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# **ANNUAL REPORT**

**FOR THE FISCAL YEAR ENDING  
MARCH 31, 1998**

**Canadian  
International  
Trade Tribunal**

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CHAIRMAN

PRÉSIDENT

June 30, 1998

The Honourable Paul M. Martin, P.C., M.P.  
Minister of Finance  
House of Commons  
Ottawa, Ontario  
K1A 0A6

Dear Minister:

I have the honour of transmitting to you, for tabling in the House of Commons, pursuant to section 41 of the *Canadian International Trade Tribunal Act*, the Annual Report of the Canadian International Trade Tribunal for the fiscal year ending March 31, 1998.

Yours sincerely,

Pierre Gosselin



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# CHAPTER I

## TRIBUNAL HIGHLIGHTS IN FISCAL YEAR 1997-98

### **Appointment of a New Chairman and a New Member**

On December 15, 1997, Mr. Pierre Gosselin was appointed Chairman of the Canadian International Trade Tribunal (the Tribunal). Prior to his appointment to the Tribunal, Mr. Gosselin held various positions in the trade policy and trade relations fields with the departments of Foreign Affairs and International Trade (DFAIT), Industry and Finance. Immediately prior to his appointment, Mr. Gosselin was Director General, Human Resources Development Bureau, at DFAIT. Among his assignments, Mr. Gosselin was Minister and Alternate Permanent Representative to the GATT, Permanent Mission of Canada to the United Nations and to the GATT in Geneva; Director General, Special Trade Relations at DFAIT; Minister-Counselor (commercial) at the Canadian Embassy in Washington, D.C.; and Minister and Permanent Representative to the Food and Agriculture Organization of the United Nations in Rome. Mr. Gosselin replaced Mr. Anthony T. Eyton.

On November 10, 1997, Mr. Peter F. Thalheimer was appointed to the position of Member of the Tribunal. From 1964 to 1993, he had a private law practice in Timmins, Ontario. Mr. Thalheimer was elected to the House of Commons in 1993, representing the riding of Timmins-Chapleau, and served as Vice-Chair to the Standing Committee on National Resources.

### **Dumping and Subsidizing Inquiries and Reviews**

The Tribunal initiated two inquiries, and two were in progress at the beginning of fiscal year 1997-98. During the fiscal year, three findings were issued. The Tribunal also initiated eight reviews of earlier findings or orders, and two were in progress at the beginning of fiscal year 1997-98. It issued seven orders, and three reviews were still in progress at the end of the fiscal year.

### **Request for a Ruling on the Identity of an Importer**

The Deputy Minister of National Revenue (the Deputy Minister) requested the Tribunal to rule, pursuant to subsection 89(1) of the *Special Import Measures Act* (SIMA), on the identity of an importer in Canada of fresh garlic originating in or exported from the People's Republic of China that was the subject of the finding issued by the Tribunal on March 21, 1997, in Inquiry No. NQ-96-002. These proceedings were still in progress at the end of fiscal year 1997-98.

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**Appeals of  
Decisions of the  
Department of  
National Revenue**

The Tribunal issued decisions on 177 appeals from decisions of the Department of National Revenue (Revenue Canada) made under the *Customs Act*, the *Excise Tax Act* and SIMA.

**Trade and Tariff  
References**

On December 17, 1997, pursuant to a reference of the Governor in Council, on the recommendation of the Minister of Finance, the Minister of Agriculture and Agri-Food and the Minister for International Trade, the Tribunal undertook an inquiry into the importation of dairy product blends outside the coverage of Canada's tariff-rate quotas. The Tribunal will submit its report by July 1, 1998.

Pursuant to a reference from the Minister of Finance dated July 6, 1994, the Tribunal investigates requests from domestic producers for tariff relief on imported textile inputs and makes recommendations in respect of those requests to the Minister of Finance. During fiscal year 1997-98, the Tribunal issued five reports to the Minister of Finance concerning requests for tariff relief. Revised terms of reference were issued to the Tribunal by the Minister of Finance on November 26, 1997. In addition, the Tribunal's third annual status report on the investigation process was submitted to the Minister of Finance on January 7, 1998.

**Procurement  
Review**

The Tribunal provides an opportunity for redress for potential suppliers concerned about the propriety of the procurement process relative to contracts covered by the *North American Free Trade Agreement* (NAFTA), the *Agreement on Internal Trade* (AIT) and the World Trade Organization (WTO) *Agreement on Government Procurement* (AGP). The Tribunal received 54 complaints during the fiscal year.

The Tribunal issued 16 written determinations of its findings and recommendations. Seven of these determinations related to cases that were in progress at the end of fiscal year 1996-97. In 7 of the 16 written determinations, the complaints were determined to be valid or valid in part.

**Review of SIMA**

On March 19, 1998, the government tabled proposed legislative amendments to improve SIMA. As changes will also be made to certain provisions of the *Canadian International Trade Tribunal Act* (the CITT Act) primarily as they relate to inquiries under SIMA, the Tribunal staff was consulted on the proposed legislative changes.

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**Access to  
Tribunal notices,  
decisions and  
publications**

During fiscal year 1997-98, the Tribunal completed the retrospective conversion of all its decisions, a project aimed at storing, on its Web site ([www.citt.gc.ca](http://www.citt.gc.ca)), all its decision issued since its establishment in December 1988. The Tribunal's Web site, therefore, constitutes an exhaustive repository of all Tribunal decisions, as well as other information relating to the Tribunal.

The Tribunal also makes available its notices and decisions on *Factsline*, a service that can be accessed using a telecopier.

Finally, Tribunal notices and decisions are published in the *Canada Gazette*. Those relating to procurement complaints are also published in *Government Business Opportunities*.

As of July 1997, the Tribunal has discontinued the publication of the Bulletin in paper form. Issues of the Bulletin, as well as back issues, are available on the Tribunal's Web site.

**Meeting Statutory  
Deadlines  
(Timeliness)**

All of the Tribunal inquiries were completed on time, and decisions were issued within the statutory deadlines. For appeals of Revenue Canada decisions that are not subject to statutory deadlines, the Tribunal usually issues, within 120 days of the hearing, a decision on the matter in dispute, including the reasons for its decision.

## Tribunal's Caseload in Fiscal Year 1997-98

	Cases Brought Forward from Previous Fiscal Year	Cases Received in Fiscal Year	Total	Decisions/ Reports Issued	Cases Withdrawn/ Not Initiated	Cases Outstanding (March 31, 1998)
<b>SIMA ACTIVITIES</b>	1	1	2	2	-	-
References (Advice)						
Inquiries	2	2	4	3	-	1
Public Interest Requests	-	1	1	1	-	-
Requests for Review	-	3	3	3	-	-
Expiries <sup>1</sup>	3	7	10	5	3	2
Reviews	2	8	10	7	-	3
<b>APPEALS</b>						
<i>Customs Act</i>	331	101	432	129	72	231
<i>Excise Tax Act</i>	254	13	267	31	49	187
SIMA	52	26	78	17	2	59
<b>Total</b>	<b>637</b>	<b>140</b>	<b>777</b>	<b>177</b>	<b>123</b>	<b>477</b>
<b>ECONOMIC, TRADE, TARIFF AND SAFEGUARD INQUIRIES</b>						
<b>Textile Reference</b>						
Requests for Tariff Relief	10	20	30	11 <sup>2</sup>	-	19
Expiries <sup>1</sup>	-	4	4	1	-	3
Reviews	-	1	1	1	-	-
<b>Economic, Trade and Tariff-Related Matters</b>	-	1	1	-	-	1
<b>PROCUREMENT REVIEW ACTIVITIES</b>						
Complaints	9	54	63	16	36	11

1. As a result of a different method of reporting expiries, the first column refers to expiries for which decisions on whether or not to review had not been made prior to the end of the previous fiscal year. The fourth column refers to decisions to review.
2. The Tribunal actually issued 5 reports to the Minister of Finance which related to 11 requests for tariff relief.

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# CHAPTER II

## MANDATE, ORGANIZATION AND ACTIVITIES OF THE TRIBUNAL

### Introduction

The Tribunal is an administrative tribunal operating within Canada's trade remedies system. It is an independent quasi-judicial body that carries out its statutory responsibilities in an autonomous and impartial manner and reports to Parliament through the Minister of Finance.

The main legislation governing the work of the Tribunal is the CITT Act, the *Canadian International Trade Tribunal Regulations* (the CITT Regulations), the Tribunal's Rules of Procedure, SIMA, the *Customs Act* and the *Excise Tax Act*.

### Mandate

The Tribunal's primary mandate is to:

- conduct inquiries into whether dumped or subsidized imports have caused, or are threatening to cause, material injury to a domestic industry;
- hear appeals of Revenue Canada decisions made under the *Customs Act*, the *Excise Tax Act* and SIMA;
- conduct investigations into requests from Canadian producers for tariff relief on imported textile inputs that they use in their production operations;
- conduct inquiries into complaints by potential suppliers concerning procurement by the federal government that is covered by NAFTA, the AIT and the AGP;
- conduct safeguard inquiries into complaints by domestic producers that increased imports are causing, or threatening to cause, serious injury to domestic producers; and
- conduct inquiries and provide advice on such economic, trade and tariff issues as are referred to the Tribunal by the Governor in Council or the Minister of Finance.

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**Method of Operations**

In carrying out most of its responsibilities, the Tribunal conducts hearings that are open to the public. These are normally held in Ottawa, Ontario, the location of the Tribunal's offices, although hearings may also be held elsewhere in Canada. The Tribunal has rules and procedures similar to those of a court of law, but not quite as formal or strict. The CITT Act states that hearings, conducted generally by a panel of three members, should be carried out as "informally and expeditiously" as the circumstances and considerations of fairness permit. The Tribunal has the power to subpoena witnesses and require parties to submit information, even when it is commercially confidential. The CITT Act contains provisions that strictly control access to confidential information.

The Tribunal's decisions may be reviewed by or appealed to, as appropriate, the Federal Court of Canada and, ultimately, the Supreme Court of Canada, or a binational panel under NAFTA, in the case of a decision affecting US and/or Mexican interests. Governments that are members of the WTO may appeal the Tribunal's decisions to a dispute settlement panel under the *WTO Understanding on Rules and Procedures Governing the Settlement of Disputes*.

**Membership**

The Tribunal may be composed of nine full-time members, including a Chairman and two Vice-Chairs, who are appointed by the Governor in Council for a term of up to five years that is renewable one time. A maximum of five additional members may be temporarily appointed. The Chairman is the Chief Executive Officer responsible for the assignment of members and for the management of the Tribunal's work. Members come from a variety of educational backgrounds, careers and regions of the country.

**Organization**

Members of the Tribunal, currently 8 in number, are supported by a permanent staff of 86 people. Its principal officers are the Executive Director, Research, responsible for the economic and financial analysis of firms and industries and for other fact finding required for Tribunal inquiries; the Secretary, responsible for administration, relations with the public, dealings with other government departments and other governments, and the court registrar functions of the Tribunal; the General Counsel, responsible for the provision of legal services to the Tribunal; and the Director of the Procurement Review Division, responsible for the investigation of complaints by potential suppliers concerning any aspect of the procurement process.

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**Organization**

**CHAIRMAN**

Pierre Gosselin

**VICE-CHAIRS**

Raynald Guay  
Patricia M. Close

**MEMBERS**

Arthur B. Trudeau\*  
Robert C. Coates, Q.C.  
Anita Szlazak  
Charles A. Gracey\*  
Peter F. Thalheimer

**SECRETARIAT**

**Secretary**  
Michel P. Granger

**RESEARCH BRANCH**

**Executive Director of Research**  
Ronald W. Erdmann

**PROCUREMENT REVIEW DIVISION**

**Director**  
Jean Archambault

**LEGAL SERVICES BRANCH**

**General Counsel**  
Gerry Stobo

\* Temporary Member

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## Legislative Mandate of the Tribunal

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Section	Authority
<b>CITT Act</b>	
18	Inquiries on Economic, Trade or Commercial Interests of Canada by Reference from the Governor in Council
19	Inquiries Into Tariff-Related Matters by Reference from the Minister of Finance
19.01	Safeguard Inquiries Concerning Goods Imported from the United States and Mexico
19.02	Mid-Term Reviews of Safeguard Measures and Report
20	Safeguard Inquiries Concerning Goods Imported Into Canada and Inquiries Into the Provision, by Persons Normally Resident Outside Canada, of Services in Canada
23	Safeguard Complaints by Domestic Producers
23(1.01) and (1.02)	Safeguard Complaints by Domestic Producers Concerning Goods Imported from the United States and Mexico
30.08 and 30.09	Extension Inquiries of Safeguard Measures and Report
30.11	Complaints by Potential Suppliers in Respect of Designated Contracts

### **SIMA (Anti-Dumping and Countervailing Duties)**

33, 34, 35 and 37	Advice to Deputy Minister
42	Inquiries With Respect to Injury Caused by the Dumping and Subsidizing of Goods
43	Findings of the Tribunal Concerning Injury
44	Recommencement of Inquiry (on Remand from the Federal Court of Canada or a Binational Panel)
45	Advice on Public Interest Considerations
61	Appeals of Re-Determinations of the Deputy Minister Made Pursuant to Section 59 Concerning Whether Imported Goods are Goods of the Same Description as Goods to which a Tribunal Finding Applies, Normal Values and Export Prices or Subsidies
76	Reviews of Findings of Injury Initiated by the Tribunal or at the Request of the Deputy Minister or Other Interested Persons
76.1	Reviews of Findings of Injury Initiated at the Request of the Minister of Finance
89	Rulings on Who is the Importer



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## Legislative Mandate of the Tribunal (cont'd)

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Section	Authority
<b><i>Customs Act</i></b>	
67	Appeals of Decisions of the Deputy Minister Concerning Value for Duty and Origin and Classification of Imported Goods
68	New Hearings on Remand from the Federal Court of Canada
70	References of the Deputy Minister Relating to the Tariff Classification or Value for Duty of Goods
<b><i>Excise Tax Act</i></b>	
81.19, 81.21, 81.22, 81.23 and 81.33	Appeals of Assessments and Determinations of the Minister of National Revenue
81.32	Requests for Extension of Time for Objection or Appeal
<b><i>Softwood Lumber Products Export Charge Act</i></b>	
18	Appeals of Assessments and Determinations of the Minister of National Revenue
<b><i>Energy Administration Act</i></b>	
13	Declarations Concerning the Amount of Oil Export Charge



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# CHAPTER III

## DUMPING AND SUBSIDIZING INQUIRIES AND REVIEWS

### The Process

Under SIMA, Canadian producers may have access to anti-dumping and countervailing duties to offset unfair injurious competition from goods exported to Canada:

- 1) at prices lower than sales in the home market or lower than the cost of production (dumping), or
- 2) that have benefited from certain types of government grants or other assistance (subsidizing).

