease in the rate of duty was recommended, the Board was apparently influenced in part by the failure of many Canadian producers to "price up to the tariff".[278] The Board's caution in extrapolating from evidence of unused tariff protection is, of course, correct from an economic viewpoint; in some instances, domestic firms may not be capable of maintaining a price level which fully exploits the existing tariff because of intense competition from imports. In these circumstances, an increase in the tariff may be necessary to protect the domestic producers from their more efficient foreign competitors.

As our discussion of the references indicates, the Board's primary objective is to set rates of duty which reflect the differential in production costs, including a normal profit, that exist between Canadian firms and their foreign competition. In most reports, the Board fails to address the more fundamental issue of the justification for the protection of a particular industry; its analysis is generally instrumental in that it simply assumes that tariff protection is desirable, and then proceeds to recommend a rate of duty designed to equalize domestic and foreign cost differences. There have been, however, a few references in which the Board was unwilling to recommend tariff increases for industries or particular firms with little chance of expansion or survival in the foreseeable future. In Reference 150, the Board

recommended against any tariff protection for the very small computer manufacturing industry.[279] In Reference 149 the Board recommended a reduction of the rate of duty to 15 per cent M.F.N. The Board said:

> The recommended M.F.N. rate of 15 p.c. should afford adequate protection except perhaps for the utterly inefficient pleasure craft producers which, even at the existing M.F.N. rates of 17½ p.c. and 25 p.c., are barely able to stay in production. On the other hand, a rate of protection lower than 15 p.c. is not recommended at this time because of the comparatively poor average productivity performance of Canadian pleasure craft producers, and their relatively weak competitive position vis-à-vis their main competitors in the United States. This situation is explained in good measure by the disadvantages which they face, along with so many other Canadian manufacturers: a small domestic market, small-scale operations, lack of specialization or, conversely, a high degree of diversification of craft produced. Other built-in handicaps are present such as the higher costs of materials and component parts, and, in the past year or so, the virtual loss of the labour costs advantage which the pleasure craft manufacturing industry in Canada has always enjoyed.[280]

The Board also argued that the proposed duty reduction would have a positive effect ". . . by way of greater rationalization, productivity and competitiveness".[281]

There have been several references in which the Board has explicitly mentioned the appropriateness of imposing the burden of high protective duties on consumers. However, it is difficult to form any conclusions about the weight that the Board attaches to the interests of consumers because the Board's reports fail to identify the factors that were determinative of its decision and recommendation. Thus, in Reference 140 the Board indicated that higher duties might impose a ". . . cost to the Canadian public that would be disproportionate to the benefit to the growers".[282] The Board did not explain exactly how the burden of higher protection might be "disproportionate"; it went on to justify its recommendation for no change in the tariff on the ground that the greenhouse growers did not require higher tariffs in order to meet the American competition. It is apparent that in formulating recommendations the Board is not applying neutral economic principles, but is choosing between competing interests. In a few recent references, the Board's "interest balancing" role has been explicitly acknowledged.[283] The Chairman of the Board had this to say in her opening remarks at the public hearing for Reference 155:

> . . . I would like to say just a few words about the Board's objectives in carrying out the work of this reference and the criteria that we are going to use to determine whether these objectives are being attained.

> Briefly the objectives I see as Support for the legitimate interests of Canadian Beneficiaries.
>
> Secondly, Support for the legitimate interests of existing or potential Canadian Manufacturers of the goods involved.
>
> Thirdly, a search for the maximum of administrative simplicity . . .
>
> Lastly and perhaps most difficult to achieve, what I can only describe as the public interest. I see that as the best possible compromise between conflicting interests and points of view. The best compromise which meets present day conditions and the perceived intent of the legislators.[284]

In Reference 155, the Board recommended the repeal of the exemption for some goods imported by charitable and educational institutions. The Board argued for repeal of the "worthy purposes" exemption on the ground that an increase in protection would facilitate the expansion of the Canadian scientific and professional equipment industry. The Board concluded that:

> . . . the short term incremental output [of the scientific and professional equipment industry] from a limitation on the free entry of certain goods under 6905-1 could amount to $20-$30 million involving possibly 1,000 to 1,250 direct and indirect jobs. The Board considers that a potential increase in output and employment of this order justifies a shift in the traditional approach of duty-free entry for qualified institutions so that some better balance of the interests of the two important groups in Canadian society may be achieved.[285]

The Board's report in Reference 155 appears to be unique among references insofar as it contains a lucid analysis of the costs and benefits to specific interest groups of the tariff policy alternatives under review.[286] The Board's uncharacteristic clarity on the distributive effects of the tariff proposals probably reflects the fact that the reference dealt with an exemption which benefited a wide range of well-organized and articulate institutions.

G. IMPLEMENTATION OF TARIFF BOARD RECOMMENDATIONS

The Tariff Board only makes tariff policy recommendations to the Minister of Finance. Strictly speaking it does not set tariffs; it is not the "price fixing board" feared by MacKenzie King. Yet, a

survey of the implementation of Tariff Board recommendations shows a very high rate of acceptance. The Board itself has conducted an implementation analysis beginning with Reference 116 (precise data were not available to carry out an analysis for earlier references). During the period 1954-1978, the Board reported on forty references; thirty-five of these reports contained specific tariff recommendations. The Board's recommendations in twenty-seven of these references were implemented wholly or in part. Of the 1,188 specific recommendations contained in the twenty-seven reports, eighty per cent were implemented.

Table One, compiled by the Board itself, provides implementation figures for all references since 1954. The Board does suggest that these statistics should be interpreted with some caution, since they are in some respects partial and judgmental. For example, a tariff recommendation by the Board comprises the nomenclature or description of goods and the rate of duty under each of the British Preferential, Most Favoured Nation, General and, when required, the General Preferential tariffs. When a recommendation of the Board is adopted only in part, the Board has deemed the overall recommendation not to have been implemented if there was not acceptance of the essence of the proposed nomenclature or the most favoured nation rate of duty, even though other elements of the recommendation were accepted. On the other hand, if these two main elements of a recommendation were accepted, the recommendation was deemed to have been implemented in its entirety, even though one or more of the minor parts, *e.g.* the general rate, were rejected. Furthermore, implementation was based on the first amendment to the relevant tariff item subsequent to the tabling of the Board's report; that is, unless specifically proposed, gradual implementation of a recommendation was not recognized. Finally, at the time of writing, the Government has deferred action on a number of the more recent Board reports. This deferral is no doubt a consequence of the recently concluded Tokyo Round of the General Agreement on Tariffs and Trade; it would be obviously impractical for a government to make policy changes in the midst of multilateral negotiations on tariff rates. If these deferred recommendations are excluded from the analysis, the rate of acceptance of the Board's recommendations is very high indeed.

Tariff Board: Implementation of Recommendations: References 116 to 155

Reference Number	Recommended Items /Sub-Items	Implemented Items /Sub-Items	Percentage Implementation
	#	#	%
1954-116	1	1	100.0
117	(a)	–	–
118	51	30	58.8
119	20	12	60.0
120	896	800[b]	90.0
121	(a)	–	–
122	5	5	100.0
123	16	16	100.0
124	79	64	81.0
125	123	120	97.6
126	1	1	100.0
127	3	3	100.0
128	2	2	100.0
129	3	3	100.0
130	21	20	95.2
131	48	48	100.0
132	18	17	94.4
133	15	15	100.0
134	15	14	93.3
135	4	nil	n.a.
136	1	nil	n.a.
137	4	4	100.0
138	5	5	100.0
139	1	1	100.0
140	2	nil	n.a.
141	1	1	100.0
142	(a)	–	–
143	3	3	100.0
144	1	nil	N.A.
145	(a)	–	–
146	11	8	72.7
147	99	(c)	(c)
148	(a)	–	–
149	20	(c)	(c)
150	2	(c)	(c)
151	12	(c)	(c)
152	144	113	75.5
153	1	(c)	(c)
154	1	(c)	(c)
155	5	(c)	(c)

[a]No recommendations made.
[b]This number is equivalent to the implementation by groups.
[c]No action, as yet, has been taken on the recommendations.

VII

Conclusions

A. THE BOARD AND CUSTOMS ADMINISTRATION

The Department of National Revenue administers the customs laws through informal processes. Decisions on classification, value for duty and many other matters are taken without a formal record, without an opportunity formally to test the validity of information, without articulated support for decisions, and by someone other than an independent decision-maker. This lack of procedural safeguards is justified by the nature of customs administration. Many of the functions National Revenue performs could not be carried out through adjudicatory proceedings. The assessment and collection of duties, for example, would absorb enormous resources if National Revenue were required to establish the classification and value for duty of all imported merchandise in an adjudicatory hearing. Informal procedures permit National Revenue to take action without first demonstrating to an impartial adjudicator that the information it relies upon is accurate. Moreover, a significant number of the issues which arise in customs administration are either relatively easy to decide or are usually non-controversial. On the other hand, much of what National Revenue does in administering the customs laws involves the application of general standards to specific cases; customs inspectors, district supervisors, and import specialists in Ottawa constantly make decisions by applying standards contained in regulations and legislation to particular fact situations. Tension therefore exists between the need for the administrative system to be fast and flexible, and the need for procedural safeguards to ensure fair and correct determinations.

The existing statutory scheme resolves this tension by combining informal administrative procedures with Tariff Board review for those who feel themselves aggrieved by administrative decisions. After duties are assessed informally, an importer may petition the Deputy Minister for a change of decision, and, if his request is denied, take an appeal to the Tariff Board. At the Board, the review process is in fact a hybrid of appellate review and *de novo* adjudication. The Tariff Board does not review an administrative record; decisions are based on a record compiled *de novo* at the Board hearing. This is not, in a technical sense a trial *de novo* since the Board does not make an independent determination of contested issues. Instead, the decision of the Deputy Minister is presumed to be correct, and the appellant carries the burden of proving that the challenged decision is erroneous.

The existing review process seems to work reasonably well. Resolving disputes through appeals to the Board, rather than through formal proceedings at the administrative level, permits customs administration to proceed expeditiously, but provides the impartial review necessary to ensure fair and correct decisions. At the same time, the presumption of correctness underlying the Deputy Minister's decisions facilitates the informal administrative process by shifting the burden of proof to persons challenging customs determinations. Even though the framework in which issues are raised and resolved appears to be sound, there may be some justification for expanding the scope of review over customs administration. Under subsection 47(1), only a few of the decisions necessary for the administration of the customs system are subject to review by the Board. Thus, the Board's supervisory role is limited to the review of classification and value for duty decisions; the Board also reviews the Deputy Minister's decisions on "normal value" under the *Anti-dumping Act*. Yet, there are large areas of customs administration which are not subject to appellate scrutiny. The *Customs Act* confers expansive decision-making powers on the Minister of National Revenue. For example, under subsection 118(2) a customs broker's licence may be revoked at any time by the Minister for reasons he considers sufficient. Moreover, many of the standards underlying value for duty determinations are subject to ministerial prescriptions — administrative determinations which are unreviewable by the Board. Thus, for example, paragraph 36(2)(*e*) authorizes the Minister to prescribe, in certain cases, the quantity of goods which corresponds to the "normal quantity sold for home consumption" under the general valuation formula. Another example is section 39 of the *Customs Act* which empowers the Minister to prescribe the method for determining value for duty in cases when ". . . the Minister is of the opinion that by

reason of unusual circumstances . . ." the valuation formulas provided by the Act cannot be applied.