The determination of dumping and subsidizing is the responsibility of Revenue Canada. It is the Tribunal that determines whether such dumping or subsidizing has caused “material injury” or “retardation” or is threatening to cause material injury to a domestic industry.

A Canadian producer or an association of Canadian producers begins the process of seeking relief from alleged injurious dumping or subsidizing by making a complaint to the Deputy Minister. The Deputy Minister may then initiate a dumping or subsidizing investigation leading to a preliminary and then a final determination of dumping or subsidizing. The Tribunal commences its inquiry when the Deputy Minister issues a preliminary determination. Revenue Canada levies provisional duties on imports from the date of the preliminary determination.

### Inquiries

When it commences an inquiry, the Tribunal tries to make all interested parties aware of the inquiry. It issues a notice of commencement of inquiry that is published in the *Canada Gazette* and forwarded to all known interested parties.

In conducting inquiries, the Tribunal requests information from interested parties, receives representations and holds public hearings. Parties participating in these proceedings may conduct their own cases or be represented by counsel. The Tribunal staff carries out extensive research for each inquiry. The Tribunal sends questionnaires to manufacturers, importers, purchasers and, in some inquiries, exporters. Questionnaire responses are the primary source of information for staff reports. These reports focus on the factors that the Tribunal considers in arriving at decisions regarding material injury or retardation or threat of material injury to a

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**Advice Given  
Under Section 37  
of SIMA**

domestic industry. The reports become part of the case record and are made available to counsel and parties. Confidential or business-sensitive information is protected in accordance with provisions of the CITT Act. Only independent counsel who have filed declarations and undertakings may have access to such confidential information.

The CITT Regulations prescribe factors that the Tribunal may consider in its determination of whether the dumping or subsidizing of goods has caused material injury or retardation or is threatening to cause material injury to a domestic industry. These factors include, among others, the volume of dumped or subsidized goods, the effects of the dumped or subsidized goods on prices and the impact of the dumped or subsidized goods on production, sales, market shares, profits, employment and utilization of production capacity.

The Tribunal holds a public hearing about 90 days after the commencement of the inquiry following receipt of the Deputy Minister's final determination of dumping or subsidizing. At the public hearing, domestic producers attempt to persuade the Tribunal that the dumping or subsidizing of goods has caused material injury or retardation or is threatening to cause material injury to a domestic industry. Importers and, sometimes, exporters and users of the goods usually challenge the domestic producers' case. After cross-examination by parties and then examination by the Tribunal, each side has an opportunity to respond to the other's case and to summarize its own. In many inquiries, the Tribunal calls witnesses who are knowledgeable about the industry and market in question. Parties may also seek exclusions from a Tribunal finding of material injury or retardation or threat of material injury to a domestic industry.

The Tribunal must issue its finding within 120 days from the date of the preliminary determination by the Deputy Minister. The Tribunal has an additional 15 days to issue a statement of reasons explaining its finding. A Tribunal finding of material injury or retardation or threat of material injury to a domestic industry is the legal authority for the imposition of anti-dumping or countervailing duties by Revenue Canada.

When the Deputy Minister decides not to initiate a dumping or subsidizing investigation because there is insufficient evidence of injury, the Deputy Minister or the complainant may, under section 33 of SIMA, refer the matter to the Tribunal for an opinion as to whether or not the evidence before the Deputy Minister discloses a reasonable indication that the dumping or subsidizing has caused material injury or retardation or is threatening to cause material injury to a domestic industry. When the Deputy Minister decides to initiate an investigation, a similar recourse is available to the Deputy Minister or any person or government under section 34 of SIMA.

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**Inquiries  
Completed  
in 1997-98**

***Polyiso Insulation  
Board***

*NQ-96-003*

*Finding:  
Injury  
(April 11, 1997)*

Section 37 of SIMA requires the Tribunal to render its advice within 30 days. The Tribunal makes its decision, without holding a public hearing, on the basis of the information before the Deputy Minister when the decision regarding initiation was reached.

The Tribunal issued two advices during fiscal year 1997-98. They concerned *Certain Hot-Rolled Carbon Steel Plate* (Reference No. RE-96-002) and *Certain Stainless Steel Round Bar* (Reference No. RE-97-001). The Tribunal concluded in both instances that the evidence before the Deputy Minister disclosed a reasonable indication that the dumping had caused material injury or was threatening to cause material injury to a domestic industry. *Certain Hot-Rolled Carbon Steel Plate* subsequently proceeded to an inquiry under section 42 of SIMA. In *Certain Stainless Steel Round Bar*, the Deputy Minister had not made a preliminary determination regarding dumping before the end of the fiscal year.

The Tribunal completed three inquiries under section 42 of SIMA in fiscal year 1997-98. Two inquiries concerned construction materials, Inquiry No. NQ-96-003, *Polyiso Insulation Board*, and Inquiry No. NQ-96-004, *Concrete Panels*. In 1996, the Canadian market for polyiso insulation board exceeded \$60 million. *Concrete Panels* involved a regional industry in British Columbia and Alberta with a market of \$1 million. Inquiry No. NQ-97-001, *Certain Hot-Rolled Carbon Steel Plate*, concerned a steel product. The Canadian market for carbon steel plate was close to \$500 million in 1997.

This inquiry involved several exporters and importers of dumped polyiso insulation board from the United States. Polyiso insulation board is used to insulate walls and roofs in residential and commercial construction. Exeltherm Inc. (Exeltherm) of Cornwall, Ontario, accounted for over 90 percent of Canadian production in 1996. The Tribunal found that the dumped imports had caused material injury to the domestic industry, but excluded from its finding polyiso insulation board imported into British Columbia and certain goods imported by manufacturers of wood drying kilns.

The Tribunal found that the dumping of polyiso insulation board had adversely affected Exeltherm's production, capacity utilization, sales volumes and prices, gross margins and overall profitability. Although Exeltherm was able to increase sales volumes, it could not make any significant gains in market share, as US imports increased strongly in both 1994 and 1995. Exeltherm's prices declined despite an increase in raw material costs and strong increases in demand for polyiso insulation board. Exeltherm's evidence demonstrated that it had either lost business to lower-priced US products or won business by matching lower

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**Concrete Panels**

NQ-96-004

*Finding:  
Injury  
(June 27, 1997)*

competing bids from US suppliers. The Tribunal found that, although somewhat improved in 1996, Exeltherm's gross margins were still at injuriously low levels and that its net income performance was unsatisfactory over the inquiry period.

This inquiry involved dumped imports of concrete panels sold in British Columbia and Alberta by Custom Building Products of Canada Ltd. (CBP) (importer) and Custom Building Products (exporter). Concrete panels are a waterproof cement tile backing board used in residential and commercial construction. Bed-Roc Industries Limited (Bed-Roc) of Surrey, British Columbia, was the sole regional producer. The Tribunal found that the dumping of concrete panels had caused material injury to a domestic industry in British Columbia and Alberta, a regional market.

Despite its transportation cost advantage, Bed-Roc participated only marginally in a rapidly growing market. While it maintained sales volumes, Bed-Roc did so only by lowering its prices to meet those of CBP. The Tribunal's review of the pricing activities of CBP and its Canadian distributor, CanWel Distribution Ltd., largely confirmed Bed-Roc's allegations of price erosion and lost sales which had led to declining revenues and gross margins and a significant net loss in Bed-Roc's 1997 fiscal year.

The Tribunal considered factors other than dumping, such as Bed-Roc's marketing strategies and competition from undumped imports, which might have caused the injury to Bed-Roc. The Tribunal found the effects of these factors on Bed-Roc's performance to be minimal in comparison with the materially injurious effects of the dumping.

**Certain Hot-Rolled  
Carbon Steel Plate**

NQ-97-001

*Finding:  
Threat of Injury  
(October 27, 1997)*

This inquiry involved an importer and several exporters of dumped carbon steel plate from Mexico, the People's Republic of China, the Republic of South Africa and the Russian Federation. Algoma Steel Inc., of Sault Ste. Marie, Ontario, Stelco Inc. of Hamilton, Ontario, and IPSCO Inc. of Regina, Saskatchewan, account for most of the Canadian production of carbon steel plate, a product used in construction and many manufactured goods. The Tribunal found that the dumping had caused injury to the domestic industry, but was not persuaded that the injury was material. However, the Tribunal found that the dumping of carbon steel plate threatened to cause material injury to the domestic industry.

Considerable excess capacity in the named countries, which had limited access to other export markets, combined with increasing volumes of dumped imports in Canada, led the Tribunal to conclude that a continuation of and an

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**Inquiries in  
Progress at the  
End of 1997-98**

increase in dumped imports threatened to cause material injury. The Tribunal found that import prices fell faster than domestic prices in 1997 and that the price gap between the two had widened. In the absence of anti-dumping duties, there was a threat of injury through price erosion and suppression and lost market share.

The Tribunal also considered the current and potential impact on the market of prices of carbon steel plate cut from coil by steel centres and plate imported from the United States, as well as the new capacity that the domestic mills had announced. With respect to plate cut from coil and the US plate, the Tribunal felt that neither was likely to have a significant impact on the market. With respect to the new capacity, the Tribunal was of the opinion that uncertainties about installation dates and product mix made it impossible to predict the impact that it might have on the market for carbon steel plate.

There was one inquiry in progress at the end of fiscal year 1997-98: *Certain Prepared Baby Foods* (Inquiry No. NQ-97-002). It involved dumped imports from the United States. The sole domestic producer, H.J. Heinz Company of Canada Ltd. of Toronto, Ontario, Gerber Products Company and its related importer in Canada and the Director of Investigation and Research, *Competition Act*, were participants in the inquiry.

Table 1 summarizes the Tribunal's inquiry activities during the fiscal year.

**Public Interest  
Consideration  
Under Section 45  
of SIMA**

Where, after a finding of injury or threat of injury, on the basis of submissions, the Tribunal is of the opinion that the imposition of anti-dumping or countervailing duties may not be in the public interest, it reports this to the Minister of Finance with a statement of the facts and reasons that led to its conclusions. The Minister of Finance decides whether there should be any reduction in duties.

During the inquiry, interested parties may make a request to make representations on the matter of public interest. Representations are made after the inquiry. The Tribunal will conduct a public interest investigation if it considers that there are exceptional circumstances.

During fiscal year 1997-98, several distributors and an exporter made public interest representations after the Tribunal's finding of injury in *Polyiso Insulation Board* (Inquiry No. NQ-96-003). In its consideration of the representations (Public Interest Investigation No. PB-97-001), the Tribunal stated that the circumstances did not justify a public interest investigation. The Tribunal observed that competition among Canadian suppliers and undumped sales from the United States would limit increases in prices expected after a finding of injury.

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## Requests for Review

Several paediatric and health organizations, as well as the Director of Investigation and Research, *Competition Act*, have indicated that they will make public interest representations should the Tribunal issue a finding of injury or threat of injury in *Certain Prepared Baby Foods* (Inquiry No. NQ-97-002).

The Tribunal may review its findings of injury or orders at any time, on its own initiative or at the request of the Deputy Minister or any other person or government (subsection 76(2) of SIMA). However, the Tribunal will initiate a review only if it determines that one is warranted, usually on the basis of changed circumstances. In such a review, the Tribunal determines if the changed circumstances are such that the finding or order remains necessary. In fiscal year 1997-98, the Tribunal received three requests for review of three findings.

The British Columbia Fruit Growers' Association requested that the Tribunal "provide a variance" to its finding of February 9, 1995, in *Delicious and Red Delicious Apples* (Inquiry No. NQ-94-001). The Tribunal decided that a review of the finding was not warranted (Request for Review No. RD-97-001).

The Garlic Growers Association of Ontario requested a review of the Tribunal's finding in *Fresh Garlic* (Inquiry No. NQ-96-002) to extend the coverage of the finding to a full calendar year, from the period of July 1 to December 31 during which the finding now applies. The Tribunal decided that a review was not warranted (Request for Review No. RD-97-002).

Russel Metals Inc. and Wirth Limited requested a review of the Tribunal's finding in *Certain Hot-Rolled Carbon Steel Plate* (Inquiry No. NQ-97-001). The Tribunal decided that a review was not warranted (Request for Review No. RD-97-003).

## Expiries and Reviews

Subsection 76(5) of SIMA provides that a finding or an order expires after five years, unless a review has been initiated. It is Tribunal policy to notify parties nine months prior to the expiry date of a finding or an order. If a review is requested, the Tribunal will initiate one if it determines that it is warranted.

During fiscal year 1997-98, the Tribunal issued seven notices of expiry. The Tribunal decided that reviews were warranted in five cases, which included decisions that were pending at the beginning of the fiscal year, and initiated reviews. Decisions on whether to initiate reviews in two other cases, *Preformed Fibreglass Pipe Insulation* (Notice of Expiry No. LE-97-006) and *Tillage Tools* (Notice of Expiry No. LE-97-007), were pending at the end of the fiscal year.



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**Reviews  
Completed  
in 1997-98**

The purpose of a review is to determine if anti-dumping or countervailing duties remain necessary. In the case of reviews upon expiry, the Tribunal assesses whether dumping or subsidizing is likely to continue or resume and, if so, whether the dumping or subsidizing is likely to cause material injury to a domestic industry. The Tribunal conducts reviews according to procedures that are similar to those in an inquiry.

Upon completion of a review, the Tribunal issues an order with reasons, pursuant to subsection 76(4) of SIMA. The Tribunal may rescind or continue a finding or an order with or without amendment. If the Tribunal continues a finding or an order, it remains in force for a further five years unless a review has been initiated and the finding or order is rescinded. If the finding or order is rescinded, imports are no longer subject to anti-dumping or countervailing duties.

In fiscal year 1997-98, the Tribunal completed seven reviews.

The Tribunal continued, with amendments, its finding in *Machine Tufted Carpeting* (Review No. RR-96-004) respecting dumped imports from the United States. The Canadian Carpet Institute and Interface Flooring Systems (Canada), Inc., as well as exporters from the United States, participated in the review.

The Tribunal continued its finding in *Fresh Iceberg (Head) Lettuce* (Review No. RR-97-002) respecting dumped imports from the United States. The BC Vegetable Marketing Commission participated in the review.

The Tribunal continued, with an amendment, its finding in *Bicycles and Frames* (Review No. RR-97-003) respecting dumped imports from Taiwan and the People's Republic of China. The Canadian Bicycle Manufacturers Association and several Canadian manufacturers, as well as the Retail Council of Canada, several Canadian distributors and exporters in Taiwan and the People's Republic of China participated in the review.