Other provisions of the *Customs Act* confer substantial discretion on front-line officials. For example, section 25 grants to customs collectors the authority to fix the value of security bonds which must be posted in lieu of payment of duty in certain situations. While abuse of discretion by front-line decision-makers is usually controlled by intra-departmental review procedures, there may be cases when review by an impartial body outside National Revenue would be desirable. Review procedures may often improve the administrative process by creating substantive standards for channelling discretionary action and requiring the agency to develop rules, procedures and statements of policy.[287] Moreover, legal doctrines that shield ministerial and cabinet decisions from review are now undergoing critical scrutiny. Several courts and commentators have identified a "duty to act fairly" which constrains the exercise of administrative discretion.[288]

We are disinclined to make any recommendations for expansion of the Tariff Board's appellate jurisdiction. First, we have not studied the customs administration process in any detail; that process is sufficiently large and complex to justify a separate study. Thus, we are not adequately informed about the nature of many of the administrative decisions made by the Minister and his officials, and the appropriateness of subjecting those decisions to some review process. Moreover, we are not sure whether the Board would be the appropriate body to carry out an expanded review function, if one were found to be desirable. The Trial Division of the Federal Court might enjoy comparative advantages in such a role. On the other hand, there is an argument for a reviewing body with expertise in customs matters, which are often technical and arcane. This general problem of the appropriate scope for unreviewable discretion in customs administration requires further study.

B. RELATIONSHIP BETWEEN THE BOARD'S REFERENCE AND APPELLATE FUNCTIONS

As we have observed, the *Tariff Board Act*, mostly for historical reasons, deals almost exclusively with the economic inquiry function, and simply applies the inquiry machinery to the appeal function.

When the Board was transformed from an investigative and advisory body into a quasi-judicial tribunal as well, a new subsection was added to the Act which provided that most of section 5, hitherto describing only an inquiry function, now applied to the new appellate function as well. Subsection 5(13) amalgamates the procedures applicable to the Board's dual functions.[289] This is objectionable because it confuses the procedural requisites of a quasi-judicial hearing with the less exacting procedure allowed in administrative decision-making. Thus, subsection 5(9) permits the Board, in both its quasi-judicial and administrative capacities, to "obtain information that in its judgment is authentic, otherwise than under the sanction of an oath or affirmation, and use and act upon such information". This authority to secure data and expert opinion on an *ex parte* basis is perfectly compatible with the Board's inquiry role. There is no compelling need for legislative decisions to be made strictly on the basis of a record, even when a hearing is required under the applicable statutes. However, it is not appropriate for the Board to hear and act upon *ex parte* evidence when it sits as an appellate tribunal. When the Board adjudicates individual rights in an appeal, it performs a task that is very similar to those performed by courts; thus it is reasonable to argue that the same standards of fairness should apply as are employed in judicial trials. The wholesale adoption of judicial procedure may not be desirable for many quasi-judicial tribunals. In this case, however, there is no special justification for allowing the Board to make its decision on information not in the record. Its appellate function essentially involves statutory construction, and all the requisite information and expert opinion are readily available to the parties who appear before the Board. At a minimum, natural justice requires that a party to an adjudicatory proceeding have access to the information necessary to respond adequately to the facts and arguments advanced by his opponent.[290] The Act, in its present form, empowers the Board to deny this basic requisite of procedural fairness. There appears to have been at least one case in which the Board has exercised its authority to use *ex parte* information.[291] The risk of abuse exists, and the statute should be amended to remove that risk.

There is a more fundamental objection to the combination of appellate and inquiry functions in one tribunal. Under the existing statutory scheme, the Board formulates detailed recommendations for amendment of the *Customs Tariff* while at the same time hearing appeals that involve the interpretation of the Act's provisions. This creates an unfortunate confusion of administrative and quasi-judicial roles that has, in some cases, led the Board to ignore the limitations

inherent in its appellate function. For example, in Appeal No. 223 the Deputy Minister applied for a declaration as to the types of mineral wax that might be properly classified as "paraffin wax" under tariff item 272(b). The language of the tariff item in question had been the subject of a reference to the Board fifteen years earlier; the Board's recommendations for amendment of the item had been subsequently adopted by Parliament, which enacted the amendment in exactly the same form as proposed by the Board. The Board's appellate decision provided the following explanation of its approach to the construction of tariff items which are the products of its reference recommendations:

> In its search for the right interpretation of tariff items the Tariff Board takes special care and pains to discover the intent of the legislators at the time that such items become law. In this particular case, the legislators' intent is fully expressed in words. When the report of the Tariff Board on Reference No. 84 was tabled in Parliament in 1936 the Honourable Charles Dunning made the following remark: "After careful consideration, the Government has decided to accept in each instance the rate of duty recommended by the Board."
>
> The legislators accepted in the language of tariff items 225 and 227(b) the words proposed by the Tariff Board and it seems a fair inference that the division the legislators had in mind between these two items was that contemplated in the report of the Tariff Board.[292]

This approach to the construction of the *Customs Tariff* obviously offends against the established rule which excludes extrinsic evidence of legislative intent in resolving issues of statutory interpretation. The objection to the combination of appellate and inquiry roles is, however, based on a more subtle argument concerning the necessity for a fresh and impartial perspective in the interpretation of detailed and technical statutory provisions. The traditional ban on the use of extrinsic evidence in statutory construction has been eroded in recent cases; it is now generally recognized that legislative history and background reports by Parliamentary committees and government departments can be very useful in divining the collective intention of Parliament.[293] There is, however, an important substantive distinction between using reference reports as evidence of legislative intent, and a wholesale imputation to the members of Parliament of the meaning intended by the Board. The Board's approach simply assumes that the meaning which it attached to its proposed amendment was the meaning adopted by Parliament. In most cases, of course, this assumption will be correct. But it is inappropriate to adopt any general presumption that the intent of the legislators will always be congruent with that of the members of the Board.

This bias in perspective which arises from the combination of appellate and reference functions would exert some influence over the Board's quasi-judicial role, even if it were explicitly enjoined to ignore its reference recommendation in appeal cases. This fundamental bias militates in favour of severance of the inquiry and appellate functions.

C. THE BOARD'S RELATIONSHIP TO THE COURTS

We have seen how the Tariff Board is encircled by powerful institutions — the courts, National Revenue, and the Department of Finance. The courts' role comes, first, from different statutory provisions which allow appeal from various kinds of Board decisions, and, secondly, from the Board's status as a "court of record" and its putative quasi-judicial character. The importance of the relationship is shown from the very many times the Exchequer Court, Federal Court, and Supreme Court of Canada have stumbled along the Board's intricate byways.

And yet the Board's relationship to the courts has been plagued by ambivalence. For one thing, as we pointed out earlier in this study, it has not always been clear whether the Board conforms more closely to the quasi-judicial or to the administrative institutional model. In 1934 the Supreme Court of Canada had no doubt that the Board was an administrative body only, simply charged with finding facts.[294] Statutory amendment overtook that decision, pushing the Board towards the judicial model. But still the position remained confused; long after these statutory changes the Supreme Court of Canada rejected the argument that the Board was capable of making decisions *in rem*.[295]

Court of record or not, the Board — although statutorily empowered to do so — has not promulgated formal rules and regulations, preferring to rely on an informal guide. The Board's self-conception, unlike that of the Anti-dumping Tribunal, does not seem to be that of a court. Of course, the Board has not suffered the agonies of a *Magnasonic* or *Sarco*.[296] The courts have not been inclined —

perhaps they have simply lacked the opportunity — to insist that the Board subscribe fully to the rules of natural justice and adopt the other paraphernalia of judicial bodies. And yet the Board must be regarded as vulnerable to judicial intervention; what was said in *Magnasonic* and *Sarco* about the treatment of confidential evidence is clearly applicable to the Board; the confidentiality provision of the *Anti-dumping Act* (subs. 29(3)) merely copied that of the *Tariff Board Act* (subs. 5(10)).

One important reason for being uncertain about how to regard the Board is the curious nature of the *Tariff Board Act*. As we have remarked, the Act simply applies to the appellate function a mechanism developed for economic inquiries. So, notwithstanding the description of the Board as a "court of record", it is specifically empowered to obtain information outside hearings and act on that information, thereby apparently violating the principle of *audi alteram partem*. The statute itself creates confusion about the nature of the Board by giving it the inquiry function and recognizing that it receives from other statutes an appellate function, but not carefully distinguishing between these disparate tasks and not creating separate and appropriate machinery for each.

Confusion about whether we should regard the Board as an administrative or quasi-judicial body, and accordingly about the appropriate degree of supervision of the Board by the courts, is matched by confusion concerning the scope of statutory appeals from the Board to the courts. The main debate has centred about the distinction between so-called "questions of law" and "questions of fact". Issues on appeal from the Board are limited to questions of law. But what is encompassed by that rubric is very uncertain. Is the interpretation of particular words in a tariff item a question of law? Is "class or kind" determination a matter of law? And so on. One sensible approach to these problems is that of the *Dentist's Supply* case.[297] There Thorson P. distinguished between choice of methodology and application of a chosen methodology; the first is a matter of law and is the appropriate subject of an appeal, while the second is a matter of fact and the exclusive domain of the Board. This distinction has been used by the courts to limit the extent of appeals from the Board. The disposition of appeals from the Board also suggests a general reluctance of the courts to become too involved in Board affairs. The statutes bestow upon the courts a broad range of disposition options. But, generally speaking, whenever any new finding of fact is necessary the case is returned to the Board, for example, as the Supreme Court of Canada did in the *Ferguson Industries* case.[298]

The fact/law distinction is, in effect, used to apportion institutional responsibility for decisions connected with the tariff and related matters; application of the distinction confines some matters to the Tariff Board and sends others to the courts. Is the distinction an appropriate way of organizing institutions? Does it take into account the relative competence of the Board and the courts? Or does it, perhaps, allow the courts too great a role in reviewing decisions which involve special expertise? The *Dentist's Supply* distinction between the choice of methodology (a question of law) and the application of a chosen methodology (a question of fact) seems to recognize respective competence in a reasonable way. If there is to be judicial review of Board decisions, then *Dentist's Supply* — together with a regular practice of sending cases back to the Board where there has been an error of law, rather than substituting a decision by the court for that of the Board — is an appropriate approach.

D. THE BOARD'S INTERPRETATIVE METHODOLOGY

Our account of the Board's work has shown that with very few exceptions the Board turns its back on policy considerations of any sort. The Board sees its job as "deciding the facts", and seems largely unaware of the complex methodological decisions embraced by this phrase.

When considering the words in a statute, the Board sees its task as one of definition. Attention is focussed on choice between definitions: is the ordinary, trade (commercial) or technical (scientific) definition the most appropriate? Likewise, consideration of such questions as that of "class or kind" eschew policy and concentrate on "facts".

Some clue to the Board's approach might be found in the principles for interpretation of taxing statutes. Grover and Iacobucci have described the "form and substance" debate in these terms:

> The question [of interpretation] becomes much more difficult . . . when the wording of a technical provision in the statute appears to result in a

> tax benefit to a taxpayer who orders his affairs in a particular manner, although the social policy behind why such a benefit would be bestowed on him is far from apparent and the result may be, indeed likely is, an unforeseen consequence of the complexities of modern taxing statutes. There are two approaches, which have long been debated, for solving this problem. The one champions the "form" of the transaction and holds that the taxpayer has the right to arrange the form of his affairs so that he minimizes his tax burdens and is entitled, in so doing, to use a very technical approach to the statutory wording. The other invokes the idea that one must examine the words of the statute with a view to their wider purposes and then look to see whether the "substance" of the taxpayer's scheme fits in with that perceived purpose.[299]

Joseph Thorson, who as an Exchequer Court judge sat on many important appeals from the Tariff Board, has written that "it is the letter of the taxing Act, and not any assumed spirit of it other than that expressed by its words, that governs".[300] Thorson continued:

> It may be said categorically that in interpreting a particular provision of a tax law reference may not be made to the underlying economic reasons for the provision . . .
>
> . . . The golden rule of construction is applicable in the case of a taxing Act, namely, that its words are to receive their natural and ordinary meaning, unless they are technical terms or words having a particular meaning by reason of their context . . .[301]

Is the taxing act approach a suitable one for the Board to adopt? Perhaps no more can be said than that said by Glanville Williams.[302] The approach relies upon a simplistic view of the precision of language and the definitional process. It considers that words have a meaning apart from their context and apart from the particular questions to be answered.

Earlier we described the Board's composition. Representatives from many occupations and a number of regions of Canada are Board members: the Board is often described, approvingly, as a "people's court". The consequence of this composition is that no particular expertise is strongly present, in particular economic or legal expertise. As a result the Board does not have the ability of a court to manoeuvre within the constraints of taxing act interpretation principles. Board members are not familiar with the arsenal of justificatory techniques so familiar to judges. Lack of familiarity with these techniques is suggested by the text of Board decisions, which can sometimes be brief and cryptic. The Board, then, may have imposed upon itself the restraints necessarily those of a court, but lacks the ability of the legally astute to maximize the freedom that remains.

E. ACCESS TO THE TARIFF BOARD

1. Standing to Seek Administrative Review

Public participation in the administrative process is generally desirable in a democratic political community, since it promotes the value of self-determination and enhances the representativeness of government decision-making. Participation by groups with a stake in the outcome may also contribute to the accuracy and efficiency of administration and policy formulation.[303] Public participation has not been a noticeable part of the administrative process at National Revenue. National Revenue makes decisions that affect many interests, including those of importers, competing Canadian companies, foreign suppliers and exporters, and purchasers of imported merchandise. When those interests are adversely affected, National Revenue's action should be subject to challenge through administrative procedures and Tariff Board review.

Presently, the only formal means of seeking administrative review of decisions made by National Revenue is to file a request for a change of decision with the Deputy Minister. Under subsections 46(3) and (4) of the *Customs Act*, requests for a change of decision may be filed only by the importer or consignee of the merchandise subject to the challenged administrative action. Canadian producers, wholesalers, or importers that make or trade in goods which are competitive with the imported merchandise have no means of seeking a decision from the Deputy Minister.[304] Similar limitations arguably restrict standing to seek Tariff Board review of decisions by National Revenue in respect of appraisal and classification of imports. Subsection 47(1) of the *Customs Act* provides that a "person who deems himself aggrieved by a decision of the Deputy Minister . . ." has standing to seek review of the decision by the Board. While subsection 47(1) has never been authoritatively interpreted by the federal courts, it has been construed by National Revenue and the Board to limit standing for Board review to the actual owners or consignees of the imported merchandise. In short, many persons who may be adversely affected by decisions of National Revenue have no effective means of challenging those decisions at either the administrative or Board level. Parliament should amend subsections 46(3) and (4) of the *Customs Act* to allow any person adversely affected by an incorrect determi-

nation of the value for duty or classification of imported merchandise to apply to the Deputy Minister for a change of decision. This proposed amendment should remove any further doubt concerning the correct interpretation of subsection 47(1) of the *Customs Act* since any person who requests a change of decision which is subsequently denied by the Deputy Minister must be an "aggrieved person" under the standing provision.

To understand the impact of these proposals, it is necessary to consider the effect they would have on those who may be adversely affected by the decisions of National Revenue — Canadian manufacturers, producers and wholesalers, competing importers, foreign suppliers and consumers. First, Canadian companies whose products compete with imported merchandise have an important stake in classification and value for duty decisions; indeed, many of the laws administered by National Revenue were enacted to protect such firms. Our proposal would also authorize standing for persons who buy merchandise from importers: manufacturers, wholesalers, retailers and consumers. These persons are not authorized to challenge administrative decisions by National Revenue. Yet, customs decisions concerning duties have a direct effect on the price and availability of imported merchandise. Normally, the interests of these persons are protected by importers, who are, of course, most directly affected by National Revenue decisions. However, importers may have neither the resources nor incentives to challenge erroneous administrative action, especially if they can shift the burden of the higher duties on to their customers. In these situations, customers of importers may be left without a remedy against errors in classification and appraisal. Foreign suppliers also have an important stake in decisions made by National Revenue, but have no means of challenging such decisions. Classification or value for duty determinations which increase duties may cost them outlets for their merchandise by causing importers to switch suppliers. Foreign suppliers are an important source of competition for domestic firms, and, especially in Canada, they provide consumers with many products which could not otherwise be obtained. These firms should not be barred from protecting their own and their customers' interests. Perhaps the most controversial aspect of our proposal is that it would enable importers to challenge Customs decisions made with respect to the merchandise of competing importers. Under subsections 46(3) and (4), only the importer or consignee of merchandise may challenge decisions concerning that merchandise. Yet an importer may be injured by National Revenue decisions concerning the merchandise of his

competitor, and he should be afforded an opportunity to challenge such decisions.

There are two principal objections to our proposal. The first argument is that there is neither pressing need nor demonstrable support for a more liberal standing rule. It can be argued that if National Revenue makes a decision that favours one importer over another importing the same merchandise, the second importer usually can protect his interest by seeking to have his merchandise treated in the same way. This argument, however, is not wholly correct since there may be instances in which this strategy is unavailable. For example, National Revenue may appraise one importer's merchandise at the correct value, but appraise that of another at an incorrectly low value; the first importer can neither successfully challenge the correct value for duty decision on his own merchandise, nor eliminate the advantage conferred on his competitor by the incorrect valuation. And, of course, the same situation can arise if the two firms import different, but nonetheless competing merchandise.

The second objection that may be raised is that the administrative and Board review procedures could be used to harass competitors, or to seek confidential business information. Importers, in particular, may be concerned that competitors might use the review procedures to seek the names of foreign suppliers or information concerning prices and costs. A partial response to these concerns is that for fifty years United States manufacturers, producers and wholesalers have been authorized to challenge U.S. Customs duty assessments of competing goods, and there is no evidence to suggest that such procedures have been abused. Under section 516 of the *Tariff Act of 1930*, an American manufacturer, producer or wholesaler may request that the Secretary of the Treasury furnish information as to the classification and rate of duty imposed upon designated imported merchandise of a class or kind manufactured, produced, or sold at wholesale by the American firm making the inquiry.[305] If the American firm believes that the appraised value is too low or that the classification is not correct, it may file a protest with the Secretary stating the value or classification it believes proper, with supporting reasons. If the Secretary refuses to re-classify or re-appraise the merchandise, the petitioner may initiate a civil action in the United States Customs Court challenging the Secretary's decision. These suits are accorded precedence over other cases on the Customs Court's docket.[306] The owner of the merchandise or his agent has the right to appear and be heard as a party in interest. It should be noted that the American standing rules do not allow competing importers,

foreign suppliers or consumers to file a protest with the Secretary and seek review of his decision in the Customs Court.[307] Although importers may have more incentive than domestic manufacturers, producers or wholesalers to learn the sources and commercial practices of their importing rivals, the apparent lack of abuse of the American procedures suggests that concerns about the disclosure of confidential information may be exaggerated. More importantly, procedures already adopted by National Revenue and the Tariff Board to protect information that is legitimately confidential reduce the likelihood that the standing rules recommended here would be misused. Moreover, confidential information developed in connection with an investigation under the *Anti-dumping Act* is exempt from disclosure, and all the relevant statutes provide that criminal penalties may be imposed for the unauthorized release of confidential information by government employees. The Anti-dumping Tribunal has developed the practice of issuing protective orders which restrict access to sensitive information developed through pre-hearing discovery to counsel and experts for the parties. These safeguards substantially decrease the likelihood that broadening standing to challenge customs decisions would result in the disclosure of confidential information.

It should be noted that the recommendation made here does not specifically identify the persons who will be permitted standing to challenge customs decisions. Rather, it adopts the general standard that persons adversely affected by an administrative decision will possess the right to seek review. In many instances, the firms discussed above would be considered adversely affected because they would suffer "injury in fact" from erroneous administrative determinations.[308] Thus, the ultimate determination of standing rules would be a matter for the Board and the federal courts to elaborate over a period of time.

2. Tariff Board Appellate Hearings

Under subsection 5(7) of the *Tariff Board Act*, the chairman may authorize any single member of the Board to preside at an inquiry hearing. Subsection 5(13), however, prohibits the use of single member hearings in appeals. Since the Act requires the Board to sit in three member panels on appeals, the Board had declined until recently to hold appeal hearings outside of Ottawa because of the

expense and scheduling difficulties involved with protracted absences by three members. Yet there is substantial evidence that the Board's failure to convene appellate hearings in regional centres deterred the filing of appeals by importers in the Maritimes and the Western Provinces. Mr. Grant Deachman, a member of the Board, recently noted that while two-thirds of the Board's appeals are initiated by importers located in Central Canada, only one-third of all Canadian imports enter at ports in this area.[309] Deachman also explained that he had received many complaints from both Western and Eastern importers concerning the expense of transporting witnesses, and often counsel, to Ottawa for appeal hearings. Deachman indicated that while there may be disadvantages in departing from the practice of three member hearings, he favoured the use of single member hearings in order to provide equal access to importers in regions distant from Ottawa.

The Board now holds hearings once a year, in Eastern and Western centres. There still remains doubts, however, whether this measure is, in itself, sufficient; the proposal for single member hearings on appeals remains very much relevant. It is all the more reasonable when viewed in light of the prevailing trend toward single member hearings by federal tribunals. For example, the Tax Review Board hears appeals in twenty-six districts throughout Canada with one member presiding.

F. THE REFERENCE FUNCTION: RESEARCH AND POLITICS

The conception of a flexible or "scientific" tariff served as the basic rationale for the creation of the Board's reference function. This idea of a scientifically precise tariff that would equalize the cost disadvantages of domestic producers, without imposing any "unnecessary" or "excessive" burden on consumers, was also the primary objective animating United States tariff policy during the 1920's and 30's.[310] In our earlier discussion of the Board's reference work, it was argued that the goal of a scientifically determined tariff policy was unattainable, and that it created the risk of misleading less sophisticated observers of the commercial policy-making process.

The two basic deficiencies of the existing reference function can be viewed as the institutional manifestations of a "scientific" tariff policy. First, the Board's research efforts have been diverted from issues of importance to voters and commercial policy-makers to the resolution of disputes regarding the short run supply and demand conditions in narrowly defined product markets. Our review of the Board's research product indicates that the narrow problems addressed by the Board in most references are very costly to solve, and that correct solutions to these problems have little real value because of the dynamic nature of markets. In short, our first basic criticism of the Board's performance is that much of its reference research is directed to problems which are not worth addressing in the comprehensive and thorough manner characteristic of most Board studies.

The other primary deficiency of the existing reference process is that it fails to provide an equal opportunity for all affected interests to participate in the formulation of commercial policy. This is essentially an objection to the wholly instrumental decision-making role which the present scheme imposes on the Board. The very idea of large scale interest representation is inconsistent with the Board's present function — the determination of scientifically "correct" levels of tariff protection. As our earlier discussion indicated, positive economic analysis can yield scientific answers, albeit highly imperfect ones, to questions regarding cost differences between domestic producers and their foreign competitors; it cannot, however, supply value-free solutions to the broader normative issue of whether existing cost differentials *should* be fully or partially offset by a protective tariff. Thus, the reference process should be perceived as a component of a larger pluralistic political process in which competing interest groups seek to promote the welfare of their members. In a liberal democratic political system, procedural fairness is the only plausible criterion for the evaluation of political processes, which should be broadly defined to include all processes which shape collective decisions. Procedural fairness in a democratic system necessitates the design of institutions of collective choice in which the preferences of all citizens are given equal weight. While this ideal of procedural justice may be practically unattainable, the Board's reference process could be redesigned to enlarge opportunities for the representation of all interests affected by domestic commercial policies. An explicitly political advisory function would, of course, necessitate a complementary reorientation of the Board's research activities. Consumer representatives have little incentive to participate in an inquiry which focuses on the cost differentials between domestic and foreign producers; as we indicated earlier, meaningful partici-

pation by all affected interests is unlikely to occur unless the Board's research mandate is expanded to include the assessment of the allocative and distributive consequences of tariff policies, and a general survey of conflicting views on the political efficacy of those policies.