The Tribunal continued, with an amendment, its order in *Waterproof Rubber Footwear* (Review No. RR-97-001) with respect to dumped imports from the People's Republic of China, but rescinded the order with respect to imports from the Czech Republic, the Slovak Republic, Poland, the Republic of Korea, Taiwan, Malaysia, the Republic of Bosnia and Herzegovina, the Republic of Croatia, the Former Yugoslav Republic of Macedonia, the Republic of Slovenia, the Federal Republic of Yugoslavia and Hong Kong, China. The Shoe Manufacturers' Association of Canada and an association representing exporters in the People's Republic of China participated in the review.

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**Reviews in  
Progress at the  
End of 1997-98**

The Tribunal rescinded its order in *Fresh, Whole, Yellow Onions* (Review No. RR-96-005) with respect to dumped imports from the United States. The BC Vegetable Marketing Commission and exporters from the United States participated in the review.

The Tribunal rescinded its finding in *Gypsum Board* (Review No. RR-97-004) with respect to dumped imports from the United States. Westroc Inc., Georgia-Pacific Corporation and CGC Inc., Canadian manufacturers seeking the continuation of the finding, and several exporters seeking a rescission of the finding participated in the review.

The Tribunal rescinded its order in *Pocket Photo Albums and Refill Sheets* (Review No. RR-97-005) respecting dumped imports from Japan, the Republic of Korea, the People's Republic of China, Taiwan, Singapore, Malaysia, the Federal Republic of Germany and Hong Kong, China. The Canadian manufacturers withdrew from the review after its initiation.

Three reviews were in progress at the end of the fiscal year. They were the findings in: (1) *Certain Hot-Rolled Carbon Steel Plate and High-Strength Low-Alloy Plate* (Review No. RR-97-006) respecting dumped imports from Belgium, the Federative Republic of Brazil, the Czech Republic, Denmark, the Federal Republic of Germany, Romania, the United Kingdom and the Former Yugoslav Republic of Macedonia; (2) *Certain Cold-Rolled Steel Sheet* (Review No. RR-97-007) with respect to dumped imports from the Federal Republic of Germany, France, Italy, the United Kingdom and the United States; and (3) *Certain Copper Pipe Fittings* (Review No. RR-97-008) with respect to dumped imports by certain exporters in the United States.

Table 2 summarizes the Tribunal's review activities during the fiscal year. Table 3 lists Tribunal findings and orders in force as of March 31, 1998.

**Judicial or Panel  
Review of SIMA  
Decisions**

Any person affected by Tribunal findings or orders can request judicial review by the Federal Court of Canada on grounds of alleged denial of natural justice and error of fact or law. In cases involving goods from the United States and Mexico, requests may be made for judicial review by the Federal Court of Canada or by a binational panel. Table 4 lists the Tribunal's decisions under section 43, 44 or 76 of SIMA that were before the Federal Court of Canada for judicial review or a binational panel in fiscal year 1997-98.

The Federal Court of Canada quashed an application to review the Tribunal's remand finding of no material injury, dated June 2, 1997, under section 44 of

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**WTO Dispute  
Resolution**

SIMA in the case of *Certain Dry Pasta* (Inquiry No. NQ-95-003R). The Federal Court of Canada dismissed an application to review the Tribunal's order in *Fresh, Whole, Yellow Onions* (Review No. RR-96-005). At the end of the fiscal year, proceedings had been suspended with respect to an application for judicial review by the Federal Court of Canada of the Tribunal's finding in *Polyiso Insulation Board* (Inquiry No. NQ-96-003). With regard to *Certain Hot-Rolled Carbon Steel Plate* (Inquiry No. NQ-97-001), the application before the Federal Court of Canada was discontinued.

Also at the end of the fiscal year, binational panels had not yet heard the applications to review the Tribunal's finding (United States) in *Concrete Panels* (Inquiry No. NQ-96-004) and the Tribunal's finding (Mexico) in *Certain Hot-Rolled Carbon Steel Plate* (Inquiry No. NQ-97-001).

Governments that are members of the WTO may appeal Tribunal injury findings or orders in dumping and countervailing cases to the WTO. The launching of an appeal must be preceded by inter-governmental consultations. There are no Tribunal findings or orders before the dispute settlement bodies of the WTO.

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## TABLE 1

### Findings Issued Under Section 43 of SIMA Between April 1, 1997, and March 31, 1998, and Inquiries Under Section 42 of SIMA in Progress at Year End

Inquiry No.	Product	Country	Date of Finding	Finding
NQ-96-003	Polyiso Insulation Board	United States	April 11, 1997	Injury
NQ-96-004	Concrete Panels	United States	June 27, 1997	Injury
NQ-97-001	Certain Hot-Rolled Carbon Steel Plate	Mexico, People's Republic of China, Republic of South Africa and Russian Federation	October 27, 1997	Threat of Injury
NQ-97-002	Certain Prepared Baby Foods	United States	In Progress	

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**TABLE 2****Orders Issued Under Section 76 of SIMA Between April 1, 1997, and March 31, 1998, and Reviews in Progress at Year End**

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Review No.	Product	Country	Date of Order	Order
RR-96-004	Machine Tufted Carpeting	United States	April 21, 1997	Finding Continued with Amendments
RR-96-005	Fresh, Whole, Yellow Onions	United States	May 21, 1997	Order Rescinded
RR-97-001	Waterproof Rubber Footwear	People's Republic of China	October 20, 1997	Order Continued with Amendment
		Czech Republic, Slovak Republic, Poland, Republic of Korea, Taiwan, Malaysia, Republic of Bosnia and Herzegovina, Republic of Croatia, Former Yugoslav Republic of Macedonia, Republic of Slovenia, Federal Republic of Yugoslavia and Hong Kong, China		Order Rescinded
RR-97-002	Fresh Iceberg (Head) Lettuce	United States	November 28, 1997	Finding Continued
RR-97-003	Bicycles and Frames	Taiwan and People's Republic of China	December 10, 1997	Finding Continued with Amendment
RR-97-004	Gypsum Board	United States	January 19, 1998	Finding Rescinded
RR-97-005	Pocket Photo Albums and Refill Sheets	Japan, Republic of Korea, People's Republic of China, Taiwan, Singapore, Malaysia, Federal Republic of Germany and Hong Kong, China	February 24, 1998	Order Rescinded
RR-97-006	Certain Hot-Rolled Carbon Steel Plate and High-Strength Low-Alloy Plate	Belgium, Federative Republic of Brazil, Czech Republic, Denmark, Federal Republic of Germany, Romania, United Kingdom and Former Yugoslav Republic of Macedonia	In Progress	
RR-97-007	Certain Cold-Rolled Steel Sheet	Federal Republic of Germany, France, Italy, United Kingdom and United States	In Progress	
RR-97-008	Certain Copper Pipe Fittings	United States	In Progress	

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## TABLE 3

### Findings and Orders in Force as of March 31, 1998<sup>1</sup>

Review No. or Inquiry No.	Date of Decision	Product	Country	Earlier Decision No. and Date
NQ-92-007	May 6, 1993	Hot-Rolled Carbon Steel Plate and High-Strength Low-Alloy Plate	Belgium, Federative Republic of Brazil, Czech Republic, Denmark, Federal Republic of Germany, Romania, United Kingdom and Former Yugoslav Republic of Macedonia	
NQ-92-009	July 29, 1993	Cold-Rolled Steel Sheet	Federal Republic of Germany, France, Italy, United Kingdom and United States	
NQ-93-001	October 18, 1993	Copper Pipe Fittings	United States	
NQ-93-002	November 19, 1993	Preformed Fibreglass Pipe Insulation with a Vapour Barrier	United States	
RR-93-001	November 23, 1993	Tillage Tools	Federative Republic of Brazil	ADT-11-83 (December 28, 1983) R-9-88 (November 24, 1988)
RR-93-003	January 18, 1994	Paint Brushes and "Heads"	People's Republic of China	ADT-6-84 (June 20, 1984) R-7-84 (September 28, 1984) R-13-88 (January 19, 1989)
NQ-93-003	April 22, 1994	Synthetic Baler Twine	United States	
NQ-93-004	May 17, 1994	Hot-Rolled Carbon Steel Plate and High-Strength Low-Alloy Plate	Italy, Republic of Korea, Spain and Ukraine	
NQ-93-005	June 22, 1994	12-Gauge Shotshells	Czech Republic and Republic of Hungary	
NQ-93-006	July 20, 1994	Black Granite Memorials and Black Granite Slabs	India	

1. This table shows the findings and orders in force. To determine the precise product coverage, refer to the Review No. or Inquiry No. as identified in the first column of the table.

## Findings and Orders in Force (cont'd)

Review No. or Inquiry No.	Date of Decision	Product	Country	Earlier Decision No. and Date
NQ-93-007	July 29, 1994	Corrosion-Resistant Steel Sheet Products	Australia, Federative Republic of Brazil, France, Federal Republic of Germany, Japan, Republic of Korea, New Zealand, Spain, Sweden, United Kingdom and United States	
NQ-94-001	February 9, 1995	Delicious and Red Delicious Apples	United States	
RR-94-002	March 21, 1995	Canned Ham and Canned Pork-Based Luncheon Meat	Denmark, Netherlands and European Union	GIC-1-84 (August 7, 1984) RR-89-003 (March 16, 1990)
RR-94-003	May 2, 1995	Women's Footwear	People's Republic of China	NQ-89-003 (May 3, 1990)
RR-94-004	June 5, 1995	Carbon Steel Welded Pipe	Republic of Korea	ADT-6-83 (June 28, 1983) RR-89-008 (June 5, 1990)
RR-94-005	July 5, 1995	Refill Paper	Federative Republic of Brazil	NQ-89-004 (July 6, 1990)
RR-94-006	August 25, 1995	Photo Albums with Self-Adhesive Leaves and Self-Adhesive Leaves	Republic of Korea, People's Republic of China, Singapore, Malaysia, Taiwan, Indonesia, Thailand, the Philippines and Hong Kong, China	ADT-4-74 (January 24, 1975) R-3-84 (August 24, 1984) CIT-18-84 (April 26, 1985) CIT-10-85 (February 14, 1986) CIT-5-87 (November 3, 1987) RR-89-012 (September 4, 1990) NQ-90-003 (January 2, 1991)
RR-94-007	September 14, 1995	Whole Potatoes	United States	ADT-4-84 (June 4, 1984) CIT-16-85 (April 18, 1986) RR-89-010 (September 14, 1990)
NQ-95-001	October 20, 1995	Caps, Lids and Jars	United States	

## Findings and Orders in Force (cont'd)

Review No. or Inquiry No.	Date of Decision	Product	Country	Earlier Decision No. and Date
NQ-95-002	November 6, 1995	Refined Sugar	United States, Denmark, Federal Republic of Germany, Netherlands, United Kingdom and European Union	
RR-95-001	July 5, 1996	Oil and Gas Well Casing	Republic of Korea and United States	CIT-15-85 (April 17, 1986) R-7-86 (November 6, 1986) RR-90-005 (June 10, 1991)
RR-95-002	July 25, 1996	Carbon Steel Welded Pipe	Argentina, India, Romania, Taiwan, Thailand, Venezuela and Federative Republic of Brazil	NQ-90-005 (July 26, 1991) NQ-91-003 (January 23, 1992)
RR-96-001	September 12, 1996	Stainless Steel Welded Pipe	Taiwan	NQ-91-001 (September 5, 1991)
NQ-96-002	March 21, 1997	Fresh Garlic	People's Republic of China	
NQ-96-003	April 11, 1997	Polyiso Insulation Board	United States	
RR-96-004	April 21, 1997	Machine Tufted Carpeting	United States	NQ-91-006 (April 21, 1992)
NQ-96-004	June 27, 1997	Concrete Panels	United States	
RR-97-001	October 20, 1997	Waterproof Rubber Footwear	People's Republic of China	ADT-2-82 (April 23, 1982) R-7-87 (October 22, 1987) RR-92-001 (October 21, 1992)
NQ-97-001	October 27, 1997	Certain Hot-Rolled Carbon Steel Plate	Mexico, People's Republic of China, Republic of South Africa and Russian Federation	
RR-97-002	November 28, 1997	Fresh Iceberg (Head) Lettuce	United States	NQ-92-001 (November 30, 1992)
RR-97-003	December 10, 1997	Bicycles and Frames	Taiwan and People's Republic of China	NQ-92-002 (December 11, 1992)



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## TABLE 4

### Cases Before the Federal Court of Canada or a Binational Panel Between April 1, 1997, and March 31, 1998<sup>1</sup>

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Case No.	Product	Country of Origin	Forum	File No./ Status
NQ-95-003R	Certain Dry Pasta	Italy	FC	A—252—97 Application quashed
NQ-95-003R	Certain Dry Pasta	Italy	FC	A—491—97 Application dismissed
NQ-96-003	Polyiso Insulation Board	United States	FC	A—394—97 Proceedings suspended
NQ-96-004	Concrete Panels	United States	BP	CDA-97-1904-01
NQ-97-001	Certain Hot-Rolled Carbon Steel Plate	Mexico	BP	CDA-97-1904-02
		People's Republic of China and Republic of South Africa	FC	A—856—97 Application discontinued
RR-96-005	Fresh, Whole, Yellow Onions	United States	FC	A—435—97 Application dismissed

**Note:** FC — Federal Court of Canada  
BP — Binational Panel



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# CHAPTER IV

## APPEALS

### Introduction

The Tribunal, among its other duties, hears appeals from decisions of the Minister of National Revenue (the Minister) under the *Excise Tax Act* or of the Deputy Minister under the *Customs Act* and SIMA. When the federal sales tax was replaced by the Goods and Services Tax on January 1, 1990, there were a number of appeals awaiting determination by the Deputy Minister and decisions awaiting appeal to the Tribunal. As a result, in the last few years, the majority of appeals heard and decided by the Tribunal involved federal sales tax assessments and determinations. However, as the bulk of these appeals have now made their way through the appeal process at Revenue Canada and the Tribunal, the latter is hearing and deciding more appeals involving the tariff classification and the value for duty of imported goods under the *Customs Act*. The Tribunal also hears and decides appeals concerning the application, to imported goods, of a Tribunal finding or order concerning dumping or subsidizing and the normal value or export price or subsidy of imported goods under SIMA.

Although the Tribunal strives to be informal and accessible, there are certain procedures and time constraints that are imposed by law and by the Tribunal itself in order to provide quality service to the public in an efficient manner. For example, the appeal process is set in motion with a notice (or letter) of appeal, in writing, sent to the Secretary of the Tribunal within the time limit specified in the act under which the appeal is made.