One possible objection to our critique of the Board's reference function is that the Board was designed to serve as an expert advisory body, and that our criticisms of the reference function implicitly ascribe fault to the Board for failing to perform functions which its designers never intended it to perform. In one sense, this is a valid rejoinder; our critique proceeds from the assumption that enlarging the scope for interest group representation in the commercial policy process is desirable. When understood in another sense, this objection is based on an incorrect conception of the Board's existing inquiry role. While the Board's legal status is wholly recommendatory, there is no real substantive difference between the economic and political content of its reference task and the decision-making functions of the traditional regulatory tribunals, such as the Canadian Transport Commission and the National Energy Board. Both the Board and these quasi-independent regulatory bodies confront the same essential task of resolving disputes between competing interests in relation to technocratically complex economic policy issues. The legal fact that the Board has no authority to alter tariff rates does not negate the argument for the expansion of effective interest representation; the provision of opportunities to participate in the deliberations of advisory bodies may often be the most effective and cost-efficient manner of influencing ultimate policy decisions.[311]

A second objection to our criticisms of the reference process is that, even if it is accepted that both an expansion of the commercial policy research agenda and an increase in the opportunities for interest representation are desirable, it is not clear that the Tariff Board is the most appropriate institution for the pursuit of either of these objectives. This objection may have merit; a rather narrowly focussed study of the Tariff Board does not provide a research framework of sufficient comprehensiveness for the resolution of these issues. We can, however, provide some observations which may aid future research on the appropriate design of commercial policy institutions. First, any reference or inquiry process should be carefully designed to preserve the beneficial features of the complementary relationship between economic research and political discourse. The primary political function of scientific research is to clarify the consequences that may ensue from collective decisions; research

sharpens assessments of private and public costs and benefits and thus facilitates informed participation in the formulation of public policy. Moreover, objective analyses of the impacts of tariff and other commercial policies should augment the range of feasible alternative measures, and thus provide a more constructive focus for political debate.[312] A reference or inquiry process should be designed to prevent domination of the agenda by well organized interests with large stakes in the policies or programs under review; our primary criticism of Board inquiries is that they usually devolve into narrowly framed disputes over the appropriate level of protection because the Minister and the Board permit domestic producers to play the decisive role in formulating the research agenda. This domination of the agenda substantially reduces the potential political benefits from the Board's research activity, at least in part because it discourages serious participation by other interest groups. This deficiency of the existing process might be partially avoided by amending the *Tariff Board Act* to authorize the Board to initiate inquiries on its own motion. It might also be desirable for the Board to conduct a "mini-inquiry" in advance of its primary research and investigative activity for the limited purpose of encouraging participation in the formulation of the reference agenda.

The other general question which must be resolved is whether responsibility for the Board's reference function, modified in the ways we have suggested, should be allocated to some other new or perhaps existing commission or tribunal. We have already noted the tension between the Board's appeal and reference functions; the potential risks of this combination of functions could be avoided by a reassignment of the reference jurisdiction to another agency in the commercial policy sector. The problem is an apparent lack of attractive alternative institutions in the commercial policy field. The institutional structure of the existing commercial policy process is highly fragmented, with several agencies and boards providing highly specialized and low-visibility functions, such as the Anti-dumping Tribunal and the Textile and Clothing Board.[313] Moreover, many aspects of trade policy are conducted wholly within the Departments of Finance, National Revenue, and Industry, Trade and Commerce. While there are sound arguments for centralizing ultimate responsibility for commercial policy-making decisions in the Cabinet, the existing design of the trade policy process narrowly circumscribes opportunities for public participation, and favours those interests which

possess comparative advantages in more traditional lobbying activities. There may be a genuine need for a trade policy advisory commission that would centralize all the research, investigatory, and interest representation functions in the commercial policy field.

AN INFORMAL GUIDE FOR PARTIES IN APPEALS BEFORE THE TARIFF BOARD

The Tariff Board is established by the *Tariff Board Act*. In its appeal jurisdiction, the Board sits as a court of record to hear appeals provided for under certain *Acts*, presently the *Customs Act*, *Excise Tax Act*, *Anti-dumping Act* and *Petroleum Administration Act*. Its hearings are held in public, usually in the Board's court room situated on the 20th floor, 365 Laurier Avenue West, Ottawa.

The Board has not made formal rules or regulations for the conduct of its proceedings; however, this informal guide, which is a consolidation of the previous guide lines issued by the Board, may assist parties appearing before the Tariff Board. The reader should note that the information provided herein may be affected by amendments made to existing legislation.

Official Languages

All documentation with respect to appeals may be submitted in English or in French. Hearings will be in the language used in the notice of appeal unless the Secretary is advised otherwise. Simultaneous translation will be arranged when necessary or when requested by any party to an appeal at least two weeks before the scheduled date of hearing.

Correspondence should be addressed to:

The Secretary
The Tariff Board
Ottawa, Canada

K1A 0G7

CLASSES OF APPEALS

Under section 47 of the *Customs Act*

The Tariff Board may hear an appeal under section 47 of the *Customs Act* by a person who deems himself aggrieved by a decision of the Deputy Minister of National Revenue, Customs and Excise. To enter an appeal the appellant

(a) must ensure that within 60 days from the date of the Deputy Minister's decision, the Secretary of the Tariff Board receives a statement in writing that he appeals the decision;

(b) should state that the notice of appeal is made pursuant to section 47 of the *Customs Act*;

(c) should forward with the notice of appeal or as soon as possible thereafter, a copy of the document containing the decision from which he appeals; and

(d) should state the classification, valuation or drawback which he believes should be applied to the goods in issue by referring to the tariff item number, the drawback item number or the section of the statute which he considers applicable.

Under section 49 of the *Customs Act*

The Tariff Board may hear appeals by way of reference from the Deputy Minister of National Revenue, Customs and Excise, wherein he may seek the opinion of the Board upon any question relating to the valuation or tariff classification of any goods or class of goods. To enter such an appeal the Deputy Minister writes to the Secretary of the Board stating the question relating to the valuation or tariff classification of the goods or class of goods upon which he seeks the Board's opinion.

Under section 59 of the *Excise Tax Act*

The Tariff Board may hear appeals by way of applications for a declaration as to what rate of tax is payable on any article or on transportation by air or that the article or transportation by air is

exempt from tax under the *Act*. Applicants should note that the Board's jurisdiction is restricted to those matters set out in section 59 of the *Act*. To make such an application for a declaration the applicant

(a) must file an application for a declaration with the Secretary of the Board, outlining the doubt or difference which exists concerning the rate of tax payable on the article or concerning its exemption from tax;

(b) should state that his application is made pursuant to section 59 of the *Excise Tax Act*;

(c) should state the declaration which, he believes, the Board should make under the law, referring, if possible, to the section of the *Act* or part of any schedule thereof which he considers applicable.

Under section 19 of the *Anti-dumping Act*

The Tariff Board may hear appeals from persons who deem themselves aggrieved by a decision of the Deputy Minister of National Revenue for Customs and Excise made pursuant to subsections 17(1) or 18(4) of the *Anti-dumping Act*. To enter an appeal under section 19, the appellant

(a) must file a notice of appeal in writing with the Deputy Minister and the Secretary of the Tariff Board within 60 days from the day on which the decision was made;

(b) should state that the notice of appeal is made pursuant to section 19 of the *Anti-dumping Act*; and whether it is an appeal from a decision of the Deputy Minister under subsection 17(1) or subsection 18(4) of the *Act*;

(c) should forward with the notice of appeal or as soon as possible thereafter a copy of the document containing the decision from which he appeals.

Under sections 17 and 65.18 of the *Petroleum Administration Act* (as amended April 17, 1978)

The Tariff Board may hear appeals by way of applications for a declaration as to whether any charge is payable or as to the amount of the charge in the following circumstances:

1. Under section 17: Charges payable on the exportation of any oils;

2. Under section 65.18: Charges payable on any petroleum or petroleum products.

To make such an application for a declaration the applicant

(a) must file an application for a declaration with the Secretary of the Board, outlining the doubt or difference which exists concerning the charge payable on oil exportation or on petroleum or petroleum products, or concerning its exemption therefrom;

(b) should state that his application is made pursuant to section 17 or section 65.18 of the *Petroleum Administration Act* (as applicable);

(c) should state the declaration which he believes the Board should make under the law, referring, if possible, to the section of the *Act* which he considers applicable.

GENERAL INFORMATION

Inscription on the Roll and Notices of Hearings

When a notice of appeal or an application for a declaration under any *Act* providing for appeals to the Tariff Board, or a reference by the Deputy Minister under section 49 of the *Customs Act* has been received, the Secretary of the Board gives the appeal a number, inscribes it on the roll of existing appeals and notifies both the appellant and the respondent (the Deputy Minister of National Revenue for Customs and Excise).

Subject to the Board's prerogative to set the date for the hearing of an appeal, the Secretary will endeavour to accommodate the parties to an appeal in this respect.

At least 21 days prior to the date fixed for hearing, notice of the hearing is published in the *Canada Gazette* and also mailed to the parties to the appeal, which may include an intervenant. However,

failure by any party for any reason to receive such notice shall not void the notice of the hearing published in the *Canada Gazette* and shall not be sufficient ground for a postponement of the hearing unless the Board so rules.

Entering of Appearance by Third Party (Intervenant)

In addition to an appellant and the respondent, anyone who wishes to intervene may be heard on the appeal if he enters an appearance with the Secretary of the Board, on or preferably before the day of the public hearing.

Procedure at the Public Hearing

The proceedings at hearings of the Board are recorded *verbatim* and copies of the transcript may be examined at the secretary's office, except for those which may contain evidence of a confidential nature.

Parties may present their case in person, by legal counsel or by any other representative of their choice. Witnesses give their evidence under oath or solemn affirmation.

The appellant first establishes, by oral and other evidence, the facts upon which he bases his case; the Deputy Minister, as respondent, then does likewise; if there are intervenants, those seeking to have set aside the respondent's decision will usually make their case before the respondent and those supporting his decision, after the respondent. After all parties have placed on record the relevant evidence they consider essential, the appellant presents by way of argument the reasoning in support of his case; the Deputy Minister, as respondent, then does likewise; if there are intervenants, those seeking to have set aside the respondent's decision will usually be heard before the respondent and those supporting his decision, after the respondent.

When proceeding under section 49 of the *Customs Act* the Deputy Minister first by oral and other evidence puts before the Board the facts pertaining to the question on which he is seeking the Board's

opinion. Interested parties who have become intervenants by entering an appearance then present their evidence. After all parties have placed their evidence on record the Deputy Minister then presents by way of argument such reasoning as he considers may assist the Board; the intervenants then present by way of argument their reasons in support of their respective opinions.

If new issues are raised after a party has presented his argument he will be allowed further argument in reply to such new issues.

Withdrawals and Postponements

A notice of appeal may be withdrawn prior to publication of the notice of hearing in the *Canada Gazette* by filing a notice of withdrawal in writing with the secretary of the Board. A notice of withdrawal received after publication of the notice of hearing will be filed at the hearing and dealt with by the Board.

A request for postponement of a hearing, received after publication of the notice of hearing, will be dealt with by the Board at the hearing. It is the Board's customary practice to place any postponed appeal at the foot of the list of all appeals inscribed on the roll at that time.

Any appeal which has not been heard for a period of six months, because the appellant is unwilling or unable to agree to the fixing of a suitable day for hearing the appeal, will be scheduled for hearing at the discretion of the Board and, if not proceeded with, may be dismissed.

Fees and Costs

There are no filing fees charged and no costs assessed against any of the parties.

Presenting Written Submissions in Advance

The parties to a hearing are urged to present their written submissions at least three weeks in advance of a hearing.

A written submission or brief should state under which section of an *Act* the appeal is being made. In appeals under the *Customs Act* or *Anti-dumping Act* the brief should

(a) describe the goods in issue;

(b) give customs entry information including the numbers of the appropriate items in the *Customs Tariff*;

(c) state the contentions of the appellant as to tariff classification, or value for duty or determination of the description, or export price, or normal value of the goods as the case may be, and refer to the appropriate provisions of the *Customs Act* or *Anti-dumping Act* on which these contentions are based;

(d) indicate the points in issue between the parties and the lines of argument to be put forward at the hearing.

In the case of appeals under the *Excise Tax Act* or *Petroleum Administration Act*, the brief should indicate, in addition to the general points above, those provisions of the *Act* upon which the parties are in contention.