### Rules of Procedure

Under the Tribunal's Rules of Procedure, the person launching the appeal (the appellant) normally has 60 days to submit to the Tribunal a document called a "brief." Generally, the brief states under which act the appeal is launched, gives an indication of the points at issue between the appellant and the Minister or Deputy Minister (in legal terminology, the Minister or the Deputy Minister is called the respondent) and states why the appellant believes that the respondent's decision is incorrect. A copy of the brief must also be given to the respondent.

The respondent must also comply with time and procedural constraints. Normally, within 60 days after having received the appellant's brief, the respondent must provide the Tribunal and the appellant with a brief setting forth Revenue Canada's position. Once these formalities are out of the way, the Secretary of the Tribunal contacts both parties in order to schedule a hearing. Hearings are generally conducted in public, before Tribunal members.

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## Hearings

An individual may present a case before the Tribunal in person, or be represented by legal counsel or by any other representative. The respondent is generally represented by counsel from the Department of Justice.

Hearing procedures are designed to ensure that the appellant and the respondent are given a full opportunity to make their cases. They also enable the Tribunal to have the best information possible to make a decision. As in a court, the appellant and the respondent can call witnesses, and these witnesses are questioned under oath by the opposing parties, as well as by the members, in order to test the validity of their evidence. When all the evidence is gathered, parties may present arguments in support of their respective positions.

The option of a file hearing is also offered to the appellant. Where a hearing is not required, the Tribunal may dispose of the matter on the basis of the written documentation before it. Rule 25 of the Tribunal's Rules of Procedure allows the Tribunal to proceed in this manner. Before deciding to proceed in this manner, the Tribunal requires that the appellant and respondent consent to disposing of the appeal by way of a file hearing and file with the Tribunal an agreed statement of facts in addition to their submissions. The Tribunal then publishes a notice of the file hearing in the *Canada Gazette* so that other interested persons can make their own views known.

The Tribunal also hears appeals by way of electronic transmission, either by teleconference or videoconference.

Teleconference hearings are used mainly to dispose of preliminary motions and jurisdictional issues where witnesses are not required to attend or give evidence.

Videoconference hearings are used as an alternative to holding hearings in remote locations across Canada or requiring parties from outside Ontario or Quebec to present themselves at the Tribunal's premises in Ottawa. This option of a videoconference hearing is generally used where there are no issues of credibility. The procedures are very similar to hearings held before the Tribunal at its premises. However, the Tribunal requires that written materials, exhibits, aids to arguments, etc., be filed with the Tribunal prior to the videoconference hearing.

Usually, within 120 days of the hearing, the Tribunal issues a decision on the matters in dispute, including the reasons for its decision.

If the appellant, the respondent or an intervener disagrees with the Tribunal's decision, the decision can be appealed to the Federal Court of Canada.

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**Appeals  
Considered in the  
Last Fiscal Year**

During fiscal year 1997-98, the Tribunal heard 188 appeals of which 141 related to the *Customs Act*, 30 to the *Excise Tax Act* and 17 to SIMA. Decisions were issued in 177 cases, of which 128 were heard during fiscal year 1997-98.

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**Decisions on Appeals**

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<b>Act</b>	<b>Allowed</b>	<b>Allowed in Part</b>	<b>Dismissed</b>	<b>Total</b>
<i>Customs Act</i>	78	19	32	129
<i>Excise Tax Act</i>	8	2	21	31
SIMA	1	-	16	17

Table 1 of this chapter lists decisions on appeals rendered in fiscal year 1997-98.

**Summary of  
Selected  
Decisions**

The following are summaries of a representative sample of significant decisions in appeals under section 67 of the *Customs Act* concerning the determination of the value for duty of imported goods under subsection 48(5) of that act. These summaries have been prepared for general information purposes only and have no legal status.

**Selling  
Commissions**

***DMG Trading Co. Ltd.  
v. The Deputy  
Minister of National  
Revenue***

*AP-96-076*

*Decision:  
Appeal dismissed  
(August 28, 1997)*

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In this appeal, the Tribunal considered whether certain selling commissions were properly added to the price paid or payable for the goods in issue pursuant to subparagraph 48(5)(a)(i). Subparagraph 48(5)(a)(i) provides, in part, that the price paid or payable in the sale of goods for export to Canada is to be adjusted by adding to it commissions and brokerage fees in respect of the goods incurred by the purchaser thereof, other than fees paid or payable by the purchaser to his agent for the service of representing the purchaser abroad in respect of the sale. The Tribunal also considered whether a certain finance or interest charge, which was included in the invoice price in consideration of a possible delay in payment of up to four months, was properly added to the price paid or payable for the goods in issue in calculating the value for duty.

The respondent determined that, while the appellant was the importer of the goods in issue, it was not “a valid purchaser in sales for export to Canada.”

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Rather, according to the respondent, the appellant was a selling agent acting for the vendor, Company X, a manufacturing firm in Finland, and the valid purchaser in the transactions at issue was another company, Company Y. Accordingly, the price paid or payable was the price paid by Company Y to the appellant.

To determine whether the appellant was a selling agent or the actual purchaser of the goods in issue, the Tribunal considered the true nature of the transaction between the parties. The Tribunal referred to its decision in *JewelWay International Canada, Inc. and JewelWay International, Inc. v. The Deputy Minister of National Revenue*, which reviewed the jurisprudence dealing with the issue of agency, and noted that various factors had been considered relevant for the purposes of determining whether there was an agency relationship, such as the extent to which one party controls another and the risk assumed by the alleged agent. The Tribunal noted that no one factor had been considered by the courts to be determinative of the issue of agency and that the courts had, in making their determinations, considered the facts as a whole and weighed the relative importance of the factors.

Similarly, the Tribunal examined the “trail” between Company X and the appellant, the appellant and Company Y, and Company Y and Company X in order to determine the exact nature of the relationships. The Tribunal acknowledged that there were some factors which could suggest that it was intended that the relationship between Company X and the appellant be that of seller and buyer. However, the Tribunal was of the view that, on balance, the facts showed that the appellant acted as the selling agent for Company X during the relevant period. In reaching its conclusion, the Tribunal relied, in particular, on the following factors: (1) the terms for the sale of the goods in issue were determined by Company X; (2) in most cases, the appellant secured customers and orders before importing the goods from Company X; (3) the goods were shipped directly to Company Y; (4) the appellant had no choice of suppliers; (5) under certain circumstances, in order to service warranties, goods had to be returned to the appellant, which would, in turn, return them to Company X; (6) in most circumstances, the appellant did not remit payment to Company X until it had received payment from Company Y; and, finally (7) the appellant did not, and could not, mark up the price charged to Company Y for the goods in issue after having been set by Company X.

In addition, the Tribunal relied on the definition of “selling agent” in Revenue Canada’s Memorandum D13-4-12 which provides, in part, that “[s]elling agents are persons who act for the account of a vendor; they seek customers and collect orders and, in some cases, may arrange for storage and delivery of the goods.” The Tribunal found that the appellant acted for the account of Company X, by

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seeking customers and by securing orders. The Tribunal also noted that the evidence showed that Company X delivered the goods to Company Y in pursuance of orders placed through the appellant and that the price quoted on the invoice sent to the appellant included an amount for the appellant's services. Since the trade discount or selling commission had already been included in the price paid or payable for the goods, it should not have been deducted by the appellant when calculating the value for duty.

Accordingly, the Tribunal concluded that the selling commissions at issue properly formed part of the price paid or payable for the goods by the purchaser, Company Y, to or for the benefit of the vendor, Company X, in calculating the value for duty.

With respect to the finance charge, the Tribunal referred to Revenue Canada's Memorandum D13-3-13, which provides, in part, that charges for interest under a financing arrangement are not to be included in the value for duty of imported goods provided that: "(a) the charges are distinguished from the price actually paid or payable for the goods; (b) the financing arrangement was made in writing; and (c) when required by Customs the purchaser can demonstrate that: (1) the price paid or payable for identical or similar goods sold without a financing arrangement closely approximates the price paid or payable for the goods being appraised or imported, and/or (2) the claimed rate of interest does not exceed the prevailing rate of interest for such transactions." The Tribunal found that the conditions in Memorandum D-13-3-13, which, in the Tribunal's view, were reasonable, had not been met and concluded, therefore, that the finance charge at issue was properly included in the price paid or payable for the goods.

## Design Work

***Capital Garment Co.  
Inc. v. The Deputy  
Minister of National  
Revenue***

*AP-96-002*

*Decision:  
Appeal allowed  
(June 3, 1997)*

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In this appeal, the Tribunal considered whether Revenue Canada, pursuant to clause 48(5)(a)(iii)(D), correctly included in the value for duty of imported apparel the value of certain imported graded paper patterns produced in Canada. Clause 48(5)(a)(iii)(D) provides, in part, that the price paid or payable in the sale of goods for export to Canada is to be adjusted by adding to it the value of design work undertaken elsewhere than in Canada and necessary for the production of the imported goods, that is supplied, directly or indirectly, by the purchaser of the goods, free of charge or at a reduced cost.

The Tribunal found that the graded paper patterns fell within the scope of subparagraph 48(5)(a)(iii), as they were supplied directly by the appellant free of charge to the manufacturer and, more importantly, they were "for use in connection with the production and sale for export of the imported goods."

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However, since the work associated with the graded paper patterns was undertaken in Canada, they were not dutiable under paragraph 48(5)(a).

The Tribunal decided that grading was one step in the design process, albeit one that takes place towards the end of that process. The Tribunal accepted that the term “design” refers to “an outline, sketch, or plan, as of the form and structure of a work of art, an edifice, or a machine to be executed or constructed” and that a “plan” is “a formulated and esp. detailed method by which a thing is to be done; a design or scheme.” The Tribunal concluded that these definitions would encompass the grading element in the manufacture of garments. The Tribunal further concluded that the fact that grading may be done off-site and may be computerized did not take it outside the scope of that which is considered to be design work.

The Tribunal disagreed with counsel for the appellant that the graded paper patterns were not covered by subparagraph 48(5)(a)(iii) since they were not “for use in ... production.” The Tribunal indicated that subparagraph 48(5)(a)(iii) only requires that assists be used in connection with production and not necessarily in production.

The Tribunal was not persuaded that the graded paper patterns in issue were like “tools, dies, moulds and other goods” enumerated in clause 48(5)(a)(iii)(B) since they were not utilized directly in the production of the imported garments.

## Royalties

### ***Nike Canada Ltd. v. The Deputy Minister of National Revenue\****

*AP-95-197 to  
AP-95-202 and  
AP-95-206 to  
AP-95-212*

*Decision:  
Appeals allowed in part  
(October 10, 1997)*

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These were appeals dealing with the issue of whether certain payments were correctly included in the value for duty of certain imported NIKE products as royalties and licence fees pursuant to subparagraph 48(5)(a)(iv).

Subparagraph 48(5)(a)(iv) provides, in part, that the price paid or payable in the sale of goods for export to Canada is to be adjusted by adding to it the value of royalties or licence fees paid, directly or indirectly, in respect of goods as a condition of the sale of those goods for export to Canada.

The appellant in these appeals, a wholly owned subsidiary of NIKE, Inc. of the United States, imports and sells athletic footwear, apparel and accessories under the trademark “NIKE.” It is licensed to distribute, sell and promote such products in Canada. NIKE International Ltd. is also a wholly owned subsidiary of NIKE, Inc. It processes all purchase orders for non-US distributors of NIKE products. NIKE (Ireland) Ltd. is a wholly owned subsidiary of NIKE International Ltd. It is the owner, among other things, of the rights to the NIKE name and trademark for Canada.



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The appellant entered into a licence agreement with NIKE (Ireland) Ltd. to use the NIKE trademarks that it holds in connection with the manufacture, importation, promotion, distribution and sale of athletic footwear, clothing and accessories throughout Canada. In consideration of the right to use the trademarks, the appellant agreed to pay to NIKE (Ireland) Ltd., among others things, a royalty or licence fee equal to a fixed percentage of its net invoiced sales revenues. The other payment in question relates to agreements which provide for various methods of payment to various professional athletes, including “athlete royalty payments” for various services, such as endorsing NIKE products, which are also based on a fixed percentage of net invoiced sales revenues.

The Tribunal found that the payments to various athletes were not royalty or licence fees described in subparagraph 48(5)(a)(iv) and, therefore, that they should not have been added to the price paid or payable for the imported goods bearing the NIKE trademark in determining the value for duty. The Tribunal also found that those payments were not in respect of the goods, but rather were in respect of services provided by the athletes that were not sufficiently related to the importation of the goods to come within the meaning of subparagraph 48(5)(a)(iv).

Turning to the royalty payments, the Tribunal noted the appellant’s concession in its submissions in response to the Federal Court of Canada’s decision in *Reebok Canada, a division of Avreca International Inc. v. The Deputy Minister of National Revenue for Customs & Excise* that the royalty payments were “in respect of” the goods in issue. The Tribunal agreed with the parties that, in the circumstances of these appeals, these payments were royalty payments and were “in respect of” the goods in issue.

With respect to the issue of whether the payments were a condition of the sale for export to Canada, the Tribunal noted that the Federal Court of Canada in *Reebok* suggested that it is significant that the royalties in that appeal related to the exclusive use and sale of goods bearing trademarks of value and were payments relating to the valuable intellectual property rights associated with the purchase and sale of the goods in issue. The Tribunal also noted that the Federal Court of Canada stated that, in its view, the Tribunal’s decision in *Reebok* was consistent with evolving jurisprudence in regard to this issue. The Federal Court of Canada then made reference to the Tribunal’s decision in *Polygram Inc. v. The Deputy Minister of National Revenue for Customs and Excise* and the Federal Court of Appeal’s decision in *Signature Plaza Sport Inc. v. Her Majesty the Queen*. The Tribunal considered these decisions and decisions that it had made subsequent to *Polygram* and *Reebok*, such as *Jana & Company v. The Deputy Minister of National Revenue* and *Mattel Canada Inc. v. The Deputy Minister of National Revenue*.\*\*

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The Tribunal concluded that, in these appeals, and, in particular, as the Federal Court of Appeal emphasized in *Signature Plaza*, the issue of who is the vendor of the goods is critical to evaluating whether a royalty can be said to be a condition of sale for export. The Tribunal noted that, in these appeals, the parties agreed that the vendor was the Asian manufacturing companies and not NIKE, Inc. On this basis, the Tribunal distinguished these appeals from *Reebok* and *Signature Plaza*. Furthermore, the Tribunal was not persuaded, based on the evidence before it, that the manufacturers in these appeals would not sell to the appellant without the royalty having been paid to NIKE (Ireland) Ltd. The Tribunal found that there was no evidence of any requirement that the appellant establish this to the manufacturers' satisfaction before the sale for export is complete. However, the Tribunal acknowledged that it was unlikely that the sale would have occurred without a licence agreement being in place.

The Tribunal was of the view that other evidence relating to the issue of NIKE, Inc.'s "control" over the manufacturing process in these appeals indicated less "control" than that found in *Reebok* or *Signature Plaza*. The appellant had paid separately for development and design assistance. Furthermore, the appellant had used its independent ability to obtain product on its own to a significant degree. This is reflected in the fact that, during the audit period, the appellant sourced 20 percent of its goods directly from domestic sources.

However, the Tribunal noted that the Federal Court of Canada did not specifically focus on such distinctions. Rather, the Federal Court of Canada indicated that, as the royalties related to the exclusive use and sale of goods bearing trademarks of value and were payments relating to the valuable intellectual property rights associated with the purchase and sale of the goods in issue, they should be considered a condition of the sale for export to Canada and, thus, included in the value for duty. The Tribunal concluded that these two circumstances applied in the appeals. Therefore, in light of the decision of the Federal Court of Canada in *Reebok*, the Tribunal found that the royalty must be considered a condition of the sale for export and, therefore, included in the value for duty of the goods in issue.

Accordingly, the Tribunal allowed the appeals with respect to the payments to athletes and dismissed the appeals with respect to the royalty payments.

\* The Tribunal's decision has been appealed to the Federal Court of Appeal (File No. A-905-97).

\*\* The Tribunal's decision has been appealed and cross-appealed to the Federal Court of Appeal (File Nos. A-291-97 and A-292-97).

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**Method of  
Valuation**

Sections 47 through 52 set out the various methods that may be used to determine the value for duty of imported goods. Subsection 47(1) provides that the “value for duty of goods shall be appraised on the basis of the transaction value of the goods in accordance with the conditions set out in section 48.” The transaction value is basically the price agreed upon between the parties to the transaction. Section 48 sets out various conditions relating to, among other things, the imposition of restrictions by the seller and the relationship between the buyer and seller.

Subsection 47(2) provides, in part, that where the value for duty of goods is not appraised on the basis of the transaction value, it shall be appraised on the basis of the following values, considered in the order set out below, that can be determined in respect of the goods and that can, under sections 49 to 52, be the basis on which the value for duty of the goods is appraised: (a) the transaction value of identical goods that meets the requirements set out in section 49; (b) the transaction value of similar goods that meets the requirements set out in section 50; (c) the deductive value of the goods; and (d) the computed value of the goods. Generally, the deductive value is calculated as the resale price of the goods or comparable imported goods in Canada less certain costs, such as commissions, profit, transportation costs and duties and taxes. Generally, the computed value is a cost-plus value calculated by adding costs and expenses for materials and production, an amount for profit and general expenses.

***Nu Skin Canada, Inc.  
v. The Deputy  
Minister of National  
Revenue***

*AP-96-129 to  
AP-96-194*

*Decision:  
Appeals allowed  
(August 26, 1997)*

These were 66 appeals in which the Tribunal considered the appropriate method of appraisal for determining the value for duty of certain imported skin care and health care products during the period from October 1989 to March 1991. The respondent submitted that the value for duty should be determined using the computed value method, while the appellant submitted that it should be determined using the transaction value method.

The appellant imported goods under two scenarios:

(1) Approximately 90 percent of all importations during the period at issue were purchased from Company X. Purchase orders were placed on Company X by the appellant or by Nu Skin International, Inc. of Utah on behalf of the appellant. Goods were shipped directly by Company X from its US production facilities to Canada. Company X invoiced the appellant, which issued a cheque to Company X. The value for duty declared by the appellant at the time of importation was Company X’s sale price to the appellant.

(2) Nu Skin International, Inc. placed separate purchase orders with various third-party producers. The goods were shipped to Nu Skin International, Inc., consolidated and then forwarded to the appellant. Nu Skin International, Inc.

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billed the appellant for the goods. The value for duty declared by the appellant at the time of importation was the third-party producer's sale price to Nu Skin International, Inc.

Nu Skin International, Inc. had used a transfer pricing formula based on the "resale price method" for goods shipped to the appellant. In the appeals, counsel for the appellant submitted that the value for duty should be determined based on the price paid or payable to Company X and the third-party producers using the transaction value method.

The Tribunal noted that, pursuant to subsection 47(1), "[t]he value for duty of goods shall be appraised on the basis of the transaction value of the goods in accordance with the conditions set out in section 48." For the value for duty of goods to be determined using the transaction value method when related parties are involved, it may be demonstrated that "their relationship did not influence the price paid or payable for the goods." Counsel for the respondent argued that, during the period at issue, the appellant did not constitute a valid purchaser in a sale for export to Canada, as it did not manifest a sufficient degree of independence from Nu Skin International, Inc. As such, the value for duty of the goods in issue could not be determined based on the transfer price of those goods between Nu Skin International, Inc. and the appellant. This was not challenged by counsel for the appellant.

Rather, counsel for the appellant accepted, for purposes of these appeals, that Nu Skin International, Inc. and the appellant constituted as single business entity during the period at issue. As such, and consistent with the reasoning in *Harbour Sales (Windsor) Limited v. The Deputy Minister of National Revenue*, the sales by Company X and the third-party manufacturers to Nu Skin International, Inc. constituted sales for export for purposes of section 48. In contrast, counsel for the respondent submitted that these transactions were not sales, but rather contracts for services or, if they were sales, that they did not qualify as sales for export under section 48.

For purposes of these appeals, and in the absence of any evidence to the contrary, the Tribunal accepted that Nu Skin International, Inc. and the appellant constituted a single business entity during the period at issue.

The Tribunal referred to its decision in *Harbour Sales* in which it interpreted the phrase "sold for export to Canada" in section 48. In that case, the Tribunal had regard to two conditions in finding that goods were sold for export to Canada. First, a sale of goods was required and, second, those goods had to have been sold for export to Canada. The Tribunal was of the view that, if it found that the transactions involving Company X and the third-party manufacturers with

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Nu Skin International, Inc. met these conditions, it need not go on to consider any subsequent transaction or other method of valuation in determining the value for duty of the imported goods.

As to the transactions involving Company X and the third-party manufacturers and Nu Skin International, Inc., the Tribunal found that they were sales of goods and not the mere provision of services to Nu Skin International, Inc. The Tribunal was of the view that Nu Skin International, Inc. did not exercise sufficiently close supervision over the production of the goods to conclude that Company X and the third-party manufacturers were merely providing services to Nu Skin International, Inc.

The Tribunal was also of the view that the goods sold to Nu Skin International, Inc. were for export to Canada. With regard to sales by Company X, goods destined for the Canadian market were distinguished from other Nu Skin products, in that they had metric sizing and bilingual labels that indicated the appellant's name and address. Goods for the Canadian market were acquired by a distinct purchase order and were shipped directly to the appellant's warehouse in Ontario from their place of manufacture.

With regard to sales by the third-party manufacturers, the goods were also acquired by a distinct purchase order and they had metric sizing and bilingual labels that indicated the appellant's name and address. However, the goods were not shipped directly to Canada, but rather to a warehouse, or portion thereof, set aside by Nu Skin International, Inc. for receiving goods destined for the Canadian market. The Tribunal was of the view that, under the circumstances, the stopover at Nu Skin International, Inc.'s warehouse was not fatal to a finding that the goods were sold for export to Canada within the meaning of section 48.

The Tribunal found that, during the period at issue, the value for duty of the goods in issue should have been based on the price paid to Company X and the third-party manufacturers using the transaction value method in section 48.

## TABLE 1

### Appeal Decisions Rendered Under Section 67 (Formerly Section 47) of the *Customs Act*, Section 81.27 (Formerly Section 51.27) of the *Excise Tax Act* and Section 61 of *SIMA* Between April 1, 1997, and March 31, 1998

Appeal No.	Appellant	Date of Decision	Decision
<b>Customs Act</b>			
AP-96-080	Nicholson Equipment Ltd.	April 25, 1997	Allowed
AP-95-261 and AP-95-263	Charley Originals Ltd., Division of Algo Group Inc. and Mr. Jump Inc., Division of Algo Group Inc.	April 29, 1997	Allowed in Part
AP-96-078	Fastco Canada	April 29, 1997	Dismissed
AP-95-065	Steen Hansen Motorcycles Ltd.	May 12, 1997	Dismissed
AP-96-059	Canadian Meter, A Division of Singer Company of Canada Limited	May 30, 1997	Dismissed
AP-96-031	Eurotrade Import-Export Inc.	June 2, 1997	Dismissed
AP-96-002	Capital Garment Co. Inc.	June 3, 1997	Allowed
AP-96-044	Hung Gay Enterprises Ltd.	June 5, 1997	Dismissed
AP-96-041	Interprovincial Corrosion Control Company Limited	June 9, 1997	Allowed
AP-95-271	Clyde R. Byers	June 16, 1997	Dismissed
AP-95-190	R.T. Vanderbilt Company, Inc.	June 25, 1997	Allowed
AP-95-214, AP-95-215 and AP-95-237	Cross Canada Auto Body Supply (Windsor) Ltd. and AT PAC West Auto Parts Ltd.	July 3, 1997	Dismissed
AP-96-016	Trudell Medical Marketing Limited	July 24, 1997	Dismissed
AP-96-042	Future Shop Ltd.	August 12, 1997	Dismissed
AP-96-105	Armstrong Bros. Tool Co.	August 15, 1997	Allowed in part
AP-96-043	Weil Company Limited	August 19, 1997	Allowed
AP-96-129 to AP-96-194	Nu Skin Canada, Inc.	August 26, 1997	Allowed
AP-96-076	DMG Trading Co. Ltd.	August 28, 1997	Dismissed
AP-96-007	Tropsport Acquisitions Inc.	August 29, 1997	Dismissed
AP-95-276 and AP-95-307	Boss Lubricants	September 3, 1997	Dismissed
AP-95-296	Moda Imports, Inc.	September 3, 1997	Allowed
AP-96-063, AP-96-085 and AP-96-089	Simmons Canada Inc. and Les Entreprises Sommex Ltée	September 15, 1997	Dismissed
AP-96-114	Tootsie Roll of Canada Ltd.	September 16, 1997	Allowed
AP-96-225	Record Tools Inc.	September 16, 1997	Allowed
AP-96-121	Newman's Valve Limited	October 10, 1997	Dismissed
AP-95-197 to AP-95-202 and AP-95-206 to AP-95-212	Nike Canada Ltd.	October 10, 1997	Allowed in part

## Appeal Decisions Rendered (cont'd)

Appeal No.	Appellant	Date of Decision	Decision
AP-96-092	Nortesco Inc.	October 16, 1997	Allowed
AP-96-213	London S.W. Ontario Martial Arts Supply Inc.	October 20, 1997	Dismissed
AP-95-127 and AP-95-191	Erv Parent Co. Ltd.	November 12, 1997	Dismissed
AP-96-196 to AP-96-198	Viessmann Manufacturing Company Inc.	November 14, 1997	Dismissed
AP-96-127	KanEng Industries Inc.	December 2, 1997	Allowed
AP-96-082	Rollins Machinery Ltd.	December 2, 1997	Allowed in part
AP-96-117	Yves Ponroy Canada	December 5, 1997	Allowed
AP-95-224	Philips Electronics Ltd.	December 18, 1997	Dismissed
AP-96-122	Papanan Enterprises Ltd.	December 18, 1997	Dismissed
AP-94-212 and AP-94-213	Chaps Ralph Lauren, A Division of 131384 Canada Inc. and Modes Alto-Regal, Inc.	December 22, 1997	Allowed in part
AP-96-205	Formica Canada Inc.	January 20, 1998	Allowed
AP-96-208 and AP-97-009	Philips Electronics Ltd.	February 5, 1998	Dismissed
AP-96-241 and AP-96-242	C.A.S. Sports International Inc. and Atomic Ski Canada Inc.	February 13, 1998	Dismissed
AP-97-036	Spalding Canada Inc.	February 19, 1998	Dismissed
<b>Excise Tax Act</b>			
AP-93-093	Kobetek Systems Limited	May 12, 1997	Dismissed
AP-95-279	Hardy Bay Machine Works	June 24, 1997	Dismissed
AP-96-029	Newport Motor Manufacturing Company Limited	June 25, 1997	Dismissed
AP-94-348	School District No. 10 (Arrow Lakes)	July 3, 1997	Allowed
AP-92-085	J.B. Furniture Manufacturing Ltd.	August 11, 1997	Dismissed
AP-96-119	Ferland Soudure Enr.	August 11, 1997	Dismissed
AP-92-031	Les Produits Securo Inc.	August 15, 1997	Allowed in part
AP-96-056	Informco Inc.	August 15, 1997	Dismissed
AP-91-170	Jim Derewianka	August 20, 1997	Dismissed
AP-95-132	W.K. Investments Ltd.	August 29, 1997	Dismissed
AP-96-012	Jorwalt Building Designers Ltd.	September 4, 1997	Allowed
AP-96-201	Raytheon Canada Limited	September 16, 1997	Allowed
AP-94-006	Humpty Dumpty Foods Limited	September 19, 1997	Dismissed
AP-94-083	Permanent Lafarge (A Division of Lafarge Canada Inc.)	September 19, 1997	Dismissed

## Appeal Decisions Rendered (cont'd)

Appeal No.	Appellant	Date of Decision	Decision
AP-96-071	Sani Métal Ltée	September 30, 1997	Allowed in part
AP-96-084	Vitrierie Vertech Inc.	September 30, 1997	Dismissed
AP-95-228 and AP-95-229	Lorna's Flowers Ltd. and Marquis Flower Shop Ltd.	October 28, 1997	Allowed
AP-92-089	Mathew & Co., Limited	November 6, 1997	Dismissed
AP-93-372	Eldorado Petroleum Ltd.	November 19, 1997	Allowed
AP-93-373	Gas King Oil Co. Ltd.	November 19, 1997	Allowed
AP-89-290 and AP-92-352	Peter Ostafie	December 15, 1997	Dismissed
AP-92-342	Smith's Marine Instruments Ltd.	December 16, 1997	Dismissed
AP-96-226	Fleck Manufacturing Inc.	December 18, 1997	Dismissed
AP-94-023, AP-94-024 and AP-94-025	Arctic College and Government of the Northwest Territories	December 19, 1997	Dismissed
AP-94-187	Timothy H. Magnus	January 20, 1998	Allowed
AP-96-066	Jarnail Singh Purewall	January 20, 1998	Dismissed
AP-94-282	Greyhound Lines of Canada Ltd.	February 2, 1998	Dismissed
<b><i>Special Import Measures Act</i></b>			
AP-96-199	Fletcher Leisure Group Inc.	September 26, 1997	Allowed
AP-96-211, AP-96-212, AP-96-216, AP-96-223, AP-96-237 to AP-96-239, AP-97-001, AP-97-004 to AP-97-008 and AP-97-024 to AP-97-026	2703319 Canada Inc. o/a VVV Enterprises, 168700 Canada Inc. o/a Sacha London, Aldo Shoes (1993) Inc., Transit (A Division of Aldo Shoes) and Globo (A Division of Aldo Shoes)	February 6, 1998	Dismissed