Endnotes

1. S.C. 1931, 21-22 George V, c. 55. Much of the account that follows in this chapter is based upon an unpublished narrative and collection of documents prepared by Grant Deachman, First Vice-Chairman of the Tariff Board at the time of writing.
2. Order in Council P.C. 530, April 7, 1926.
3. Order in Council P.C. 1937, August 8, 1930.
4. S.C. 1867, c. 6.
5. R.S.C. 1927, c. 115.
6. See *Hansard*, January 24, 1912, pp. 1839-40.
7. *Ibid.*, February 7, 1912, p. 2591.
8. *Ibid.*, p. 2595.
9. *Supra*, note 2.
10. *Hansard*, May 1, 1930, p. 1625.
11. *Ibid.*, March 12, 1931, p. 2.
12. *Ibid.*, May 15, 1931, p. 1639.
13. R.S.C. 1927, c. 42.
14. *Hansard*, July 7, 1931, pp. 3496-7. Subsection 4(2) read: ". . . and the inquiry into any such matter may include inquiry as to the effect which an increase or decrease of the existing rate of duty upon a given commodity might have upon industry or trade, and the extent to which the consumer is protected from exploitation."
15. *Ibid.*, July 8, 1931, p. 3527.
16. R.S.C. 1970, c. T-1.
17. R.S.C. 1970, c. C-40.
18. R.S.C. 1970, c. E-13.
19. R.S.C. 1970, c. A-15.
20. S.C. 1974-75-76, c. 47.
21. J. H. Perry, *Taxes, Tariffs and Subsidies* (Toronto: University of Toronto Press, 1955) p. 28.

22. *Ibid.*, p. 144.

23. R. E. Caves and R. H. Holton, *The Canadian Economy: Retrospect and Prospect* (Cambridge, Mass.: Harvard University Press, 1961) p. 240.

24. Hector B. McKinnon (Chairman, 1940-1959) — Secretary of the Advisory Board of Tariffs and Taxation, Commissioner of Tariffs of the Department of Finance, Canadian negotiator in early GATT rounds; W. J. Callaghan (1943-47) — Commissioner of Tariffs of the Department of Finance; J. F. MacNeill (1949-51) — Law Clerk of the Senate; G. H. Glass (1959-1971) — Commissioner of Tariffs of the Department of Finance; Louis C. Audette (Chairman, 1959-1972) — Chairman, Canadian Maritime Commission; Louis Couillard (Chairman, 1972-75) — Deputy Minister of Manpower and Immigration, Vice-Chairman of Economic Council; Jean Lupien (1976-79) — Vice-President, Central Mortgage and Housing Corporation, Assistant Deputy Minister of the Environment, Deputy Minister of Health.

25. Charles Hébert (1933-46); F. L. Corcoran (1958-68); A. de B. McPhillips (1963-71) (also a former Member of Parliament).

26. C. A. Elliott (1957-1971); E. C. Gerry (1959-69) (accountant); V. D. R. Eldon (1961-62).

27. F. J. Leduc (1949-59) (formerly a Minister in the Government of Québec); Léo Gervais (1962-73) (Quebec civil servant); W. T. Dauphinee (1969-75) (formerly a Minister in the Government of Nova Scotia).

28. Milton N. Campbell (1933-43); and McPhillips.

29. G. H. Sedgewick (Chairman, 1933-39); René Labelle (1971-76).

30. W. W. Buchanan (1949-59) (subsequently Chairman of the Anti-dumping Tribunal).

31. W. J. Landreth (1971-78). Information about previous Board members was supplied by the Board.

32. Miss McDougall left the Board in September, 1979 to be Deputy Minister of Health and Welfare. She was replaced by John McDonald, formerly President of the Export Development Corporation.

33. S.C. 1931, c. 55; now see *supra*, note 16.

34. See R.S.C. 1927, c. 42, s. 49; now R.S.C. 1970, c. C-40, s. 47.

35. *Supra*, note 5.

36. The *Customs Act* was amended by S.C. 1948, c. 41, s. 5; the *Excise Tax Act* by S.C. 1948, c. 50, s. 10.

37. By S.C. 1948, c. 70, s. 4.

38. Subsection (3) deals with the compellability of a witness outside the province of service, and subsection (7) permits an inquiry to be made by any member or members designated by the Chairman.

39. R.S.C. 1970, c. C-41.

40. R.S.C. 1970, 2nd Supp., c. 10.

41. Section 26 defines "sale price" and "duty paid value" and contains provisions for calculating these values. Subsection 28(1) provides that in certain difficult circumstances the Minister may fix the value for tax of domestic goods.

42. Subsection 26(1) defines "producer or manufacturer" and subsections 26(2)-(5) provide that in certain situations a person may or may not be deemed to be a producer or manufacturer.

43. For a full description of the Canadian anti-dumping system, see Philip Slayton, *The Anti-dumping Tribunal* (1979) Law Reform Commission of Canada; Slayton, "The Canadian Anti-dumping System" (1978) 2 *Can. Bus. L.J.* 146; and Slayton, "The Canadian Legal Response to Steel Dumping" (1979) 2 *Can.-U.S. L.J.* 81.

44. [1934] S.C.R. 538.

45. R.S.C. 1927, c. 42, s. 43, as amended by S.C. 1930, c. 2.

46. S.C. 1932-33, c. 7.

47. *Supra*, note 44, at p. 545.

48. *Ibid.*, pp. 548-9.

49. S.C. 1948, c. 41.

50. S.C. 1950, c. 13.

51. S.C. 1951, c. 28, ss. 7, 8.

52. S.C. 1950, c. 52.

53. *Hunt Foods Export Corp. of Canada Ltd. v. The Deputy Minister of National Revenue for Customs and Excise* [*DMNRCE*] (1970) 4 T.B.R. 333.

54. See also *St. John Shipbuilding and Dry Dock Co. Ltd. v. DMNRCE* [1966] S.C.R. 196. The Board had considered whether or not a crane was of a class or kind made in Canada. At page 204 Cartwright J. says: "In dealing with the matter the Board was not restricted to the precise grounds on which the Deputy Minister had based his decision. Its task was to decide on the material before it under which item the imported crane should be classified."

55. *W. B. Elliott v. DMNRCE* (1963) 3 T.B.R. 28.

56. R.S.C. 1952, s. 43, as amended by S.C. 1955, c. 32, s. 3. Now R.S.C. 1970, c. C-40, s. 46.

57. *Javex Co. Ltd. et al. v. DMNRCE* (1959) 2 T.B.R. 28; aff'd [1961] S.C.R. 170.

58. *Ibid.*, at p. 32.

59. *Ibid.*, at p. 176.

60. *Jay-Zee Food Products Ltd. v. DMNRCE* (1965) 3 T.B.R. 241.

61. *Goodyear Tire and Rubber Co. et al. v. DMNRCE et al.* (1955) 1 T.B.R. 201; rev'd, [1956] S.C.R. 610.

62. R.S.C. 1952, c. 100, now R.S.C. 1970, c. E-13, s. 59.

63. *Supra*, note 61 (S.C.C.), at p. 613.

64. *Ibid.*, at p. 614.

65. The Board has carefully followed the *Goodyear* decision: see *infra*, pp. 59-60. For a recent echo of the *Goodyear* case, see *Cefer Designs Ltd. v. DMNRCE* [1972] F.C. 911.

66. Enacted by S.C. 1948, c. 41, s. 5.

67. *DMNRCE v. Parke, Davis & Co. Ltd.* [1954] 1 T.B.R. 12, at pp. 15-16.

68. *Bertram & Sons Co. Ltd. v. DMNRCE* (1959) 1 T.B.R. 185, at p. 187.

69. *DMNRCE v. J. Freedman and Son Ltd.* (1954) 1 T.B.R. 174, at pp. 177-8.

70. *Ibid.*, at p. 180.

71. S.C. 1958, c. 26, s. 2. This section was reproduced virtually unaltered in R.S.C. 1970, c. C-40, s. 48. There were minor changes as a result of section 65 of the *Federal Court Act*.

72. A further limitation of the Court of Appeal's jurisdiction with respect to the Tariff Board was expressed in *In re Anti-dumping Act and in re Danmor Shoes* [1974] F.C. 22. In the particular case the Board had ruled (1) that it had no jurisdiction to deal with a particular matter, and (2) that it would not accept certain evidence. Before the disposition of the case by the Board, the appellant challenged these rulings before the Federal Court. Chief Justice Jackett held that he had no jurisdiction to hear argument. Though the rulings of the Board may have been wrong, they were not contained in a "decision". The Federal Court's section 28 jurisdiction does not encompass "rulings" as opposed to "decisions". The appellant could challenge the Board's final decision if it could be shown that the decision was in some way based upon or affected by the wrong ruling, but the wrong ruling would not be grounds for setting aside a right decision.

73. *Supra*, note 67, at p. 25.

74. *Dentist's Supply Co. of New York v. DMNRCE* (1960) 2 T.B.R. 87, at p. 90.

75. *Canadian Lift Truck Co. Ltd. v. DMNRCE* (1956) 1 T.B.R. 121, at p. 122.

76. *General Supply Co. of Canada Ltd. v. DMNRCE* (1952) 1 T.B.R. 76; *DMNRCE v. Rediffusion, Inc.* (1953) 1 T.B.R. 100; *Canadian Lift Truck*, *supra*, note 75.

77. *Supra*, note 69, at p. 177.

78. *Supra*, note 74, at pp. 91-2.

79. *The National Council of the Baking Industry v. DMNRCE* (1959) 2 T.B.R. 179.

80. Cameron J. relied on *Miln-Bingham Printing Co. Ltd. v. The King* [1930] S.C.R. 282. In that case, Duff J. said:

> "No doubt, for the purpose of ascertaining the meaning of any given word in a statute, the usage of that word in other statutes may be looked at, especially if the other statutes happen to be *in pari materia*, but it is altogether a fallacy to suppose that because two statutes are *in pari materia*, a definition clause in one can be bodily transferred to the other."

81. *Supra*, note 60, at p. 243.

82. *Moirs Ltd. v. DMNRCE* (1964) 3 T.B.R. 17, at p. 28.

83. *Pfizer Co. Ltd. v. DMNRCE* [1973] F.C. 3, at p. 7; rev'd [1977] 1 S.C.R. 456.

84. *Supra*, note 67, at p. 21.

85. *E.T.F. Tools Ltd. v. DMNRCE* (1962) 3 T.B.R. 50, at p. 52.

86. *Supra*, note 53, at p. 342.

87. *Canadian Lift Truck Co. Ltd. v. DMNRCE* (1954) 1 T.B.R. 113, at p. 120; aff'd. by S.C.C., *supra*, note 75.

88. *Dominion Engineering Works v. DMNRCE* (1956) 1 T.B.R. 143; aff'd., [1958] S.C.R. 652.

89. But see *DMNRCE v. Stephens-Adamson Mfg. Co. of Canada* (1966) 3 T.B.R. 303, where Jackett P. said that the *Dominion Engineering* case only "rejected an attack on a decision of the Board in which the contention was that the Board was wrong in law in not applying a test of competitiveness. The decision does not, in my view, establish that competitiveness cannot be a criterion in the solution of a class or kind problem under the *Customs Tariff*." (p. 306).

90. *Supra*, note 88, at p. 656.

91. *MacMillan & Bloedel (Alberni) Ltd. v. DMNRCE* (1959) 2 T.B.R. 127: rev'd [1965] S.C.R. 366.

92. This rule has been followed in subsequent cases: for example, see *Central Electric Wire Ltd. v. DMNRCE* (1967) 3 T.B.R. 296; *DMNRCE v. Ferguson Industries Ltd.*, *infra*, note 94.

93. *Supra*, note 91 (S.C.C.), at p. 374.

94. *DMNRCE v. Ferguson Industries Ltd.* (1970) 4 T.B.R. 357; rev'd. [1973] S.C.R. 21.

95. *Great Canadian Oil Sands Supply Co. Ltd. v. DMNRCE* [1976] 2 F.C. 281.