## TABLE 2

### Tribunal Decisions Appealed to the Federal Court of Canada Between April 1, 1997, and March 31, 1998, and Pending as of March 31, 1998<sup>1</sup>

Appeal No.	Appellant	Federal Court No.
AP-94-006	Humpty Dumpty Foods Limited	T—77—98
AP-94-083	Permanent Lafarge (A Division of Lafarge Canada Inc.)	T—78—98
AP-94-148	Suncor Inc.	T—699—97
AP-94-212	Chaps Ralph Lauren, A Division of 131384 Canada Inc.	A—53—98
AP-94-213	Modes Alto-Regal, Inc.	A—76—98
AP-94-327	Double N Earth Movers Ltd.	T—698—97
AP-95-126	Mattel Canada Inc.	A—292—97
AP-95-197, AP-95-198, AP-95-200 to AP-95-202, AP-95-206 to AP-95-212	Nike Canada Ltd.	A—905—97
AP-95-230	Euro-Line Appliances	A—323—97
AP-95-255	Mattel Canada Inc.	A—291—97
AP-95-261 and AP-95-263	Charley Originals Ltd., Division of Algo Group Inc. and Mr. Jump Inc., Division of Algo Group Inc.	A—528—97
AP-96-016	Trudell Medical Marketing Limited	A—695—97
AP-96-048	Canadian Optical Supply Company Ltd.	A—368—97
AP-96-054	Sunbeam Corporation (Canada) Limited	A—342—97
AP-96-082	Rollins Machinery Ltd.	A—3—98
AP-96-105	Armstrong Bros. Tool Co.	A—818—97
AP-96-114	Tootsie Roll of Canada Ltd.	A—848—97
AP-96-117	Yves Ponroy Canada	A—97—98
AP-96-127	KanEng Industries Inc.	A—44—98
AP-96-205	Formica Canada Inc.	A—98—98
AP-96-211, AP-96-212, AP-96-216, AP-96-223, AP-96-237 to AP-96-239, AP-97-001, AP-97-004 to AP-97-008 and AP-97-024 to AP-97-026	2703319 Canada Inc. o/a VVV Enterprises, 168700 Canada Inc. o/a Sacha London, Aldo Shoes (1993) Inc., Transit (A Division of Aldo Shoes) and Globo (A Division of Aldo Shoes)	A—155—98
AP-96-241 and AP-96-242	C.A.S. Sports International Inc. and Atomic Ski Canada Inc.	A—108—98
AP-97-036	Spalding Canada Inc.	A—123—98

1. The Tribunal has made reasonable efforts to ensure that the information listed is complete. However, since the Tribunal does not participate in appeals to the Federal Court of Canada, it is unable to confirm that the list contains all Tribunal decisions appealed to the Federal Court of Canada between April 1, 1997, and March 31, 1998.

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## TABLE 3

### Decisions of the Federal Court of Canada Rendered Between April 1, 1997, and March 31, 1998<sup>1</sup>

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Appeal No.	Appellant	Federal Court No.	Outcome	Date
3078	Alrich Custom Cabinets Ltd.	T—16—93	Appeal discontinued	March 30, 1998
AP-89-027	Hussmann Store Equipment Limited	T—2382—90	Appeal dismissed	June 26, 1997
AP-89-234	Douglas Anderson and Creed Evans	T—2487—93	Appeal remanded	May 27, 1997
AP-89-267	Perma Tubes Ltd.	T—2586—91	Appeal discontinued	October 30, 1997
AP-90-037	Tom Baird & Associates Ltd.	A—866—96	Appeal dismissed	November 18, 1997
AP-90-138	Pigmalion Services	A—252—97	Appeal dismissed	October 20, 1997
AP-92-224	Reebok Canada Inc., A Division of Avreca International Inc.	T—864—94	Appeal dismissed	June 30, 1997
AP-92-255	Krispy Kernels (Canada) Inc.	T—1040—94	Appeal dismissed	October 23, 1997
AP-93-140 and AP-93-142	J P L International Diffusion Inc.	T—3038—94	Appeal allowed	February 26, 1998
AP-93-237	Dannycos Trading (Canada) Ltd.	T—2084—94	Appeal allowed	April 28, 1997
AP-93-274 and AP-93-294	Continuous Colour Coat Limited	T—2831—94	Appeal dismissed	October 27, 1997
AP-93-320	Technessen Ltd.	T—765—95	Appeal dismissed	December 2, 1997
AP-94-005	Schrader Automotive Inc.	T—799—95	Appeal allowed	September 26, 1997
AP-95-109	Bennett Fleet Inc.	A—3—97	Appeal dismissed	March 18, 1998
AP-96-041	Interprovincial Corrosion Control Company Limited	A—592—97	Appeal discontinued	February 20, 1998

1. The Tribunal has made reasonable efforts to ensure that the information listed is complete. However, since the Tribunal does not participate in appeals to the Federal Court of Canada, it is unable to confirm that the list contains all appeals that were decided between April 1, 1997, and March 31, 1998.

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# CHAPTER V

## ECONOMIC, TRADE, TARIFF AND SAFEGUARD INQUIRIES

### Introduction

The CITT Act contains broad provisions under which the government or the Minister of Finance may ask the Tribunal to conduct an inquiry on any economic, trade, tariff or commercial matter. In an inquiry, the Tribunal acts in an advisory capacity, with powers to conduct research, receive submissions and representations, find facts, hold public hearings and report, with recommendations as required, to the government or the Minister of Finance.

### Dairy Blends

The Tribunal initiated an inquiry into the importation of dairy product blends outside the coverage of Canada's tariff-rate quotas. A panel of the Tribunal, composed of Arthur B. Trudeau (presiding), Pierre Gosselin and Patricia M. Close, conducted the inquiry and will submit its report by July 1, 1998.

The inquiry was referred to the Tribunal on December 17, 1997, by the Governor in Council on the recommendation of the Minister of Finance, the Minister of Agriculture and Agri-Food and the Minister for International Trade.

Pursuant to section 18 of the CITT Act, the Tribunal was directed:

(a) to inquire into the matter of the importation of dairy product blends outside the coverage of Canada's tariff-rate quotas by:

- (i) examining the factors influencing the domestic market for such imports and the implications of these imports for the Canadian dairy producing and processing industry and other segments of the Canadian food processing industry, including production and revenue levels;
- (ii) reviewing the legal, technical, regulatory and commercial considerations relevant to the treatment of imports of these products, as well as Canada's international trade rights and obligations under NAFTA and the WTO Agreement;
- (iii) identifying options for addressing any problems raised by this issue in a manner consistent with Canada's domestic and international rights and obligations; and

(b) to hold public hearings with respect to the inquiry.

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**Tariff-Related  
Inquiries**

A pre-hearing conference was held in Ottawa on January 30, 1998. The pre-hearing conference allowed parties an opportunity to make preliminary submissions concerning the issues to be addressed in the course of the inquiry, the scope of the inquiry, the methodology to be used and the possible options.

Prior to the public hearing in April, the Tribunal conducted an extensive program of economic and legal research. As part of this program, questionnaires were sent to the Dairy Farmers of Canada, dairy processors, importers and foreign governments. More than 90 questionnaires were received and compiled in a data tabulation report.

Other reports prepared by staff included an industry profile and reports on import regimes, on possible industry reactions to imports of dairy product blends and on the international and domestic legal framework. In addition to staff work, a report was prepared for the Tribunal by Treloar Product Development International Inc. and International Food Focus Ltd. on the potential market for dairy product blends outside the coverage of Canada's tariff-rate quotas. Staff of the Economic and Policy Analysis Directorate of the Department of Agriculture and Agri-Food prepared a report for the Tribunal on the impact of imports of butteroil/sugar blends on the Canadian dairy industry. The public hearing for this inquiry were held in Ottawa from April 6 to 9 and from April 14 to 16, 1998.

Under section 19 of the CITT Act, the Minister of Finance may refer to the Tribunal for inquiry and report "any tariff-related matter, including any matter concerning the international rights or obligations of Canada in connection therewith."

**Textile  
Reference**

Pursuant to a reference from the Minister of Finance dated July 6, 1994, as amended on March 20 and July 24, 1996, and on November 26, 1997, the Tribunal was directed to investigate requests from domestic producers for tariff relief on imported textile inputs for use in their manufacturing operations and to make recommendations in respect of those requests to the Minister of Finance.

**Scope of the  
Reference**

A domestic producer may apply for tariff relief on an imported textile input used, or proposed to be used, for production. The textile inputs for which tariff relief may be requested are the fibres, yarns and fabrics of Chapters 51, 52, 53, 54, 55, 56, 58, 59 and 60; certain monofilaments or strips and textile and plastic combinations of Chapter 39; rubber thread and textile and rubber combinations of Chapter 40; and products of textile glass fibres of Chapter 70 of the schedule to the *Customs Tariff*. Since July 24, 1996, and at least until July 1, 1999, the following yarns are not included in the textile reference:

	<p>Knitting yarns, solely of cotton or solely of cotton and polyester staple fibres, measuring more than 190 decitex, of Chapter 52 or subheading No. 5509.53 other than those used to make sweaters, having a horizontal self-starting finished edge and the outer surfaces of which are constructed essentially with 9 or fewer stitches per 2 centimetres (12 or fewer stitches per inch) measured in the horizontal direction.</p>
<p><b>Types of Relief Available</b></p>	<p>The tariff relief that may be recommended by the Tribunal to the Minister of Finance ranges from the removal or reduction of tariffs on one or several, partial or complete, tariff lines, textile- and/or end-use-specific tariff provisions. In the case of requests for tariff relief on textile inputs used in the manufacture of women's swimsuits, co-ordinated beachwear and co-ordinated accessories only, the recommendation could include company-specific relief. The recommendation could be for tariff relief for either a specific or an indeterminate period of time. However, the Tribunal will only recommend tariff relief that is administrable on a cost-effective basis.</p>
<p><b>Notification of a Request</b></p>	<p>Upon receipt of a request for tariff relief, and before commencement of an investigation, the Tribunal issues a brief electronic notice announcing the request. The minimum period of time for the notification of a request before an investigation is commenced is 30 days.</p> <p>This notification is designed to increase transparency, identify potential deficiencies in the request, avoid unnecessary investigations, provide an opportunity for the domestic textile industry to contact the requester and agree on a reasonable domestic source of supply, inform other users of identical or substitutable textile inputs, prepare the domestic industry to respond to subsequent investigation questionnaires and give associations advance time for planning and consultation with their members.</p>
<p><b>Investigations</b></p>	<p>When the Tribunal is satisfied that a request is properly documented, it commences an investigation. A notice of commencement of investigation is sent to the requester, all known interested parties and any appropriate government department or agency, such as Revenue Canada, the Department of Foreign Affairs and International Trade, the Department of Industry and the Department of Finance. The notice is also published in the <i>Canada Gazette</i>.</p> <p>In any investigation, interested parties include domestic producers, certain associations and other persons who are entitled to be heard by the Tribunal because their rights or pecuniary interests may be affected by the Tribunal's</p>

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recommendations. Interested parties are given notice of the request and can participate in the investigation. Interested parties include competitors of the requester, suppliers of goods that are identical to or substitutable for the textile input and downstream users of goods produced from the textile input.

To prepare a staff investigation report, the Tribunal staff gathers information through such means as plant visits or questionnaires. Information is obtained from the requester and interested parties, such as a domestic supplier of the textile input, for the purpose of determining whether the tariff relief sought will maximize net economic gains for Canada.

In normal circumstances, a public hearing is not required, and the Tribunal will dispose of the matter on the basis of the full written record, including the request, the staff investigation report and all submissions and evidence filed with the Tribunal.

The procedures developed for the conduct of the Tribunal's investigations envisage the full participation of the requester and all interested parties. A party, other than the requester, may file submissions, including evidence, in response to the properly documented request, the staff investigation report and any information provided by a government department or agency. The requester may subsequently file submissions with the Tribunal in response to the staff investigation report and any information provided by a government department or agency or other party.

Where confidential information is provided to the Tribunal, such information falls within the protection of the CITT Act. Accordingly, the Tribunal will only distribute confidential information to counsel who are acting on behalf of a party and who have filed a declaration and undertaking.

**Recommendations  
to the Minister**

The Tribunal will normally issue its recommendations, with reasons, to the Minister of Finance within 120 days from the date of commencement of the investigation. In exceptional cases, where the Tribunal determines that critical circumstances exist, the Tribunal will issue its recommendations within any earlier specified time frame which the Tribunal determines to be appropriate. The Tribunal will recommend the reduction or removal of customs duties on a textile input where it will maximize net economic gains for Canada.

**Review Process**

Where the Minister of Finance has made an order for tariff relief pursuant to a recommendation of the Tribunal, certain domestic producers may make a request to the Tribunal to commence an investigation for the purpose of recommending

	<p>the renewal, amendment or termination of the order. A request for the amendment or termination of the order should specify what changed circumstances justify such a request.</p> <p>Where the Minister of Finance has made an order for tariff relief subject to a scheduled expiry date, the Tribunal will, before the expiry date, issue a formal notice that the tariff relief provided by the order will expire unless the Tribunal issues a recommendation that tariff relief should be continued and the Minister of Finance implements the recommendation. The notice invites interested parties to file submissions for or against continuation of tariff relief.</p> <p>If no opposition to the continuation of tariff relief is received, upon receipt of submissions and information supporting the request for continuation of tariff relief, the Tribunal may decide to recommend the continuation of tariff relief. Conversely, if no request for continuation of tariff relief is submitted, the Tribunal may decide to recommend the termination of tariff relief. If it appears that a more complete review is warranted, the Tribunal will look at whether all relevant factors which led it to recommend tariff relief continue to apply and whether extending tariff relief under such conditions would continue to provide net economic benefits for Canada.</p>
<p><b>Annual Status Report</b></p>	<p>In accordance with the terms of reference received by the Tribunal directing it to conduct investigations into requests from Canadian producers for tariff relief on imported textile inputs that they use in their manufacturing operations, the Tribunal provided the Minister of Finance, on January 7, 1998, with its third annual status report on the investigation process. The status report covered the period from October 1, 1996, to September 30, 1997.</p>
<p><b>Recommendations Submitted During 1997-98</b></p>	<p>During fiscal year 1997-98, the Tribunal issued 5 reports to the Minister of Finance which related to 11 requests for tariff relief. In addition, the Tribunal issued 1 report further to a review of recommendations that were issued on September 19, 1995. At year end, 19 requests were outstanding, of which investigations had been commenced in respect of 8 requests. Table 1 at the end of this chapter summarizes these activities.</p>
<p><b>Recommendations in Place</b></p>	<p>By the end of fiscal year 1997-98, the Government had implemented 43 recommendations by the Tribunal, of which 41 are still subject to tariff relief orders. As of January 1, 1998, the codes implementing the Tribunal's recommendations have all been replaced by tariff items, with the exception of the codes implementing the recommendations for Request No. TR-95-054 (Handler</p>

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Textile (Canada) Inc.) and Request No. TR-95-063 (Buckeye Industries) which, because they limited relief under the United States Tariff only, became obsolete when that tariff became free on that date. Table 4 provides a summary of recommendations implemented to date.

A summary of a representative sample of Tribunal recommendations issued during the fiscal year follows.

**Peerless Clothing Inc.**

TR-96-005

*Recommendation:  
Tariff relief granted  
(February 20, 1998)*

The Tribunal recommended to the Minister of Finance that tariff relief on importations of woven fabrics of combed or carded yarns, wholly of virgin wool and fine animal hair, containing not less than 10 percent by weight of fine animal hair, as certified by the exporter, of a weight exceeding 140 g/m<sup>2</sup> but not exceeding 300 g/m<sup>2</sup>, for use in the production of men's suits, jackets, blazers and trousers, not be granted. In its report, the Tribunal indicated that the domestic textile industry currently produces similar or substitutable fabrics or has the technical capabilities to produce identical or substitutable fabrics. The Tribunal was of the view that the costs which would be incurred by the domestic textile industry, if tariff relief were granted, would outweigh the benefits to the producers of men's suits, jackets, blazers and trousers. The complete removal of the tariff, in this particular case, would hamper Canadian textile producers' opportunity to participate in this emerging market.

**Les Collections Shan Inc.**

TR-96-008  
to TR-96-013

*Recommendation:  
Five-year tariff relief  
and no tariff relief for  
labels  
(July 22, 1997)*

The Tribunal recommended to the Minister of Finance that the customs duty on importations, limited to specific yearly volumes, of certain woven fabrics of cotton, woven fabrics of man-made filaments and man-made staple fibres, nonwovens, padding, knitted fabrics, tulle and narrow woven fabrics, for use in the manufacture of women's swimsuits, "co-ordinated beachwear" and "co-ordinated accessories" be removed for a period of five years, solely for Les Collections Shan Inc. (Shan), excluding fabrics of a uniform solid colour of black or white. The Tribunal further specified that the subject fabrics that are for use in the manufacture of "co-ordinated beachwear" and "co-ordinated accessories" are fabrics made by the same supplier that produces the subject fabric for use in the manufacture of a woman's swimsuit with which these fabrics are meant to co-ordinate. These subject "co-ordinated" fabrics are also of similar or complimentary patterns and colours as the subject swimsuit fabric.

In its report, the Tribunal noted that Shan occupies a unique position within the Canadian women's swimwear industry and that it is using high-quality fabrics from Europe to produce trendsetting swimsuits for a clientele that wants a sophisticated product created by a designer that has established its reputation in fashion circles. The Tribunal also noted that Shan's uniqueness extends to its



**Jones Apparel Group  
Canada Inc.**

TR-97-001

*Recommendation:  
Indeterminate tariff  
relief  
(December 19, 1997)*

“co-ordinated beachwear” and “co-ordinated accessories,” which include cover-ups, wraps, handbags and other accessories manufactured largely with similar prints to those used to produce the swimsuits with which they are intended to be sold. It also appeared to the Tribunal that there are no Canadian producers that can supply fabrics for both swimsuits and “co-ordinated beachwear,” a condition that is of great importance if a supplier wishes to sell to Shan. Furthermore, in the Tribunal’s view, granting tariff relief would improve Shan’s financial position and advance its relative competitive position vis-à-vis its competitors. The Tribunal estimated that the granting of such tariff relief would result in a net economic benefit of approximately \$100,000 per annum.

The Tribunal recommended that tariff relief not be granted for labels, narrow woven, of a width of 3 cm or less, solely of single multifilament yarns of polyester, with normal selvages, inscriptions or motifs produced by weaving, because it believed that Canadian producers of labels are in a position to meet Shan’s needs regarding woven labels.

The Tribunal recommended to the Minister of Finance that tariff relief on importations of woven fabrics, containing 35 percent or more by weight of cellulose acetate or cellulose triacetate filaments mixed with polyester filaments or with viscose rayon filaments, containing not more than 5 percent by weight of any other fibre, with an average yarn twist of 500 turns per metre in the warp and/or the weft, of a weight of 100 g/m<sup>2</sup> or more but not exceeding 310 g/m<sup>2</sup>, for use in the manufacture of women’s jackets, blazers, dresses, skirts, trousers or waistcoats, be granted for an indeterminate period of time. The Tribunal noted that there did not appear to be any domestic production of fabrics identical to or substitutable for the subject fabrics and, consequently, that there would not be any direct commercial costs associated with the removal of the customs duty on importations of the subject fabrics. The Tribunal estimated that the granting of such tariff relief would result in a net commercial benefit of approximately \$200,000 per annum.

## TABLE 1

### Disposition of Requests for Tariff Relief Between April 1, 1997, and March 31, 1998

Request No.	Requester	Textile Input	Date of Disposition	Status/Recommendations
TR-95-013	Doubletex	fabric	In Progress	
TR-96-005	Peerless Clothing Inc.	fabric	February 20, 1998	Tariff relief not granted
TR-96-007	H.D. Brown Entreprises Limited	fabric	July 17, 1997	Tariff relief not granted
TR-96-008 to TR-96-013	Les Collections Shan Inc.	fabric and nonwoven	July 22, 1997	Five-year tariff relief. No tariff relief in Request No. TR-96-009 (labels)
TR-96-014	Peerless Clothing Inc.	fabric	In Progress	
TR-97-001	Jones Apparel Group Canada Inc.	fabric	December 19, 1997	Indeterminate tariff relief
TR-97-002 and TR-97-003	Universal Manufacturing Inc.	fabric	February 27, 1998	Indeterminate tariff relief
TR-97-004, TR-97-007, TR-97-008 and TR-97-010	Blue Bird Dress of Toronto Ltd.	fabric	In Progress	
TR-97-005	Phantom Industries Inc.	yarn	In Progress	
TR-97-006	Peerless Clothing Inc.	fabric and nonwoven	In Progress	
TR-97-009	Not used			
TR-97-011	Australian Outback Collection (Canada) Ltd.	fabric	Not yet initiated	
TR-97-012	Ballin Inc.	fabric	Not yet initiated	
TR-97-013	Blue Bird Dress of Toronto Ltd.	fabric	Not yet initiated	
TR-97-014	Lenrod Industries Ltd.	nonwoven	Not yet initiated	
TR-97-015 to TR-97-020	Helly Hansen Canada Limited	fabric	Not yet initiated	
TR-97-021	Wire Rope Industries Limited	sisal core	Not yet initiated	

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## TABLE 2

### Notices of Expiry of Tariff Relief Recommendations Between April 1, 1997, and March 31, 1998

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Expiry No.	Original Request No.	Textile Input	Status/Recommendations
TE-97-001	TR-94-011 and TR-94-019	Woven fabrics known as "Armani Gabardine"	Review initiated (TA-97-001)
TE-97-002	TR-94-005	100 percent polyester herringbone woven fabric	In Progress
TE-97-003	TR-94-009	VINEX FR-9B fabric	In Progress
TE-97-004	TR-95-009	Certain dyed woven fabrics of rayon and polyester	In Progress

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## TABLE 3

### Disposition of Reviews of Tariff Relief Recommendations Between April 1, 1997, and March 31, 1998

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Review No.	Expiry No. (Original Request No.)	Textile Input	Date of Disposition	Status/Recommendations
TA-97-001	TE-97-001 (TR-94-011 and TR-94-019)	Woven fabrics known as "Armani Gabardine"	February 26, 1998	No extension of tariff relief

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## TABLE 4

### Tariff Relief Recommendations in Place

Request No.	Requester	Tariff Item(s)	Duration
TR-94-001	Canatex Industries (Division of Richelieu Knitting Inc.)	5402.41.12	Permanent tariff relief
TR-94-002 and TR-94-002A	Kute-Knit Mfg. Inc.	5205.14.20 5205.15.20 5205.24.20 5205.26.20 5205.27.20 5205.28.20 5205.35.20 5205.46.20 5205.47.20 5205.48.20 5206.14.10 5206.15.10 5206.24.10 5206.25.10 5509.53.10	Three-year tariff relief
TR-94-004	Woods Canada Limited	5208.52.10	Permanent tariff relief
TR-94-005	Hemisphere Productions Inc.	5407.61.91	Three-year tariff relief
TR-94-009	Équipement Saguenay (1982) Ltée	5512.99.10	Three-year tariff relief
TR-94-010	Palliser Furniture Ltd.	5806.20.10	Permanent tariff relief
TR-94-011 and TR-94-019	Château Stores of Canada Ltd. and Hemisphere Productions Inc.	5515.11.20	Two-year tariff relief
TR-94-012	Peerless Clothing Inc.	5309.29.20	Indeterminate tariff relief
TR-94-013 and TR-94-016	MWG Apparel Corp.	5208.42.20 5208.43.20 5208.49.20 5513.31.10 5513.32.10 5513.33.10	Permanent tariff relief
TR-94-017 and TR-94-018	Elite Counter & Supplies	9943.00.00	Permanent tariff relief
TR-95-003	Landes Canada Inc.	5603.11.20 5603.12.20 5603.13.20 5603.14.20 5603.91.20 5603.92.20 5603.93.20 5603.94.20	Permanent tariff relief
TR-95-004	Lingerie Bright Sleepwear (1991) Inc.	5208.12.20 5208.52.20	Indeterminate tariff relief

## Recommendations in Place (cont'd)

Request No.	Requester	Tariff Item(s)	Duration
TR-95-005	Lingerie Bright Sleepwear (1991) Inc.	5513.11.10 5513.41.10	Indeterminate tariff relief
TR-95-009	Peerless Clothing Inc.	5408.21.10 5408.21.20 5408.22.21 5408.22.30 5408.31.20 5408.32.30	Indeterminate tariff relief Two-year tariff relief
TR-95-010 and TR-95-034	Freed & Freed International Ltd. and Fen-nelli Fashions Inc.	5111.19.10 5111.19.20	Indeterminate tariff relief
TR-95-011	Louben Sportswear Inc.	5408.31.10 5408.32.20	Indeterminate tariff relief
TR-95-012	Perfect Dyeing Canada Inc.	5509.32.10	Indeterminate tariff relief
TR-95-014	Palliser Furniture Ltd.	5801.35.10	Two-year tariff relief
TR-95-036	Canadian Mill Supply Co. Ltd.	5208.21.20	Indeterminate tariff relief
TR-95-037	Paris Star Knitting Mills Inc.	5408.24.11 5408.24.91 5408.34.10 5516.14.10 5516.24.10	Indeterminate tariff relief
TR-95-051	Camp Mate Limited	5407.41.10 5407.42.10 5407.42.20 5903.20.22	Indeterminate tariff relief
TR-95-053 and TR-95-059	Majestic Industries (Canada) Ltd. and Caulfeild Apparel Group Ltd.	5802.11.10 5802.19.10 5802.19.20	Indeterminate tariff relief
TR-95-056	Sealy Canada Ltd.	3921.19.10 5407.69.10 5407.73.10 5407.94.10 5516.23.10 5903.90.21 6002.43.20	Indeterminate tariff relief
TR-95-057 and TR-95-058	Doubletex	5407.51.10 5407.61.92 5407.69.10 5515.11.10 5516.21.10 5516.91.10	Indeterminate tariff relief
TR-95-060	Triple M Fiberglass Mfg. Ltd.	7019.59.10	Indeterminate tariff relief
TR-95-061	Camp Mate Limited	6002.43.30	Indeterminate tariff relief

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## Recommendations in Place (cont'd)

Request No.	Requester	Tariff Item(s)	Duration
TR-95-064 and TR-95-065	Lady Americana Sleep Products Inc. and el ran Furniture Ltd.	6002.43.10	Indeterminate tariff relief
TR-96-003	Venture III Industries Inc.	5407.61.92	Indeterminate tariff relief
TR-96-004	Acton International Inc.	5906.99.21	Indeterminate tariff relief
TR-96-008, TR-96-010 to TR-96-013	Les Collections Shan Inc.	O.I.C. P.C. 1997-1668	Five-year tariff relief





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# CHAPTER VI

## PROCUREMENT REVIEW

### Introduction

Suppliers may challenge procurements that they believe have not been carried out in accordance with the requirements of the following: Chapter Ten of NAFTA, Chapter Five of the AIT or the AGP. The bid challenge portions of these agreements came into force on January 1, 1994, July 1, 1995, and January 1, 1996, respectively.

Any potential suppliers who believe that they may have been unfairly treated during the solicitation or evaluation of bids, or in the awarding of contracts on a designated procurement, may lodge a formal complaint with the Tribunal. A potential supplier with an objection is encouraged to resolve the issue first with the government institution responsible for the procurement. When this process is not successful or a supplier wants to deal directly with the Tribunal, the complainant may ask the Tribunal to consider the case by filing a complaint within the prescribed time limit.

When the Tribunal receives a complaint, it reviews the submission against the criteria for filing. If there are deficiencies, the complainant is given an opportunity to correct these within a specified time limit. Once the complaint meets the criteria for filing, the government institution and all other interested parties are sent a formal notification of the complaint. A copy of the complaint is sent to the government institution. When the Tribunal decides to conduct an inquiry, an official notice of the complaint is published in *Government Business Opportunities* and the *Canada Gazette*. If the contract in question has not been awarded, the Tribunal may order the government institution to postpone awarding any contract pending the disposition of the complaint by the Tribunal, unless the government institution certifies that the procurement is urgent or that the delay would be against the public interest.

After receipt of its copy of the complaint, the government institution responsible for the procurement files a report responding to the allegations. The complainant is then sent a copy of the Government Institution Report and has seven days to submit comments. These are forwarded to the government institution and any interveners.

A staff investigation, which can include interviewing individuals and examining files and documents, may be conducted and result in the production of

a Staff Investigation Report. This report is circulated to the parties for their comment. Once this phase of the inquiry is completed, the Tribunal reviews the information collected and decides whether a hearing should be held.