96. It should be remembered that there are statutory provisions, apart from the tariff items themselves, that refer to "class or kind" – see sections 6 and 7 of the *Customs Tariff*.

97. *Research-Cottrell Ltd. v. DMNRCE* (1967) 3 T.B.R. 251; rev'd. [1968] S.C.R. 684.

98. *DMNRCE v. Quebec Hydro Electric Commission et al.* (1968) 4 T.B.R. 113; rev'd by S.C.C. (1970) 4 T.B.R. 127.

99. *Ibid.*, at pp. 131-2.

100. *Ayerst Organics Ltd. v. DMNRCE* (1970) 4 T.B.R. 404, at p. 409.

101. *Consumers Gas Co. v. DMNRCE* [1972] F.C. 1057, at p. 1062; aff'd. by S.C.C., (1976) 59 D.L.R. (3d) 610. The issue was whether regulators were used in the production of gas.

102. Glanville L. Williams, "Language and the Law", (pts. 1-5) (1945) 61 *L.Q.R.* 71, 179, 293, 384; (1946) 62 *L.Q.R.* 387.

103. *Ibid.*, pt. II, at p. 183.

104. *Ibid.*, pt. II, at p. 189.

105. *Ibid.*, pt. III, at pp. 298-9.

106. *Ibid.*, pt. III, at p. 300.

107. *Idem.*

108. *Re McIntyre Porcupine Mines Ltd. and Morgan* (1921) 49 O.L.R. 214, at pp. 220-221.

109. *Semet-Solvay Co. Ltd. v. DMNRCE* (1958) 2 T.B.R. 47.

110. R.S.C. 1952, c. 58. The contemporary counterpart is subsection 36(1), which reads:

> "(1) Subject to section 39, the value for duty shall, notwithstanding any invoice or affidavit to the contrary, be the fair market value, at the time when and place from which the goods were shipped directly to Canada, of like goods when sold
>
> (*a*) to purchasers located at that place with whom the vendor deals at arm's length and who are at the same or substantially the same trade level as the importer, and
>
> (*b*) in the same or substantially the same quantities for home consumption in the ordinary course of trade under competitve conditions."

111. *Supra*, note 55.

112. Now sections 35 and 36 with some variations. Section 35 read at the time of the *Elliott* case:

> "**35.** (1) Whenever duty ad valorem is imposed on goods imported into Canada, the value for duty shall be determined in accordance with the provisions of this section.
>
> (2) The value for duty shall be the fair market value, at the time when and place from which the goods were shipped to Canada, of like goods when sold in like quantities for home consumption in the ordinary course of trade under fully competitive conditions and under comparable conditions of sale.

(3) When the value for duty cannot be determined under subsection (2) for the reason that like goods are not sold under comparable conditions of sale, the value for duty shall be the fair market value, at the time when and place from which the goods were shipped to Canada, of like goods when sold in like quantities for home consumption in the ordinary course of trade under fully competitive conditions."

113. *Supra*, note 61.

114. *Supra*, note 109.

115. Supra, note 79.

116. *Supra*, note 53.

117. *Pfizer Corporation et al. v. The Queen* [1966] S.C.R. 449.

118. *Supra*, note 94.

119. *Supra*, note 95.

120. We are grateful for the advice of Grant Deachman, First Vice-Chairman, Jean Bertrand, member, and J. E. Lafrance, secretary of the Board, on the nuts and bolts aspects of this Chapter.

121. Board proceedings under the *Customs Act* and the *Anti-dumping Act* are referred to as "appeals", while those under the *Excise Tax Act* and the *Petroleum Administration Act* are called "applications" or "appeals by way of applications": see Appendix, *infra*, pp. 128-130. For the sake of simplicity, in this Chapter, the terms "appeals" and "notices of appeal" will cover both appeals and applications, as well as references under section 49 of the *Customs Act*.

122. Both acts simply state that the Board may declare the rate of tax "[w]here any difference arises or where any doubt exists": R.S.C. 1970, c. E-13, s. 59; S.C. 1974-75-76, c. 47, ss. 17 and 65.18.

123. But see R.S.C. c. E-13, ss. 44 and 59(4).

124. Basically, the Guide asks for a copy of the impugned decision, and for the notice to state the provision under which it is filed, the points of contention and the decision sought: see *infra*, pp. 128-130.

125. See *Danmor Shoes*, *supra*, note 72.

126. E.g. a request to determine who is liable for excise tax: see *supra*, pp. 20-21.

127. The latest version of the Guide speaks of peremptory fixing of a hearing date after a six months delay due to the appellant: see Appendix, *infra*, p. 132.

128. See *infra*, p. 133.

129. For the legal controversy which brought about this development, see *infra*, p. 52.

130. As to the nature of the right of appeal, see *supra*, pp. 22-23. The one difference is that the *Customs Act* and the *Anti-dumping Act* require the intervenor, but not the appellant or the Deputy Minister, to have

"a substantial interest in the appeal and [obtain] leave": R.S.C. 1970, c. C-40, s. 48(1)(*c*); R.S.C. 1970, c. A-15, s. 20(1)(*c*).

131. The Board is not limited by such agreements: see *supra*, p. 18.

132. *Infra*, pp. 130-1.

133. The process is slightly different in the case of references under section 49 of the *Customs Act*, when the Deputy Minister initiates the proceedings. See Appendix, *infra*, pp. 131-2.

134. *See*, for example, *Quality Garment Mfg. Co. Ltd. v. DMNRCE* (1962) 2 T.B.R. 324, and *Maranda and Labrecque Ltd. v. DMNRCE* (1963) 3 T.B.R. 81.

135. By virtue of subsection 5(13), subsection 5(9) applies equally to inquiries and appeals. In *Dorr-Oliver Long Ltd. v. Sherritt Gordon Mines Ltd.* (1959) 2 T.B.R. 113, the issue was the classification for duty of certain imported filters. The problem turned in part on the use of the filters, but there was no direct evidence led concerning use. The Board accepted an unchallenged statement on use in the appellant's brief; on appeal it was argued that to do so was improper. Kearney J. upheld the Board: "The Tariff Board is not bound by rules of evidence and can accept and act on information that, in its judgment, is authentic otherwise than under the sanction of an oath or affirmation . . ." *Ibid*, at p. 117.

136. But see *infra*, pp. 50-1, for disturbing exceptions to these two statements.

137. Note however, that there is an obligation to avoid anomalous results: see *supra*, pp. 19-20, and in particular, the text accompanying note 60.

138. See *supra*, p. 38, our comments on the contents of notices of the Deputy Minister's decision.

139. *Infra*, p. 127.

140. R.S.C. 1970, c. I-13. Section 21 reads:

> "**21.** (1) Where an act or thing is required or authorized to be done by more than two persons, a majority of them may do it.
>
> (2) Where an enactment establishes a board, court, commission or other body consisting of three or more members (in this section called an "association"),
>
> (a) at a meeting of the association, a number of members of the association equal to
>
> (i) at least one-half of the number of members provided for by the enactment, if that number is a fixed number, and
>
> (ii) if the number of members provided for by the enactment is not a fixed number but is within a range having a maximum or minmum, at least one-half of the number of members in office if that number is within the range,

constitutes a quorum;

(*b*) an act or thing done by a majority of the members of the association present at a meeting, if the members present constitute a quorum, shall be deemed to have been done by the association; and

(*c*) a vacancy in the membership of the association does not invalidate the constitution of the association or impair the right of the members in office to act, if the number of members in office is not less than a quorum."

141. S. 3(9) of the *Tariff Board Act* reads:

"(9) A vacancy on the Board does not impair the right of the remaining members to act."

142. In re *Tariff Board Act* [1977] 2 F.C. 228, at pp. 231-2.

143. *Ibid.*, at p. 232.

144. *Idem.*

145. For an account of these events see *Lily Cups Limited v. DMNRCE*, Appeal No. 1162 (July 27, 1977).

146. *Leland Electric Canada Ltd. v. DMNRCE* (1960) 2 T.B.R. 81.

147. *Danfoss Mfg. Co. Ltd. v. DMNRCE* (1971) 5 T.B.R. 75.

148. *Re Magnasonic Canada Ltd. and Anti-dumping Tribunal* [1972] F.C. 1239.

149. *Anti-dumping Tribunal Rules of Procedure*, C.R.C., c. 300, Rule 12.(1) Briefs, written submissions or exhibits to be filed with the Tribunal by any person that contain information considered by that person to be confidential shall be submitted separately and each page of the brief, submission or exhibit shall be legibly marked at the top "Confidential to the Tribunal" or "En confidence au Tribunal".

(2) Where any brief, written submission or exhibit referred to in subsection (1) is voluntarily submitted to the Tribunal during the course of an inquiry and the Tribunal does not consider the brief, written submission or exhibit to be confidential, the Tribunal shall

(a) inform the person who submitted the brief, written submission or exhibit that is is not considered to be confidential; and

(b) advise the person that he may either

(i) withdraw his request that the brief, written submission or exhibit be regarded as confidential, or

(ii) request that the brief, written submission or exhibit be returned.

(3) Where a brief, written submission or exhibit is returned by the Tribunal pursuant to subparagraph (2)(b)(ii), the information or evidence contained therein shall be deemed not to have been submitted to the Tribunal.

(4) Subsections (2) and (3) do not preclude the admission of any information or evidence required by the Tribunal during an inquiry.

150. *Ibid.*, Rule 24.(1) Subject to subsection (2) where the Tribunal directs that evidence and information given or elicited in the course of any hearing is to be dealt with in camera, no person, other than the person or persons presenting the information or evidence, may be present at the hearing.

(2) The Tribunal may permit counsel, other than a counsel who is an interested party and is appearing on his own behalf, to be present at a hearing heard in camera if the counsel undertakes not to disclose to any person the evidence or information given or elicited during the period he was so permitted to be present.

151. See Philip Slayton, *The Anti-dumping Tribunal* (1979) Law Reform Commission of Canada, pp. 17-9.

152. *Sarco Canada Ltd. v. Anti-dumping Tribunal* [1979] 1 F.C. 247, at p. 265.

153. See *supra*, p. 44.

154. *Accessories Machinery Ltd. v. DMNRCE* (1960) 2 T.B.R. 190: the same declaration was given in twenty-two other appeals heard together with this appeal.

155. *Frito-Lay Canada Ltd. v. DMNRCE* (Appeal No. 1241), *Calfax Int'l Inc. v. DMNRCE* (Appeal No. 1264), *Hostess Food Products Ltd. v. DMNRCE* (Appeal No. 1272) (April 10, 1978), at p. 9.

156. Reference 154 (Edible Oil Products) (1978).

157. F.C.A., appeal no. 293-78, *Appeal Book*, at pp. 279-286.

158. *Frito Lay*, *supra*, note 155 at p. 9. Chief Justice Thurlow, on the bench, speaking for an unanimous court, rejected an appeal, partly because "the appellant's submission that there was a failure of natural justice [was] not made out" as there was nothing relevant or contentious that might relate to the Frito-Lay case in the briefing book: *supra*, note 157 (June 11th, 1980).

159. *Supra*, p. 8.

160. [1980] 2 F.C. 142.

161. S.C. 1970-71-72, c. 11.

162. Compare with subsection 9(3) of the *Tax Review Board Act*, which provides that appeals shall be heard, determined and disposed of by a single member.

163. *Supra*, note 67.

164. S.C. 1950, c. 52. The amendment added subsection 5(13), the text of which is found *supra*, p. 14.

165. S.C. 1950, c. 13, s. 3. The following subsection was added to s. 49:

"Notice of the hearing of an appeal under subsection one shall be

published in the *Canada Gazette* at least twenty-one days prior to the day of the hearing, and any person who, on or before that day, enters an appearance with the Secretary of the Tariff Board may be heard on appeal."

166. S.C. 1951, c. 28, s. 8.

167. For one slight difference, in relation to the right of appeal, see *supra*, note 130.

168. *Infra*, p. 127.

169. See *e.g.*, *supra*, pp. 13-4.

170. *Supra*, note 149. See *Slayton*, *supra*, note 151, p. 43 *et seq.*

171. *Ibid*, at pp. 17-9.