The Tribunal then makes a determination, which may consist of recommendations to the government institution (such as re-tendering, re-evaluating or providing compensation) and the award of reasonable costs to a prevailing complainant for filing and proceeding with the bid challenge and/or costs for preparing the bid. The government institution, as well as all other parties and interested persons, is notified of the Tribunal's decision. Recommendations made by the Tribunal in its determination are to be implemented to the greatest extent possible.

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### Summary of Procurement Review Activities

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	1996-97	1997-98
<b>CASES RESOLVED BY OR BETWEEN PARTIES</b>		
Resolved Between Parties	0	1
Withdrawn	6	9
Abandoned While Filing	<u>1</u>	<u>2</u>
<b>Subtotal</b>	7	12
<b>INQUIRIES NOT INITIATED OR CONTINUED ON PROCEDURAL GROUNDS</b>		
Lack of Jurisdiction	7	8
Late Filing	5	4
No Valid Basis	<u>9</u>	<u>12</u>
<b>Subtotal</b>	21	24
<b>CASES DETERMINED ON MERIT</b>		
Complaint not Valid	7	9
Complaint Valid	<u>5</u>	<u>7</u>
<b>Subtotal</b>	12	16
<b>IN PROGRESS</b>	<u>9</u>	<u>11</u>
<b>TOTAL</b>	49	63

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**Summary of  
Selected  
Decisions**

During fiscal year 1997-98, the Tribunal issued 16 written determinations of its findings and recommendations. In 7 of the 16 written decisions, the complaints were determined to be valid or valid in part. In these cases, various remedies were granted in the form of cost awards or recommendations. Eleven other cases were in progress at year end. Table 1 at the end of this chapter summarizes these activities, as well as those cases resolved by or between parties.

Of the cases heard by the Tribunal in carrying out its procurement review functions, certain decisions stand out from among the others because of the legal significance of the cases. A brief résumé of a representative sample of such cases follows. These summaries have been prepared for general information purposes only and have no legal status.

**Sybase Canada Ltd.***PR-96-037**Determination:  
Complaint valid  
(July 30, 1997)*

The Tribunal made a determination with respect to a complaint filed by Sybase Canada Ltd. (the complainant) concerning a solicitation of the Department of Public Works and Government Services (the Department). The solicitation was a limited tender for the purchase of a departmental licence for a Relational Database Management System for up to 55,000 users, plus maintenance over a five-year period from Oracle Corporation Canada Inc. for the Department of National Defence.

The complainant alleged that the Department had not carried out this procurement in accordance with the provisions of Article 1016(1) of NAFTA.

Having examined the evidence and arguments presented by the parties and considered the subject matter of the complaint, the Tribunal determined that the complaint was valid; therefore, it recommended, as a remedy, that the Department issue a competitive solicitation for the requirement in accordance with the provisions of NAFTA, the AGP and the AIT.

**Northern Micro Inc.***PR-97-006**Determination:  
Complaint valid  
(July 29, 1997)*

The Tribunal made a determination with respect to a complaint filed by Northern Micro Inc. (the complainant) concerning a solicitation of the Department for the supply of computer workstations by means of National Individual Standing Offers (NISOs) for Human Resources Development Canada.

The complainant alleged that the procurement process was flawed because the Department's determination that a single business entity could represent more than one bidder was insupportable in the circumstances.

After careful consideration of the requirements of NAFTA and the AIT, the Tribunal determined that the complaint was valid. The Tribunal recommended, as

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**TRAC Industries Ltd.**

*PR-97-023*

*Determination:  
Complaint dismissed/  
Lack of jurisdiction  
(November 27, 1997)*

a remedy, that the Department consider the complainant's compliant offer as that of the third bidder and proceed in accordance with the provisions of the applicable agreements and of the Request for a Standing Offer. The Department agreed to implement the Tribunal's recommendation and proceeded to grant a NISO to the complainant.

The Tribunal made a determination with respect to a complaint filed by Trac Industries Ltd. (the complainant) concerning a solicitation of the Department for depot level inspection and repair services for armoured vehicles general purpose, Department of National Defence.

The complainant alleged that the Department improperly applied certain evaluation criteria in the tender documents relating to the labour force qualification to perform certain welding operations and, thereby, erroneously declared the complainant's proposal non-responsive.

The Department filed with the Tribunal a notice of motion to obtain, amongst other things, an order dismissing the complaint on the basis that the Tribunal was without jurisdiction in this matter, since the procurement was excluded for regional and economic development purposes from the applicable provisions of NAFTA, the AGP and the AIT.

Having examined the evidence and arguments presented by the parties and considered the obligations specified in NAFTA, the AGP and the AIT, the Tribunal determined that the complaint was not within the Tribunal's jurisdiction, and the complaint was, therefore, dismissed.

**Wang Canada  
Limited**

*PR-97-034*

*Determination:  
Complaint valid  
(March 11, 1998)*

The Tribunal made a determination with respect to a complaint filed by Wang Canada Limited (the complainant) concerning a solicitation of the Department. The solicitation was for computer maintenance services on a national basis for the Department of National Revenue.

The complainant alleged that the Department failed to evaluate its bid in accordance with the evaluation criteria set out in the Request for Proposal.

Having examined the evidence and arguments presented by the parties and considered the subject matter of the complaint, the Tribunal determined that the procurement was not conducted according to NAFTA and the AIT and that, therefore, the complaint was valid.

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**Judicial Reviews of  
Procurement  
Decisions**

The Tribunal recommended, as a remedy, that, subject to the provisions of Article 1015(4)(c) of NAFTA, the Department award the contract to the complainant.

The Department decided not to implement the Tribunal's recommendation. However, it decided that it would reissue the procurement in order to clarify the requirements of the Request for Proposal and allow all bidders to have another opportunity to bid.

The Federal Court of Appeal dismissed an application by Corel Corporation to review a decision by the Tribunal in File No. PR-96-011. In dismissing the case the court said "that the Tribunal did not make any reviewable error in deciding as it did."

Two applications are currently before the Federal Court of Canada both relating to File No. PR-97-008, Symtron Systems Inc.

Table 2 lists the procurement decisions before the Federal Court during fiscal year 1997-98.

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## TABLE 1

### Disposition of Procurement Complaints Between April 1, 1997, and March 31, 1998

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File No.	Complainant	Date of Receipt of Complaint	Status/Decision
PR-96-027	Philip Environmental	January 7, 1997	Decision issued April 10, 1997 Complaint valid
PR-96-030	Symtron Systems Inc.	February 24, 1997	Decision issued May 6, 1997 Complaint valid in part
PR-96-033	Versatech Products Inc.	February 27, 1997	Solved between parties
PR-96-034	Atlantic Safety Centre	March 4, 1997	Decision issued May 14, 1997 Complaint not valid
PR-96-035	Accutel Conferencing Systems Inc.	March 7, 1997	Decision issued June 5, 1997 Complaint valid
PR-96-036	Mirtech International Security Inc.	March 11, 1997	Decision issued June 3, 1997 Complaint not valid
PR-96-037	Sybase Canada Ltd.	March 11, 1997	Decision issued July 30, 1997 Complaint valid
PR-96-040	Hervé Pomerleau inc.	March 18, 1997	Decision issued May 9, 1997 Complaint not valid
PR-96-041	On Power Systems Inc.	March 19, 1997	Not accepted for inquiry/No valid basis
PR-97-001	ISS Integrated Security Solutions Inc.	April 3, 1997	Not accepted for inquiry/No valid basis
PR-97-002	H&R Consultants	April 4, 1997	Decision issued June 23, 1997 Complaint not valid
PR-97-003	Agra Monenco Inc.	April 9, 1997	Not accepted for inquiry/Lack of jurisdiction
PR-97-004	Excel Human Resources Inc.	April 18, 1997	Complaint withdrawn
PR-97-005	Hovey Manufacturing (Canada) Ltd.	April 28, 1997	Decision issued July 28, 1997 Complaint not valid
PR-97-006	Northern Micro Inc.	April 30, 1997	Decision issued July 29, 1997 Complaint valid
PR-97-007	Telesat Canada	June 6, 1997	Complaint withdrawn
PR-97-008	Symtron Systems Inc.	June 12, 1997	Decision issued September 10, 1997 Complaint valid
PR-97-009	DMR Consulting Group Inc.	June 20, 1997	Decision issued September 18, 1997 Complaint not valid
PR-97-010	Équipement Industriel Champion Inc.	June 27, 1997	Decision issued October 31, 1997 Complaint not valid
PR-97-011	Marathon Management Company, A Division of Marathon Watch Company Ltd.	June 26, 1997	Complaint withdrawn

## Disposition of Procurement Complaints (cont'd)

File No.	Complainant	Date of Receipt of Complaint	Status/Decision
PR-97-012	Akweks Kowa Corp.	July 4, 1997	Not accepted for inquiry/Lack of jurisdiction
PR-97-013	Nanaimo Shipyard Ltd.	July 4, 1997	Complaint withdrawn
PR-97-014	AMCAN Technologies Incorporated	July 22, 1997	Not accepted for inquiry/Late filing
PR-97-015	Claude Néon Ltd.	August 4, 1997	Not accepted for inquiry/No valid basis
PR-97-016	S.C.S. Shielding Inc.	August 16, 1997	Abandoned while filing
PR-97-017	Micromass Canada Inc.	August 18, 1997	Not accepted for inquiry/Lack of jurisdiction
PR-97-018	Le Groupe Mentor Inc.	August 25, 1997	Not accepted for inquiry/No valid basis
PR-97-019	Array Systems Computing Inc.	August 29, 1997	Not accepted for inquiry/Late filing
PR-97-020	Océanide Inc.	September 9, 1997	Decision issued November 12, 1997 Complaint dismissed/ Lack of jurisdiction
PR-97-021	Canada Communication Group Inc.	September 12, 1997	Not accepted for inquiry/Lack of jurisdiction
PR-97-022	Tecmotiv (USA) Inc.	September 12, 1997	Not accepted for inquiry/No valid basis
PR-97-023	Trac Industries Ltd.	September 19, 1997	Decision issued November 27, 1997 Complaint dismissed/Lack of jurisdiction
PR-97-024	MIL Systems	September 26, 1997	Not accepted for inquiry/Late filing
PR-97-025	Harris Corporation	September 29, 1997	Order issued November 28, 1997 Complaint dismissed/Late filing
PR-97-026	Marchand Electrical Company Ltd.	October 10, 1997	Not accepted for inquiry/No valid basis
PR-97-027	NOTRA Environmental Services Inc.	October 16, 1997	Decision issued December 16, 1997 Complaint not valid
PR-97-028	C.A. Ventin Architect Ltd.	October 24, 1997	Decision issued January 16, 1998 Complaint not valid
PR-97-029	Hitachi Data Systems Inc.	November 4, 1997	Complaint withdrawn
PR-97-030	Amdahl Canada Limited	November 6, 1997	Complaint withdrawn
PR-97-031	Educom Training Systems Inc.	December 3, 1997	Not accepted for inquiry/Lack of jurisdiction
PR-97-032	Ébénisterie Alfredo Limitée	December 4, 1997	Complaint withdrawn
PR-97-033	IBM Canada Ltd.	December 11, 1997	Accepted for inquiry
PR-97-034	Wang Canada Limited	December 16, 1997	Decision issued March 11, 1998 Complaint valid
PR-97-035	Frontec Corporation	December 22, 1997	Accepted for inquiry

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## Disposition of Procurement Complaints (cont'd)

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File No.	Complainant	Date of Receipt of Complaint	Status/Decision
PR-97-036	Novus Incorporated	December 29, 1997	Accepted for inquiry
PR-97-037	Tactical Technologies Inc.	December 31, 1997	Accepted for inquiry
PR-97-038	Oxfam Canada	January 13, 1998	Not accepted for inquiry/No valid basis
PR-97-039	Patton Aircraft & Industries Limited	January 19, 1998	Not accepted for inquiry/No valid basis
PR-97-040	Société de coopération pour le développement international	January 22, 1998	Accepted for inquiry
PR-97-041	Mirtech International Security Inc.	January 28, 1998	Accepted for inquiry
PR-97-042	Pacific Body Armour	February 2, 1998	Not accepted for inquiry/No valid basis
PR-97-043	AVSpex	February 3, 1998	Not accepted for inquiry/No valid basis
PR-97-044	Tactical Technologies Inc.	February 3, 1998	Not accepted for inquiry/Lack of jurisdiction
PR-97-045	Folite Industries	February 6, 1998	Accepted for inquiry
PR-97-046	J.W. Electric & Controls	February 6, 1998	Abandoned while filing
PR-97-047	Valcom Ltd.	February 12, 1998	Accepted for inquiry
PR-97-048	Bell Canada	February 16, 1998	Complaint withdrawn
PR-97-049	Bell Canada	February 16, 1998	Complaint withdrawn
PR-97-050	Marcomm Incorporated	March 5, 1998	Not accepted for inquiry/No valid basis
PR-97-051	Safety Projects International Inc.	March 12, 1998	Accepted for inquiry
PR-97-052	PeopleSoft Canada Company Limited	March 16, 1998	Accepted for inquiry
PR-97-053	Accutel Conferencing Systems Inc.	March 19, 1998	Not accepted for inquiry/No valid basis
PR-97-054	Bell Canada	March 27, 1998	Accepted for inquiry



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## TABLE 2

### Cases Before the Federal Court of Canada Between April 1, 1997, and March 31, 1998

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File No.	Complainant	Appellant	File No./ Status
PR-96-011	Corel Corporation	Corel Corporation	A—1048—96 Application dismissed
PR-97-008	Symtron Systems Inc.	I.C.S. International Code Fire Services Inc.	A—700—97
PR-97-008	Symtron Systems Inc.	Attorney General of Canada	A—687—97



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# PUBLICATIONS

**October 1997**

Annual Report for the Fiscal Year Ending March 31, 1997

**October 1996**

*Textile Reference Guide*

**February 1998**

*Textile Reference: Annual Status Report*

**Bulletin**

Vol. 9, Nos. 1 - 4

**New Brochure  
and Information  
Documents**

A brochure and a series of documents designed to inform the public of the work of the Tribunal are available. They include:

- *Introductory Guide on the Canadian International Trade Tribunal*
- *Information on Appeals from Customs, Excise and SIMA Decisions*
- *Information on Dumping and Subsidizing Inquiries and Reviews*
- *Information on Textile Tariff Investigations*
- *Information on Procurement Review*

Publications can be obtained by contacting the Secretary, Canadian International Trade Tribunal, Standard Life Centre, 333 Laurier Avenue West, Ottawa, Ontario K1A 0G7 (613) 993-3595 or they can be accessed on the Tribunal's Web site.