172. *Ibid*, at pp. 55-6, 68.

173. *Elias Bros. Inc. v. DMNRCE* (1950) 1 T.B.R. 29. The Board found that cookie jars are for serving rather than storing food, and thus are exempt from Excise Tax as being "articles for use in the preparation or serving of food" under then s. 14(*c*) of Schedule 1 of the *Excise Tax Act*.

174. *Quebec and Ontario Transportation Co. Ltd. v. DMNRCE* (1968) 4 T.B.R. 212. The appeal dealt with valuation for duty.

175. *General Mills Canada Limited v. DMNRCE* (Appeals Nos. 1407 and 1411) (July 3, 1979). The Board decided that Granola Bars are properly classified as prepared cereal Bars (tariff item 4505-1) rather than as confectionery (tariff item 14100-1).

176. *SF Products Canada Ltd. v. DMNRCE* (1966) 3 T.B.R. 245. The Board had to decide whether the dryers were of a class or kind made in Canada.

177. *Tropic-Cal of Canada Ltd. v. DMNRCE* (Appeal No. 1026) (October 2 1974).

178. *Woburn Chemicals Ltd. v. DMNRCE* (1951) 1 T.B.R. 40: *Status Shoe Corp. of Canada Ltd. v. DMNRCE* (1969) 4 T.B.R. 289.

179. *Pentagon Construction v. A.-G. of Canada* (1959) 2 T.B.R. 416.

180. *H. Bedos & Company (Canada) Inc. v. DMNRCE* (1962) 2 T.B.R. 264. The same declaration was given in Appeals 578, 579 and 580, which were heard together with this appeal.

181. *Nabisco Foods Ltd. v. DMNRCE* (1961) 2 T.B.R. 132.

182. *Supra*, note 55.

183. For the position of third parties before the Board, see *Hunt Foods*, *supra*, note 53.

184. *Pedwell Lumber Co. Ltd. v. DMNRCE* (1967) 4 T.B.R. 8; *Barwood Flooring Canada Ltd. v. DMNRCE* (1967) 4 T.B.R. 8.

185. R.S.C 1952, c. 100, s. 37: Where goods subject to tax under this Part [being Part VI relating to the consumption or sales tax in issue] or under Part IV are sold at a price that in the judgment of the Minister is less than the fair price on which the tax should be imposed, the Minister has the power to determine the fair price and the taxpayer shall pay the tax on the price so determined. (Now R.S.C. 1970, c. E-13, s. 34.

186. *Supra*, note 61.

187. *Victoria Wholesale Souvenirs Ltd. v. DMNRCE* (Appeal No. 973) (December 4, 1972).

188. *The Children's Apparel Manufacturers' Assoc. v. DMNRCE* (1967) 4 T.B.R. 27.

189. *Rexall Drug Co. Ltd. v. DMNRCE* (1966) 3 T.B.R. 309.

190. *International Metal Fabricators Inc. v. DMNRCE* (Appeal No. 982) (November 1, 1971).

191. (5) Where the normal value of any goods cannot be determined under subsection (1) by reason that there was not a sufficient number of sales of like goods that comply with all the terms and conditions that are referred to in that subsection or that are applicable by virtue of subsection (2), the normal value of the goods shall be determined, at the option of the Deputy Minister in any case or class of cases, as

> (*a*) such price of like goods when sold by the exporter to importers in any country other than Canada during the period referred to in paragraph (1)(*c*) as, in the opinion of the Deputy Minister, fairly reflects the market value of the goods at the time of the sale of the goods to the importer in Canada, as adjusted by allowances calculated in the manner prescribed by the regulations to reflect the differences in the terms and conditions of sale, in taxation and other differences relating to price comparability between the sale of the like goods by the exporter to importers in any country other than Canada but with no other allowances affecting price comparability whatever; or
>
> (*b*) the aggregate of
>
> (i) the cost of production of the goods, and
>
> (ii) an amount of administrative, selling and all other costs and for profits,
>
> calculated in such manner as may be prescribed by the regulations.

192. *Danmor Shoe Co. Ltd. v. DMNRCE* (Appeal No. 1010); *Creative Shoes Ltd. v. DMNRCE* (Appeal No. 1011); *Créations Marie-Claude Inc. v. DMNRCE* (Appeal No. 1012); *General Footwear Co. Ltd. v. DMNRCE* (Appeal No. 1062); *Crosley Shoe Corp. Ltd. v. DMNRCE* (Appeal No. 1063); *Créations Marie-Claude Inc. v. DMNRCE* (Appeal No. 1067). All six appeals were subject to a Tariff Board declaration

dated August 4, 1975. For a discussion of the background to these cases, see Slayton, *supra*, note 151, at p. 16.

193. R.S.C. 1970, c. A-15, s. 11: Where, in the opinion of the Deputy Minister, sufficient information has not been furnished or is not available to enable the determination of normal value or export price under section 9 or 10, the normal value or export price, as the case may be, shall be determined in such manner as the Minister prescribes.

194. *Caribex Seafoods Ltd. v. DMNRCE* (January 31, 1978).

195. R.S.C. 1970, c. O-2.

196. *Unit Rig and Equipment Co. (Canada) Ltd. v. DMNRCE* (September 22, 1978).

197. See Slayton, *supra*, note 151, at pp. 31-3.

198. *Magnasonic Canada Ltd. v. DMNRCE* (August 29, 1978).

199. The relevant subsections of the *Customs Act* are:

> "**41.** (1) Notwithstanding anything in this Act, where the value for duty as determined under sections 36 to 40 is less than the amount for which the goods were sold to the purchaser in Canada, exclusive of all charges thereon after their shipment from the country of export, the value for duty shall be the amount for which the goods were sold, less the amount, if any, by which the fair market value of the goods has decreased between the time of purchase and the time of exportation.
>
> **42.** (2) There shall be added to the value for duty as determined under sections 36 to 41 the amount of consideration or money value of any special arrangement between the exporter and the importer, or between any person interested therein, because of the exportation or intended exportation of such goods, or the right to territorial limits for the sale or use thereof."

200. *Woodward Stores Ltd. v. DMNRCE* (Appeal No. 1060) (November 27, 1974).

201. *Northwest Rubber Mats Ltd. v. DMNRCE* (Appeal No. 1425) (June 18, 1979).

202. Subsection 29(3) of the Act provides that:

> "(3) There shall be imposed, levied and collected only five-twelfths of the tax imposed by section 27 on the sale or importation of the articles enumerated in Schedule V."

The relevant part of Schedule V is:

> "Part I
>
> . . .
>
> 6. Floor tile and hard surface composition yardage flooring for permanent bonding to floors and underlay therefor; materials to be incorporated to terrazzo flooring."

203. *Parsons-Steiner Ltd. v. DMNRCE* (1950) 1 T.B.R. 32.

204. *Campbell Soup Co. Ltd. v. DMNRCE* (1950) 1 T.B.R. 33.

205. *Sherwin-Williams Co. of Canada, Ltd. v. DMNRCE* (1950) 1 T.B.R. 35.

206. *J. H. Ryder Machinery Co. Ltd. v. DMNRCE* (1952) 1 T.B.R. 66.

207. *Carl Zeiss Canada Ltd. v. DMNRCE, et al.* (1967) 4 T.B.R. 31.

208. *Canadian Housewares Ltd. v. DMNRCE* (1949) 1 T.B.R. 8.

209. *F. Walter Perkin v. DMNRCE* (1951) 1 T.B.R. 61.

210. *Essex Hybrid Seed Co. Ltd. v. DMNRCE* (1961) 2 T.B.R. 254.

211. *Lyman Tube & Bearings Ltd. v. DMNRCE* (1960) 2 T.B.R. 3.

212. *The Eastern Car Co. Ltd. v. DMNRCE* (1953) 1 T.B.R. 111.

213. Subsection 6(10) of the *Customs Tariff* in 1960 is now R.S.C. 1970, c. C-41, s. 6.

214. *Supra*, note 154. See the discussion of *MacMillan and Bloedel* and *Ferguson Industries, supra*, pp. 30-1.

215. But see *Reference by DMNRCE Re Classification of Fabrics* (1951) 1 T.B.R. 26. The Board said that "it is considered that 'kind' of fabric is related to end-use. This would explain why in our finding we may accept a certain fabric as of a kind NOT MADE IN CANADA when used in the manufacturing of neckties but as MADE IN CANADA when used for scarves and mufflers."

216. *Accessories Machinery Ltd. v. DMNRCE* (1952) 1 T.B.R. 48.

217. *The Toronto Salt Works Ltd. v. DMNRCE* (1954) 1 T.B.R. 169.

218. *J.H. Ryder Machinery Co. Ltd. v. DMNRCE* (1952) 1 T.B.R. 69.

219. *The Singer Mfg. Co. v. DMNRCE* (1962) 2 T.B.R. 301.

220. *Nabisco Foods Ltd. v. DMNRCE* (1961) 2 T.B.R. 131.

221. *Rexair of Canada Ltd. v. DMNRCE* (1953) 1 T.B.R. 129.

222. Now R.S.C. 1970, c. C-40, ss. 36 and 37 (substantially amended). The section read:

> "**35.** (1) Whenever any duty *ad valorem* is imposed on any goods imported into Canada, the value for duty shall be the fair market value of such or the like goods when sold for home consumption in the ordinary course of trade under fully competitive conditions, in like quantities and under comparable conditions of sale at the time when and place whence such goods were exported by the vendor abroad to the purchaser in Canada; or, except as otherwise provided in this Act, the price at which the goods were sold by the vendor abroad to the purchaser in Canada, exclusive of all charges thereon after their shipment from the place whence exported direct to Canada, whichever may be greater.

(2) When the fair market value of any goods is not ascertainable under subsection (1), the value for duty of such goods shall be the nearest ascertainable equivalent of such value.

(3) When neither the fair market value nor the equivalent of such value can be ascertained, the value for duty shall be the actual cost of production of similar goods at date of shipment to Canada, plus a reasonable addition for administration, selling cost and profit."

223. S.C. 1955, c. 32, s. 2.

224. *Reference by the DMNRCE as to the value for duty of photographic films and paper* (1958) 2 T.B.R. 142.

225. *Supra*, note 178.

226. Subsections 3(8) and 5(13).

227. See G. Blake, *Customs Administration in Canada: An Essay in Tariff Technology* (Toronto: University of Toronto Press, 1957) at pp. 162-63.

228. See Law Reform Commission of Canada Working Paper 17, *Commissions of Inquiry: A New Act* (1977), and *Report on Advisory and Investigatory Commissions* (1979).

229. See *supra*, note 14.

230. See, e.g., W. S. Culbertson, *Reciprocity* (New York: McMillan & Co. 1937) at p. 7.; S. D. Clark, *The Canadian Manufacturers Association: A Study in Pressure Groups* (Toronto: University of Toronto Press 1936) Chapters 1 and 2.

231. See, J. Freedman, "Expertise and the Administrative Process" (1976) 28 *Admin. L. Rev.* 363-78.

232. J. Kindleberger and F. Lindert, *International Economics* (New York: Irwin & Co., 1978) at pp. 3-7.

233. *Ibid.*, at pp. 86-102.

234. See J. R. Williams, *The Canadian-United States Tariff and Canadian Industry* (Toronto: University of Toronto Press, 1978) at pp. 3-33.

235. For an excellent summary of Canadian tariff history see Economic Council of Canada, *Looking Outward: A New Trade Strategy for Canada* (Ottawa: Ministry of Supply & Services, 1975) at pp. 9-24.

236. See e.g., H. McApinchin, *The Regional Impact of the Canadian Tariff* (Ottawa: Ministry of Supply & Services, 1979) at pp. 3-31.

237. Section 16 of the *Customs Tariff* authorizes the Governor in Council to create commissions of inquiry for the investigation of conspiracies in restraint of trade by domestic producers. Subsection 4(3) of the *Tariff Board Act* provides that the Governor in Council may authorize the Tariff Board to carry out investigations under section 16. There does not appear to be any instance of the exercise of this reference power. The *Combines Investigation Act* established the Restrictive Trade Practices Commission for the investigation of trade conspiracies and

other anti-competitive practices. It is therefore unlikely that the Board will ever be called upon to conduct an inquiry under section 16 of the *Customs Tariff*.

Subsection 4(4) of the *Tariff Board Act* provides:

> "(4) It is also the duty of the Board to inquire into any other matter or thing in relation to the trade or commerce of Canada that the Governor in Council sees fit to refer to the Board for inquiry and report."

238. The normal practice is for the Board itself to draft the Minister's letter of reference, following a period of consultation with Department officers.

239. *Report by the Tariff Board Pursuant to the Inquiry Ordered by the Minister of Finance respecting Bakers' Yeast:* Reference No. 153 (Ottawa: Supply & Services, 1978). See p. 1 for the complete terms of reference. (These reports will hereinafter be noted in abbreviated form, e.g.: *Report* on Reference No. 153 (Baker's Yeast) (1978)).

240. Interview with Mr. Joseph Loomer, Assistant Deputy Minister, Department of Finance, August 14, 1979, Ottawa.

241. See, e.g. K. E. Eaton and N. A. Chalmers, *Canadian Law of Customs and Excise* (Toronto: Canada Law Book, 1968) pp. 85-120.

242. Section 6 of the *Customs Tariff* provides:

> "**6.** For the purpose of this Act goods shall not be deemed to be of a class or kind made or produced in Canada unless so made or produced in substantial quantities; and the Governor in Council may provide that such quantities, to be substantial, shall be sufficient to supply a certain percentage of the normal Canadian consumption and may fix such percentages."

Order in Council P.C. 1618, July 2, 1936 provides that:

"Articles shall not be deemed to be of a class or kind made or produced in Canada unless a quantity sufficient to supply ten percentum of the normal Canadian consumption of such article is so made or produced."

243. In Reference 139 (iron and steel for shipbuilding, 1967), Canadian steel producers sought repeal of an exemption from duty for iron and steel for use in shipbuilding. The event which precipitated the steel makers' efforts to remove the exemption was the expiry of a longstanding subsidy designed to encourage the expansion of the Canadian shipbuilding industry. The promotional program had required domestic producers to utilize inputs manufactured in Canada in order to qualify for subsidy payments. Thus, the "Canadian content" requirement for eligibility had served as an effective substitute for tariff protection for input manufacturers; when the subsidy program was abolished, the Canadian steel makers mounted an organized campaign for a protective tariff.

244. The three appeals under tariff item 40920-7, which describes a wide range of grading, sorting and packaging machinery, are discussed in

the Board's *Report* on Reference No. 137 (Machinery for Fresh Fruit or Fresh Vegetables) (1966), at pp. 47-48.

245. *Supra*, note 239.

246. *Bowes Co. Ltd. v. DMNRCE* (1971) 5 T.B.R. 150.

247. Yeast, live or active, with a moisture content of more than 15 per cent, produced by Anheuser-Busch, Inc., St. Louis, Missouri, United States of America (ADT-6-75) (January 29, 1976); finding of no material injury.

248. *Supra* note 239, at p. 44.

249. See, *The Export and Import Permits Act*, R.S.C. 1970, c. E-17, subs. 5(2), which authorizes the Governor in Council to impose import controls to safeguard Canadian industries from injurious import competition.

250. These three appeals are discussed in the Board's *Report* on Reference No. 154 (Edible Oil Products) (1978), at pp. 18-19. Tariff item 1305-1 refers to "lard compound and similar substances, n.o.p.".

251. *Supra*, note 53.

252. *Supra*, note 250, at p. 1.

253. *Ibid.*, at p. 17.

254. *Official Transcript*, Public Hearing on Reference No. 154, at p. 7.

255. *Ibid.*, at pp. 8-9.

256. Anthony Downs cites as an example of such an issue the case of tariff changes, where it is very difficult to organize an effective consumer lobby to secure a 50¢ reduction in the cost of shoes for every Canadian consumer; stakes which are very large on an aggregate basis are quite small from the perspective of the individual consumer. A. Downs, *An Economic Theory of Democracy* (New York: Free Press, 1959) at p. 255.

257. *Report* on Reference No. 155 (Exemption from Duties for Certain Institutions and Goods) (1978), at pp. 4-5.

258. *Report* on Reference No. 150 (Computers and Related Telecommunications Equipment) (1976), at pp. 291-319.

259. *Supra*, note 257, at p. 6.

260. *Official Transcript*, Public Hearing on Reference No. 155, Vol. 2, at p. 537.

261. *Ibid.*, at p. 539.

262. Interview with Dr. W. L. Posthumus, Director of Research, Tariff Board, August 13, 1979, Ottawa.

263. *Report* on Reference No. 149 (Pleasure Craft) (1976), at p. 12.

264. *See*, e.g., *ibid.*, at pp. 17-26; *Report* on Reference No. 145 (Knitted Outer Garments) (1978) at pp. 15-25.

265. *Supra*, note 263, at p. 271.

266. *Ibid.*, at p. 273.

267. For example, in Reference 149 the Board appended the following caveat to its analysis of the industry's cost data:

> "Finally, whereas the Board's questionnaire survey of the industry for the year 1971 was completed by a representative sample of pleasure craft manufacturers and produced hitherto unavailable information, the data obtained, in some respects at least, remain rather sketchy, or cannot be revealed for reasons of confidentiality. In other cases it proved impossible to obtain sufficiently comparable information (e.g. as regards production costs) because of major differences or deficiencies in the accounting records of the establishments concerned."
>
> *Supra*, note 263, at pp. 13-14.

268. *Report* on Reference No. 140 (Greenhouse Vegetables) (1969), at p. 133.

269. *Supra*, note 262.

270. *Supra*, note 260, at pp. 3-4.

271. Reference 149 contains this discussion of the distinction between nominal and "effective" protection:

> "A Canadian manufacturer receives protection against foreign competition in accordance with the nominal rate of duty set forth in the *Customs Tariff* with respect to the product he produces. In most instances, however, the "benefit" of this nominal tariff protection does not accrue in its entirety to the manufacturer — he uses part of it at least to "pay" for the "cost" to him of the tariff protection received by his suppliers of materials, parts, accessories, equipment, etc. The manufacturer's real or "effective protection" is measured by the difference between the amount of the "benefit" he derives from the nominal protection he received on his output and the amount of the "cost" he must "pay" due to the protection incorporated by his suppliers in the price of his material inputs. The amount of this difference, or effective protection, measured against the manufacturer's net output or "value added", indicates the rate of effective protection."
>
> *Supra*, note 263, at p. 275.

272. *Report* on Reference No. 151, (Glass Fibres and Filaments) (1977) at p. 69.

273. *Supra*, note 250.

274. *Hunt Foods* case, *supra*, note 53.

275. *Supra*, note 254, at p. 8.

276. *Supra*, note 272, at p. 75.

277. *Ibid.*, at p. 75.

278. *Supra*, note 263, at pp. 274-75.

279. *Supra*, note 258, at pp. 323-26.

280. *Supra*, note 263, at p. 360.

281. *Ibid.*, at p. 364.

282. *Supra*, note 268, at p. 132.

283. See, e.g., *supra*, note 263, at pp. 271-75. In this section of the *Report* the Board explicitly discusses the distributive effects of the available tariff options.

284. *Supra*, note 260, at p. 6.

285. *Supra*, note 257, at pp. 30-31.

286. *Ibid.*, at pp. 20-30.

287. K. C. Davis, *Discretionary Justice: A Preliminary Inquiry* (Chicago: University of Illinois Press, 1971) at pp. 57-59; A. Sofaer, "Judicial Control of Informal Discretionary Adjudication and Enforcement" (1972) 72 *Colum.L.Rev.* 1293.

288. See *e.g.*, D. J. Mullan, "Fairness: The New Natural Justice?" (1975) 25 *U.T.L.J.* 281: *Nicholson v. Haldimand-Norfolk Regional Board of Commr's. of Police* [1979] 1 S.C.R. 311.

289. See *supra*, p. 14, for text of subsection 5(13).

290. See, e.g., *Re Magnasonic* case, *supra*, note 148; H. N. Janisch, "Fairness: Confidentiality and Staff Studies" in H. N. Janisch (ed.), *Current Issues in Administrative Law* (Halifax: Dalhousie Continuing Legal Education Series, No. 7, 1975) at p. 14.

291. See *supra*, p. 50.

292. *Reference by Deputy Minister of National Revenue for Reclassification of Mineral Wax*, (1950) 1 T.B.R. 38, at pp. 38-39.

293. See, *e.g.*, *Re Anti-Inflation Act*, [1975] 2 S.C.R. 373; P. Hogg, *The Constitutional Law of Canada*, (1977, Carswell & Co.) at p. 395.

294. *Supra*, note 44.

295. *Javex Company* case, *supra*, note 57. But still again see *supra*, note 60 and accompanying text.

296. *Supra*, notes 148 and 152.

297. *Supra*, note 74.

298. *Supra*, note 94.

299. Warren Grover and Frank Iacobucci, "Introduction", in Grover and Iacobucci (eds.), *Materials on Canadian Income Tax*, Third Edition, (Toronto: Richard de Boo, 1976) p. 38.

300. Joseph T. Thorson, "Form and Substance" (1966) 14 *Can. Tax J.* 59, at p. 60.

301. *Ibid.*, at p. 61.

302. See *supra*, pp. 33-4.

303. *See, e.g.*, J. Williams, "Securing Fairness and Regularity in Administrative Proceedings" (1977) 29 *Admin. L. Rev.* 1; J. Quinn "Institutional Design and Canadian Merger Policy" in J.R.S. Prichard, et al. (eds.), *Canadian Competition Policy: Essays in Law and Economics* (Toronto: Butterworths, 1979) at pp. 279-81.

304. On occasion, the Department of National Revenue has referred the complaints of domestic producers to the Tariff Board under subsection 49(1) of the *Customs Act*; subsection 49(2) provides that a reference under subsection 49(1) ". . . shall be deemed to be an appeal to the Tariff Board". If a domestic producer's contention is not submitted to the Board under section 49, he may obtain Tariff Board review only by importing the commodity, securing a decision by the Deputy Minister, and appealing to the Tariff Board on the ground that he has been treated too leniently. It should be noted that this procedure has not been permitted by the United States Customs Court since 1913. See, G. A. Elliott, *Tariff Procedures and Trade Barriers* (Toronto: University of Toronto Press, 1955) at pp. 61-62.

305. *The Tariff Act of 1930*, 28 U.S.C. 2634, *as amended* (1977).

306. See, R. F. Strum, *A Manual of Customs Law* (New York: American Importers Assn., 1974) at pp. 20-21.

307. *Ibid.*, at pp. 21-22.

308. See *e.g.*, *Thorson v. A.-G. of Canada* [1975] 1 S.C.R. 138.

309. Speech by Mr. Grant Deachman, Member of Tariff Board, to the Canadian Importers Association, April 28, 1977. Toronto.

310. The "flexible tariff" provisions of the *Fordney-McCumber Tariff Act of 1922*, 42 U.S. Stat. 941 (1922), transformed the United States Tariff Commission from a purely fact-finding body to one that could be classified as a regulatory agency. The announced purpose of the 1922 tariff was to equate the costs of production of American producers with those of their foreign competitors. Even the proponents of the scientific tariff had doubts about the probable accuracy of the economic analysis required, and the effects of rapid changes in market conditions. *See*, e.g. Bronz, "The Tariff Commission as a Regulatory Agency" (1961), 61 *Colum. L. Rev.* 463, at p. 466.

311. See, e.g., Brown-John, "Advisory Agencies in Canada: An Introduction" (1979) 22 *Can. Pub. Admin.* 72.

312. D. Hartle, *Public Policy Decision Making and Regulation* (1979, Institute for Research on Public Policy) at pp. 93-94.

313. See *The Textile and Clothing Board Act*, S.C. 1970-71-72, c. 39.